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TITLE 329 SOLID WASTE MANAGEMENT BOARD

FIRST NOTICE OF COMMENT PERIOD #05-234(SWMB)

DEVELOPMENT OF NEW RULES CONCERNING INDIANA PERFORMANCE TRACK INITIATIVES

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on new rules to 329 IAC concerning instituting a state voluntary performance-based program similar to the United States Environmental Protection Agency's National Environmental Performance Track Program to provide opportunities and incentives for eligible companies to allocate resources towards continuous improvement of their environmental management system and pollution prevention programs. IDEM seeks comment on inclusion of a voluntary performance program into Title 329.

CITATIONS AFFECTED: 329 IAC.

AUTHORITY: IC 13-14-8; IC 13-19-3-1.

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose and Background

IDEM is considering implementing a performance-based incentive program for companies that not only meet environmental regulatory requirements, but that voluntarily go beyond those requirements to provide even greater protection to the environment and public health. To reward and encourage these companies, U.S. EPA and several states have implemented innovative programs that provide flexibility to eligible companies in meeting certain existing requirements. IDEM is considering basing a state incentive program on U.S. EPA's National Environmental Performance Track Program (Performance Track). The goal of the program is to achieve better environmental results, focusing more on outcomes than traditional measures. By providing regulatory flexibility, opportunities are provided to go beyond the compliance measures established by regulations. Opportunities are also created for state and federal government, as well as the regulated community, to focus resources more strategically to produce better overall environmental results.

Performance Track is a voluntary, performance-based program that provides incentives to companies that have gone above and beyond standard regulatory requirements. Incentives may include: recognition, networking opportunities, low priority for routine inspections, permitting flexibility, and decreased record keeping, reporting, and monitoring frequencies. These incentives include policy, guidance, and regulatory approaches. In some cases, other actions also must be completed before a company may take advantage of an incentive. For example, states are responsible for implementing parts of many federal environmental programs. In such cases, states may need to revise regulations, seek U.S. EPA approval of a revised program, re-issue permits, or take other actions.

IDEM is reviewing details of the Performance Track program and implementation challenges U.S. EPA has experienced. U.S. EPA's Performance Track program specifies that any facility, large or small, public or private, in the United States and its territories may apply for program membership. The program accepts applications twice per year, from February 1 to April 30, and from August 1 to October 31. To be accepted into the federal program, a company must satisfy four entry criteria:

- Facilities must be in compliance with applicable Federal, State, Local, and Tribal environmental regulations.
- Facilities must operate a well-designed environmental management system (EMS) as part of their overall management system.
- Facilities must demonstrate a record of environmental improvements for the previous two years beyond the minimums required of them. Facilities also must take additional future actions and commit to further improvements in the succeeding three years.
- Facilities must engage the public, and each year must report publicly on their progress toward meeting the goals that they have chosen, as well as summarize their compliance and the performance of their EMS. U.S. EPA makes the applications and annual performance reports of each company member available to the public.

Performance Track is designed so that U.S. EPA and other stakeholders can monitor and track the implementation of the benefits currently being offered to Program members, as well as those being considered. Member facilities commit to providing annual reports on the status of their efforts to achieve their commitments to improvements in specific environmental categories. This reporting

commitment and other activities to engage the public result in a high level of scrutiny that will aid in monitoring the activities of the Performance Track Program. U.S. EPA analyzes these data and publishes a program report annually.

Companies are accepted into Performance Track for a period of three years. To continue receiving the benefits associated with the Program, facilities must renew their membership, which requires developing additional, continuing commitments to environmental performance improvements.

If a member company encounters significant performance problems that warrant its removal from Performance Track, U.S. EPA may remove the company from the program. Reasons for removal could include falsifying information in the application or Annual Performance Report, failing to file an Annual Performance Report, misrepresenting environmental performance in advertising or marketing claims, or for compliance problems that would be seen as inconsistent with Performance Track entry criteria.

If U.S. EPA decides that it may be necessary to remove a member company from Performance Track, U.S. EPA will provide the facility with notice of its intention. The company will be allowed 30 days to respond by taking corrective measures. If corrective measures resolve the issues, U.S. EPA will withdraw its notice of intention. A member company may also withdraw from the program at any time by notifying U.S. EPA of its intent in writing.

