Document: IC 13-14-9 Notice, **Register Page Number:** 26 IR 2473
Source: April 1, 2003, Indiana Register, Volume 26, Number 7

TITLE 326 AIR POLLUTION CONTROL BOARD

FIRST NOTICE OF COMMENT PERIOD
#03-67(APCB)

DEVELOPMENT OF AMENDMENTS TO RULES CONCERNING NEW SOURCE REVIEW RULES

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amending state air permit rules in response to the amendments to the U.S. EPA's New Source Review rules that were published in the Federal Register (67 FR 80186) on December 31, 2002. IDEM seeks comment on the affected citations listed and any other provisions of Title 326 that may be affected by this rulemaking.

CITATIONS AFFECTED: 326 IAC 2.

AUTHORITY: IC 13-14-8; IC 13-17-3.

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose

The purpose of the changes in the federal revisions to the New Source Review rules published on December 31, 2002, is to provide new methods of determining applicability for existing major sources. This first notice discusses the background for this program and identifies alternatives to be considered for implementing changes at the state level.

Background of Federal Rules

On December 31, 2002, the United States Environmental Protection Agency (U.S. EPA) published a final rule concerning regulations governing New Source Review (NSR) programs mandated by parts C and D of Title I of the Clean Air Act (CAA). U.S. EPA stated that these revisions "are intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, resulting in greater environmental protection" (67 FR 80186, December 31, 2002). The applicability of the permit program is based on whether a modification to a source results in an increase in emissions above certain amounts. The December 31, 2002, rules change the method for determining the magnitude of the change in emissions. These changes include baseline emissions determinations, and an actual-to-projected-actual methodology. The new rules also provide optional applicability tests for sources that have accepted plantwide applicability limitations (PALs), sources that have designated clean units, and sources engaging in pollution control projects (PCPs). The December 31, 2002, rules revised amendments that were originally proposed in the July 23, 1996, Federal Register. More information regarding the background of the regulations is provided in the December 31, 2002, Federal Register notice.

Part C of Title I of the CAA requires states to include in their state implementation plan (SIP), emission limitations and other measures that are necessary to prevent significant deterioration of the air quality in each region designated as attainment or unclassifiable. Section 51.166 of Title 40 of the Code of Federal Regulations (40 CFR 51.166) contains the specific minimum requirements for a PSD program. The PSD program is a preconstruction review program that requires review of major new sources of air pollution emissions and major modifications of existing sources located in attainment areas where air quality meets health based standards. If a state does not have a PSD program as an approved part of its SIP, a state may be delegated the authority to implement and enforce the federal PSD program contained in 40 CFR 52.21.

Similar to the PSD program, Part D of Title I of the CAA requires states to include in their SIP provisions to require preconstruction permits for construction and operation of new or modified major sources located in nonattainment areas. Section 51.165 of Title 40 of the Code of Federal Regulations (40 CFR 51.165) and Appendix S of 40 CFR Part 51 contain the specific minimum requirements for a nonattainment new source review program. If a state does not have a nonattainment new source review program as an approved part of its SIP, a state may be delegated the authority to implement and enforce the federal nonattainment new source review program contained in 40 CFR 52.24.

The December 31, 2002, rule revisions require states with approved SIPs to adopt the federal NSR reform amendments no later

than January 2, 2006. States that have been delegated the authority to implement the federal rules are to implement the federal NSR reform amendments no later than March 3, 2003.

Ten northeastern states have filed a lawsuit in the D.C. Circuit Court challenging the final NSR rules. The states have also filed a motion to stay the final NSR rule revisions. These states claim that a stay of the rules is warranted because the states are likely to prevail in court when the case challenging the rules is heard and because states will suffer irreparable harm if the new rules take effect on March 3, 2003. They also assert that states would be harmed due to increased pollution and due to confusion created if the new rules are implemented and later overturned by the court. This legal action may have an impact on Indiana's rulemaking effort.

