

July 28, 1998

Paul Dubenetzky, Branch Chief
Office of Air Management
Indiana Department of Environmental Management
100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46206-6015

Dear Mr. Dubenetzky:

The purpose of this letter is to inform you of the United States Environmental Protection Agency's (USEPA) concerns regarding the inclusion of supersession condition and credible evidence language in Title V permits. The topic of supersession has developed into a national issue with concerns over the legal consequences of incorporating such language into permits. The specific concerns with Indiana's permit program and possible steps for resolution are outlined immediately below. Credible evidence has also gained national significance because the language can be construed as allowing only specified testing and monitoring methods to be used to demonstrate violations of or compliance with permit terms and conditions. However, as underscored by the credible evidence rule, 62 Fed. Reg. 8314 (Feb. 24, 1997), the Clean Air Act provides that USEPA, the State, and citizens, including the source itself, may use any credible evidence for these purposes.

Supersession:

A Title V permit incorporates into one document and provides for the implementation of all applicable requirements of the Clean Air Act that apply to a permit holder. 40 C.F.R. § 70.2 defines "applicable requirement" as, among other things, "(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act...." By definition, "applicable requirements", such as preconstruction permit conditions, need to exist apart and independent of the Title V permit. Rescission of an underlying preconstruction permit by the terms of a Title V permit could result in the nullification of the terms of the preconstruction permit as "applicable requirements" which must be incorporated into future Title V permits. When a term or condition no longer exists in a preconstruction permit, the term or condition may no longer be an applicable requirement, as defined by the Part 70 regulations. Once a Title V permit superseded previous preconstruction permits, there may be no legal basis for incorporating any conditions which were inadvertently overlooked or for maintaining

conditions when the Title V permit was renewed. Therefore, preconstruction permits should not be superseded.

Indiana has been issuing Title V permits with a supersession condition in A.5 under Source Summary. The condition states that:

The terms and conditions of this permit incorporate all the current applicable requirements for all emission units located at this source, and supersede all terms and conditions in all registrations and permits, including construction permits, issued prior to the effective date of this permit. All terms and conditions in such registrations and permits are no longer in effect.

Pursuant to this condition, the Title V permit automatically supersedes any previously issued construction permit and/or operating permit. Furthermore, it is my understanding that the Indiana Department of Environmental Management (IDEM) would allow a source's state operating permit to expire once the source was issued a Title V permit. This would similarly cause concerns because the applicable requirements would no longer exist outside the Title V permit. As with permits to construct, once a state operating permit is superseded or expired, there may be no legal basis for incorporating or maintaining the conditions of the superseded permit into the Title V permit. Neither Title V (Subchapter V of the Clean Air Act as amended) nor its implementing regulations provide the permitting authority with the authority to create applicable requirements through the Title V permitting process.

Along with the supersession language found in Indiana's Title V permits, my staff have identified specific rule provisions which complicate the supersession issue. 326 IAC 2-1-4 contains the state operating permit rules. A non-SIP approved part of the rules states that sources subject to 2-7, 2-8, or 2-9 shall comply with those rules instead of the state operating permit rules, thereby eliminating the requirement for a state operating permit if a source is subject to Part 70. Also, 326 IAC 2-7-2(f), which was approved as part of the original Part 70 submittal, states that a Part 70 source is exempt from the requirement to have a state operating permit once the Title V permit is effective. Again, this language eliminates the need for the source to have a state operating permit. When the source's construction and operating permits disappear, only the Title V permit will exist. As a result, there may be no requirement to keep the construction and operating permit terms in the Title V permit, since they may no longer exist as applicable requirements.

It is my understanding that IDEM would like to include language in its Title V permits to alleviate the regulated community's concern about enforcement of multiple permits or requirements. Title V is designed to be the primary enforcement tool which incorporates all applicable requirements into one document. As we discussed, Indiana may incorporate the following language into the permit shield condition immediately before B.14(a)(1)&(2):

This permit shall be used as the primary document for determining compliance with applicable requirements established by previously issued permits. Compliance with the conditions of this permit shall be deemed in compliance with any applicable requirements as of the date of permit issuance.

Adding the language to the permit shield condition will ensure that supersession concerns are avoided by limiting the language to applicable requirements which have been specifically identified in the permit and to determinations in the permit which specifically identify other applicable requirements as not applicable, while addressing the regulated community's concerns with multiple permit requirements.

In the long term, national policy on supersession will require certain changes in the rules discussed above so that the State operating permit, which contains the applicable requirements, will not disappear. Possible solutions may involve making permanent the state operating permit. Also, the State may wish to consider developing a merged state operating/Title V permit program or even a merged state operating/construction/Title V program, such that the renewal of all permits can be done concurrently. In this case, the Title V permit would also be, in effect, the state operating and/or construction permit. My staff is available to assist you in exploring options to address these underlying concerns, and, again, we will be continuing to appraise you of national efforts. In the meantime, you should be aware that USEPA intends to object to any permits containing supersession language.

Credible Evidence:

With respect to credible evidence, IDEM has been drafting and proposing Title V permits which include several examples of language which may preclude the use as evidence testing or monitoring other than that specified in the Title V permit. Such examples can be found in various sections of the model Title V permit, including sections D.4.4. (Section D.4.4. provides that "[c]ompliance shall be determined utilizing one of the following options.;" "A determination of noncompliance pursuant to either of the methods specified in (a) or (b) above shall not be refuted by evidence of compliance pursuant to the other method.") and D.1.7, (Section D.1.7. provides that "[c]ompliance with the VOC content

and usage limitations contained in Conditions D.x.x and D.x.x shall be determined pursuant to 326 IAC 8-1-2(a)(7) using formulation data supplied by the coating manufacturer."). This language makes it possible for a permitted source to assert that the methods for demonstrating compliance specified in the permit are the only methods admissible to demonstrate violation of the permit terms. In order to make clear the authority to use other evidence to prove compliance or noncompliance, USEPA believes this language must be removed from permits.

For these reasons, USEPA will object to any Title V permit which IDEM proposes to issue, which contains such "credible evidence buster" language. The USEPA suggests that, in addition to removing the above-referenced language from permits, IDEM should include in each permit general language providing for the use of other credible evidence. This phrase would give the source notice that any person could rely upon any credible evidence to prove the source's compliance status. An example of such a phrase is:

"Notwithstanding the conditions of this permit that state specific methods that may be used to assess compliance or noncompliance with applicable requirements, other credible evidence may be used to demonstrate compliance or noncompliance."

If IDEM would like to use an alternate method or text, USEPA would be willing to explore options which will resolve this issue expeditiously.

If you have any questions or wish to discuss these issues further, please call Pallavi Reddy or Alvin Choi, of my staff, at (312)886-6204 or (312)886-3507.

Sincerely yours,

/s/

Stephen Rothblatt, Acting Director
Air and Radiation Division