On April 22, 2004, U.S. EPA issued a regulation under the Resource Conservation and Recovery Act (RCRA) applicable to members of U.S. EPA's Performance Track Program to allow large quantity hazardous waste generators up to 180 days, and in certain cases 270 days, to accumulate their hazardous waste without a RCRA permit or interim status, provided the generator meets certain conditions. (69 FR 21737). This incentive will result in fewer loads. IDEM is considering adopting a similar incentive into state rules.

Other states that have developed performance-based incentive programs include Colorado, Michigan, New Jersey, Oregon, Texas, Virginia, and Wisconsin. IDEM plans to review these state programs for information and ideas that may be appropriate for Indiana.

Significant improvements in environmental quality are being achieved at the state and federal level as a result of performance-based programs. These programs provide opportunities and incentives for companies to allocate resources towards continuous improvement of their environmental management system and pollution prevention program. Through these focused efforts, U.S. EPA and state agencies are reporting increased compliance levels and reductions in material usage, energy consumption and emission levels by program members. With this notice, IDEM will begin discussions regarding the development of a voluntary performance-based program designed to recognize and provide greater flexibility to Indiana companies for exemplary environmental performance and stewardship.

A program developed for Indiana must be in accordance with U.S. EPA guidelines and be approvable by U.S. EPA. IDEM seeks comment on possible incentive topics that could be included in this or future rulemakings, elements of U.S. EPA's program and programs in other states that may be appropriate for Indiana, adoption into a state program of elements similar to the federal program in the April 22, 2004 Federal Register, and any other issues related to development and implementation of a performance-based incentive program for Indiana companies.

Alternatives To Be Considered Within the Rulemaking

Alternative 1. Implement the program through new rules.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? This alternative is not imposed by federal law, but it provides a regulatory framework to implement a voluntary state program based on the National Environmental Performance Track Program.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

Alternative 2. Implement the program through guidance.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? No.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

Alternative 3. Do not implement the program in Indiana.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? No.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

Applicable Federal Law

This rule is based on the U.S. EPA's National Environmental Performance Track Program, a voluntary program that recognizes excellent environmental performance with opportunities and incentives. Specific environmental laws may become applicable if future

federal rules for the National Environmental Performance Track Program are adopted at the state level. 40 CFR 262 (Standards Applicable to Generators of Hazardous Waste) contains the RCRA provisions affected by the federal incentives in the April 22, 2004 Federal Register (69 FR 21737).

Potential Fiscal Impact

There would be no fiscal impact imposed under any of the identified alternatives because the program is voluntary. However, companies taking advantage of the program could see reduced costs from some of the potential incentives such as reduced record keeping, reporting, and monitoring frequency.

Small Business Assistance Information

IDEM established a compliance and technical assistance (CTAP) program under IC 13-28-3. The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with IC 13-28-3 and IC 13-28-5, there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at www.in.gov/idem/ctap.

Small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Sandra El-Yusuf
IDEM Compliance and Technical Assistance Program
OPPTA - MC60-04
100 N. Senate Avenue
W-041
Indianapolis, IN 46204-2251
(317) 232-8578
selyusuf@idem.in.gov

The Small Business Assistance Program Ombudsman is:

Eric Levenhagen
IDEM Small Business Assistance Program Ombudsman
External Affairs - MC50-01
100 N. Senate Avenue
IGCN 1301
Indianapolis, IN 46204-2251
(317) 234-3386
elevenha@idem.in.gov

Public Participation and Meeting Information

A public meeting will be held on September 27, 2005, at 1:00 p.m. in Indiana Government Center-South, Conference Center Room 4, 402 West Washington Street, Indianapolis, Indiana. The purpose of this meeting is to present information to interested parties about this rulemaking and to receive comment and answer questions from attendees. Additional meetings will be held as needed throughout the rulemaking process. If you are interested in attending the meeting or being informed of future meetings, please contact Christine Pedersen, Rules Section, Office of Air Quality at (317) 233-6868 or (800) 451-6027 (in Indiana), or at cpederse@idem.in.gov. Please provide your name, address, phone number, and e-mail address, if applicable, where you can be contacted.

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:

#05-234(SWMB) Performance Track for Land Programs

Christine Pedersen Mail Code 61-50

Rules Development Section

Office of Air Quality

Indiana Department of Environmental Management

100 North Senate Avenue

Indianapolis, Indiana 46204.

Hand delivered comments will be accepted by the IDEM receptionist on duty at the Tenth 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 Rules Section at (317) 233-0426.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by October 3, 2005.

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

Bruce H. Palin

Assistant Commissioner

Office of Land Quality