Background of State Rules

Since September 30, 1980, IDEM has been U.S. EPA's delegated authority for implementation of the federal PSD program in Indiana. Beginning in 1999, Indiana conducted state rulemakings to update and correct the state PSD rule at 326 IAC 2-2 such that the rule could be submitted to U.S. EPA and approved into the SIP. After working informally with U.S. EPA Region V during the state rulemakings, Indiana submitted the updated and corrected PSD rule to U.S. EPA on February 1, 2002, for approval into the SIP. After a formal review, the U.S. EPA published a notice in the March 3, 2003, Federal Register informing the public that U.S. EPA conditionally approved, as a revision to the Indiana State Implementation Plan (SIP), the Prevention of Significant Deterioration (PSD) rules submitted by Indiana. This approval goes into effect on April 2, 2003, at which time the state PSD rule at 326 IAC 2-2 will be federally enforceable under the CAA. This will mean that the PSD program will be implemented by Indiana using the state rules in an approved SIP instead of a delegated federal program. As a condition of the approval, Indiana will have to make the corrections to the state rule that U.S. EPA specified in the notice within one (1) year of the effective date of the federal rule.

A notice under IC 13-14-9-7 is published in this Indiana Register to address the deficiency identified by U.S. EPA in the conditional approval of Indiana's PSD program at the same time as this rulemaking to address the NSR revisions. The deficiency must be corrected within one year of the effective date of the conditional approval (April 2, 2003), or U.S. EPA will initiate withdrawal of federal approval of the PSD rules into the SIP. These two rule actions are completely independent of each other.

Having SIP approval means that Indiana's PSD permits are subject to the same procedure as all other Indiana air permits, including those for new or modified major sources in nonattainment areas and minor new source review anywhere in the state. Draft permits are subject to public review and comments by any affected party, including the U.S. EPA. Indiana's administrative and judicial review process is available to rule on objections to final permit decisions.

The NSR rule amendments will be submitted to U.S. EPA for approval as an amendment to the SIP upon promulgation.

Applicable Federal Law

The Clean Air Act (CAA) mandates a new source review program for major sources of air pollution in parts C and D of Title I. This mandate is located in two (2) programs in the CAA: NSR PSD (part C) and NSR for Nonattainment areas (part D). The purpose of parts C and D is to protect human health and welfare from any actual or potential adverse effects from air pollutants. It also preserves the air quality in national parks, ensures economic growth will occur in a manner consistent with the preservation of existing clean air resources, and provides for careful evaluation of the consequences of permitting decisions both in Indiana and other states.

IDEM recognizes that the minimum elements of the new source review programs for major sources are established by the federal CAA and by federal regulations. Therefore, these requirements are expected to be generally consistent across the country. Nonetheless, it is not unusual for states to adopt rules that contain provisions that are more strict than the minimum federal requirements or contain additional provisions that meld the federally-mandated program with existing state programs. Indiana has longstanding provisions that are more strict with respect to maximum allowable increases under the PSD rules. In addition, even after the 1990 amendments to the federal Clean Air Act removed the mandate, Indiana has maintained the authority to regulate certain hazardous air pollutants (including mercury) under PSD.

U.S. EPA, through 67 FR 80186, developed new NSR language regarding applicability at existing major sources. The state, according to 67 FR 80241, must develop or adopt rules in accordance with U.S. EPA's new rules by January 2, 2006. However, according to the CAA section 116 (42 U.S.C. 7416) Indiana may adopt or enforce, "(1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution [but] such state... may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section." Therefore, Indiana may adopt its own version of the NSR rules to comply with 67 FR 80241 as long as Indiana's rules are at least as stringent as U.S. EPA's NSR reform rules. U.S. EPA has been asked for clarification on a number of provisions in the new federal NSR rules. Until they are able to provide responses, it is not clear what deviations from the federal language will be acceptable to U.S. EPA.

Alternatives To Be Considered Within the Rulemaking

This rulemaking will consider modifications to Title 326 concerning changes to the NSR rules. There are a variety of options to be considered concerning the federal NSR rules (67 FR 80241). Indiana could:

1. Adopt the federal requirements as:
   (a) an incorporation by reference; or
   (b) full-text into the state rules.

   Either option would require some adjustments to the rule language to implement because the federal rules do not fit into the structure of the state rules.
2. Take no action to adopt the federal rules.
3. Adopt certain parts, but not all of the federal rules.
4. Adopt some or all of the federal rules with changes to address specific concerns in Indiana.

Within the major topics of the new federal rules, the IDEM has identified a number of options to be considered for adoption into the state rules:

Applicability Test for Existing Sources

The new rule makes two changes to the existing NSR regulations that will affect how to calculate emission increases to determine whether physical changes or changes in the method of operation trigger the major NSR requirements. First, there is a new procedure for determining "baseline actual emissions". The relevant terminology for calculating pre-change emissions for most applications will now be "baseline actual emissions" rather than "actual emissions". Any consecutive 24-month period in the past ten (10) years can be used to determine baseline actual emissions. Second, the existing actual-to-potential applicability test for determining if a physical or operational change at an existing emission unit will result in an emissions increase is being supplemented with an actual-to-projected-actual applicability test. The previous "past actual to future potential" method almost always resulted in a determination of a greater emissions increase.

Examples of the types of changes that are open to consideration include: changes to definitions contained in the final regulations; applicability of the actual-to-projected-actual test; notification requirements prior to making changes; downward adjustments to the determination of baseline actual emissions and projected actual emissions; data requirements for establishing the look back period; enforceable limitations on projected actual emissions; requirements for tracking post-change emissions, netting requirements; and reporting and record keeping requirements.

IDEM seeks comment on these and any other alternatives for applicability tests for existing sources.

Plantwide Applicability Limitations (PALs)

The new rules promulgate plantwide applicability limitations (PAL) based on actual emissions. If the owner of a source elects to establish a plantwide actual emissions cap, then the new regulations will make the major NSR rules not applicable to new or modified emissions units. In return for this flexibility, emissions from all emission units under the PAL must be rigorously monitored to ensure that the emission cap is not exceeded. A PAL offers flexibility and regulatory certainty. In order to take full advantage of a PAL, sources will need to keep emissions well below the cap.

Currently, there are state regulations in 326 IAC 2-1.1-12 that address facility wide emission caps in operating permits. The state rule was submitted to U.S. EPA as a revision to the minor NSR SIP on February 3, 1999, but has not yet been approved. Under the new Federal requirements, 326 IAC 2-1.1-12 would need to be repealed and replaced with the PAL provisions from 40 CFR 52.21(aa) in the major new source review program.

Examples of the types of changes that are open to consideration include: limiting the pollutants and source categories applicable to PALs; permit application requirements for obtaining a PAL; determination of a PAL level; effective period of a PAL; PAL termination and renewal requirements; PAL increases and adjustments; PAL elimination of previous enforceable permit limits; PAL testing, monitoring, reporting, and record keeping requirements. IDEM also notes that the types of agency review of PALs may be resource-intensive and are comparable to the types of site-specific review fees currently included in the existing PSD regulation for other site-specific reviews. Therefore, IDEM is soliciting comment on an alternative where an appropriate site-specific fee adjustment is made to fees in 326 IAC 2-1.1-7 to address specific resource needs for proposed PALs. Such a site-specific fee could be based on a flat fee approach, an approach based on the number of significant emissions units or number of pollutants involved, or other means.

IDEM seeks comment on these and any other alternatives for plantwide applicability limitations.

Clean Unit Designation

The federal regulations under 40 CFR §51.165 and 40 CFR §51.166 provide a new type of applicability test for emissions units designated as Clean Units. An emissions unit automatically qualifies as a Clean Unit, and qualifies to use the Clean Unit applicability test, if it has gone through a major NSR permitting review and is complying with best available control technology (BACT) or lowest achievable emission rate (LAER), which includes installation and operation of state-of-the-art emissions control technologies (add-on control, pollution prevention and work practices). Conversely, if the emissions unit has not gone through a major NSR permitting

review, but has installed and operates state-of-the-art emissions control technologies (add-on control, pollution prevention and work practices), then it does not automatically qualify, but it can still qualify for Clean Unit status. These emissions units must first go through a SIP-approved permitting process that includes a process for determining whether the emissions unit meets the criteria to be designated as a Clean Unit. This process must include public notice and opportunity for public comment.

To obtain Clean Unit status and qualify for the Clean Unit applicability test using a SIP-approved permitting process, a two-part test must be used. The air pollution control technology which includes pollution prevention or work practices, must be comparable to BACT or LAER and must demonstrate that the allowable emissions will not cause or contribute to a NAAQS or PSD increment violation, or adversely impact an air quality related value (AQRV), such as visibility, that has been identified for a Federal Class I area. The owner and operator may make a showing that the air pollution control technology, which includes pollution prevention or work practices, is comparable to BACT/LAER in two ways: (1) by comparing the emissions unit's control level to BACT/LAER determinations for similar sources in the RACT/BACT/LAER Clearinghouse (RBLC); or (2) by making a case-by-case demonstration that the emissions control is "substantially as effective" as BACT or LAER. There are different criteria to determine Clean Unit status for sources located in non-attainment and attainment areas. The methodologies for determining clean unit status in both attainment and nonattainment areas are somewhat different than the respective methods for determining BACT and LAER.

The effective date of the Clean Unit designation varies with the permitting situation and actual construction and operation of the control technologies. The Clean Unit designation is valid for a period up to ten (10) years from the effective date of the designation. Once an emissions unit qualifies as a Clean Unit, it is subject to an alternative major NSR applicability test for calculating emissions increases for subsequent changes. For Clean Units, the owner or operator first determines whether a project causes the need to change the emission limitations or work practice requirements in the permit that were established in conjunction with BACT, LAER, or Clean Unit determinations and any physical or operational characteristics that formed the basis for the BACT, LAER, or Clean Unit determination for a particular unit. If it does, Clean Unit status is lost, and the project is subject to the applicability requirements as if the emissions unit was never a Clean Unit. If the project does not cause the need to change the emission limitations or work practice requirements in the permit that were established in conjunction with BACT, LAER, or Clean Unit determinations and any physical or operational characteristics that formed the basis for the BACT, LAER, or Clean Unit determination for a particular unit, then the emissions unit maintains Clean Unit status, and no emissions increase from the Clean Unit is deemed to occur from the project for the purposes of major NSR.

Examples of the types of changes that are open to consideration include: alternatives to the time period for retroactive clean unit designations; revisions to the comparability analysis for state-of-the art control technologies with retroactive BACT or LAER determinations in attainment or non attainment areas as the case may be; identifying what constitutes a physical or operational characteristic; possible changes to the minor NSR requirements in 326 IAC 2-7-10.5 to provide a mechanism for approving clean unit designations; and clarifying how to account for clean units when determining whether other changes at a source are subject to NSR. IDEM also notes that the types of agency review of clean unit designations may be resource-intensive and are comparable to the types of site-specific review fees currently included in the existing PSD regulation for other site-specific reviews. Therefore, IDEM is soliciting comment on an alternative where an appropriate site-specific fee adjustment is made to fees in 326 IAC 2-1.1-7 to address specific resource needs for making clean unit designations. Such a site-specific fee could be based on a flat fee approach, an approach based on the number of significant emissions units or number of pollutants involved, or other means.

IDEM seeks comment on these and any other alternatives for clean unit designations.

Pollution Control Projects

In the new rules, U.S. EPA extended the current pollution control project (PCP) exclusion for existing electric utility steam generating units to existing units that are not electric utility steam generating units by codifying and slightly revising the concepts from the July 1, 1994 guidance, "Pollution Control Projects and New Source Review (NSR) Applicability". U.S. EPA designated a list of projects that will be considered presumptively environmentally beneficial. If a source constructs a project on that list that would otherwise be subject to major new source review (i.e., due to a significant increase in collateral emissions), a source may be excluded from the major new source review requirements by providing notice to the permitting authority prior to construction. If a source plans to construct a PCP that is not on that list, the source must submit an application to the permitting authority prior to construction. The permitting authority will review the application and determine if the project is environmentally beneficial. The permitting authority's determination will be included in a permit and subject to review by the U.S. EPA and the public prior to issuance. In either case, a PCP must meet specified criteria to ensure that collateral emissions are minimized and that the construction of a PCP will not cause or contribute to a violation of any national ambient air quality standard (NAAQS) or PSD increment or adversely impact an air quality related value for a Federal Class I area.

IDEM understands the benefits of an exclusion for PCPs and currently implements PCP exclusions in the current state major new source review rules for electric utility steam generating units at 326 IAC 2-2-1(x)(2)(H) and 326 IAC 2-3-1(s)(2)(H), and units that are not electric utility steam generating units at 326 2-2.5. The major differences between the current state exclusions and the new federal exclusions are:

• A significant source modification approval is required prior to using the PCP exclusion to construct a PCP in all cases in the state rules.

• A list of projects presumed to be environmentally beneficial is not included in the state rules.

• Emission offsets are required for PCPs that result in a collateral increase of a pollutant in an area that is designated nonattainment for that pollutant.

• The state exclusions for units that are not electric utility steam generating units are not approved portions of the SIP, and rely on a July 1, 1994, U.S. EPA guidance memo rather than a federal rule.

Examples of the types of changes that are open for consideration include: modifying the list of projects presumed to be environmentally beneficial; including a minor new source review permitting requirement instead of a notification requirement for a listed project; including an air quality analysis as a mandatory application requirement; requiring emission offsets for a collateral increase of a pollutant for which an area is designated nonattainment; requiring an affidavit of construction for a PCP to ensure that it is properly installed; including more restrictions on the generation of emission reduction credits by a PCP; and including provisions for the removal of a PCP.

IDEM seeks comment on these and any other alternatives for pollution control projects.

Other alternatives identified during this rulemaking will also be considered. The IDEM will work closely with the U.S. EPA and the Air Pollution Control Board to ensure that alternative language satisfies the federal criteria for being approved into the SIP.

If you have questions about the alternatives discussed in this notice, please contact Stacey Pfeffer, Permit Branch, Office of Air Quality at (317) 233-2628 or (800) 451-6027 (in Indiana), or at spfeffer@dem.state.in.us.

Rulemaking Public Meeting Information

IDEM has begun to meet with interested parties to discuss adoption of new NSR requirements. A public meeting was held on March 6, 2003. The minutes from this meeting, any future meetings, and other information regarding this rulemaking can be viewed at IDEM's Air Permit Program Web site at http://www.IN.gov/idem/air/permits/. The alternatives listed in this notice were briefly discussed at the March 6, 2003 meeting. Future public meetings will be posted to the website. IDEM will continue to work with all interested parties throughout this rulemaking process.

If you wish to be notified of future meetings, please contact Chris Pedersen, Rules Section, Office of Air Quality at (317) 233-6868 or (800) 451-6027 (in Indiana), or at cpederse@dem.state.in.us.

STATUTORY AND REGULATORY REQUIREMENTS

IC 13-14-8-4 requires the board to consider the following factors in promulgating rules:

(1) All existing physical conditions and the character of the area affected.

(2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.

(3) Zoning classifications.

(4) The nature of the existing air quality or existing water quality, as the case may be.

(5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.

(6) Economic reasonableness of measuring or reducing any particular type of pollution.

(7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

(1) The submission of alternative ways to achieve the purpose of the rule.

(2) The submission of suggestions for the development of draft rule language.

Mailed comments should be addressed to:

#03-67(APCB) NSR Changes
Chris Pedersen
c/o Rules Section Administrative Assistant
Rule Development Section
Office of Air Quality
Indiana Department of Environmental Management
P.O. Box 6015
Indianapolis, Indiana 46206-6015.

Hand delivered comments will be accepted by the IDEM receptionist on duty at the 10th floor reception desk, Office of Air Quality, Indiana Government Center-North, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 233-2342, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rule Development Section at (317) 233-0426.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by May 1, 2003.

Additional information regarding this action may be obtained from Chris Pedersen, Rule Development Section, Office of Air Quality, (317) 233-6868 or (800) 451-6027 (in Indiana).

Janet G. McCabe
Assistant Commissioner
Office of Air Quality