Inside This Issue

- EPA Proposes SIP Call in 36 States, Including Kentucky and Indiana, Regarding Startup, Shutdown and Malfunction, p. 2
- EPA Proposes to Designate Areas of Kentucky and Indiana as Nonattainment for the 2010 SO\textsubscript{2} NAAQS, p. 4
- EPA Issues “Questions and Answers” Document Regarding Impact of Decision by U.S. Court of Appeals for the D.C. Circuit to Remand EPA’s Implementation Rule for the PM\textsubscript{2.5} NAAQS, p. 6
- EPA Issues Draft Guidance for PM\textsubscript{2.5} Permit Modeling, p. 7
- EPA Approves Indiana SIP Revisions to Incorporate Consent Decree Requirements, p. 8
- EPA Takes Action on Kentucky Infrastructure SIP Submissions, p. 8
- EPA Approves Revisions to the Cincinnati-Hamilton Maintenance Air Quality SIP, p. 9
- EPA Proposes Revisions to Greenhouse Gas Reporting Rule and Confidentiality Determinations for New or Substantially Revised Data Elements, p. 10
- United States Court of Appeals for the Sixth Circuit Rules that Pre-Construction Projections of Emission Increases are Subject to an Enforcement Action by EPA, p. 10

Permitting

KDAQ Permitting Status

By Kelly D. Bartley, Lexington Office

The Kentucky Division for Air Quality (KDAQ) reports that during the first quarter 2013, it has received 226 applications for new, renewed or revised permits, registrations or other approvals. During that timeframe, KDAQ issued 198 initial, renewed and revised permits and registrations. As of April 5, 2013, KDAQ reported a total of 286 applications, including registrations, pending.

IDEM Permitting Status

By Jennifer Kahney Thompson, Indianapolis Office

The Indiana Department of Environmental Management (IDEM) reports that it issued the following permit decisions from January 1, 2013 to March 31, 2013: 87 Title V Permits; 41 Federally Enforceable State Operating Permits; 44 Minor Source Operating Permits; 60 Source Specific Operating Agreements; and 19 Registrations.

IDEM also had the following permit applications submitted during this same time frame: 74 Title V Permit Applications; 51 Federally Enforceable Operating Permit Applications; 36 Minor Source Operating Permit Applications; 49 Source Specific Operating Permit Applications; 16 Registration Applications; and 38 applications not yet classified.

IDEM’s Permitting Branch is currently operating with 39 permit writers, six section chiefs, 11
administrative personnel, two environmental specialists, and one branch chief.

**LMAPCD Permitting Status**

*By Bradley E. Dillon, Louisville Office*

The Louisville Metro Air Pollution Control District (LMAPCD) continues to run a significant backlog of permit applications. The Agency has, however, made an effort to prioritize construction permits to assist companies with expansion or pollution control projects. Of particular significance to Title V sources, on March 27, 2013, the LMAPCD sent out a large number of administrative citations to Title V permitted companies for alleged deficiencies in the submittal of their 2011 Emissions Inventory Statements. The administrative citations were contained in a new format that resembled a ticket for a traffic violation. The alleged violations varied among the many companies that received the citations, and each came with a proposed $750 penalty if paid within ten days or $1,000 if paid within thirty days.

**STATE REGULATIONS**

**EPA Proposes SIP Call in 36 States, Including Kentucky and Indiana, Regarding Startup, Shutdown and Malfunction**

*By Robin B. Thomerson, Lexington Office*

In a number of EPA-approved State Implementation Plans (SIPs), including the SIPs for Kentucky and Indiana, state permitting authorities have provided various forms of exemptions for excess emissions that occur during periods of startup, shutdown and malfunction (SSM). In the Kentucky SIP, the KDAQ SSM provision is found at 401 KAR 50:055, and provides that the KDAQ Director may determine that a source should be relieved from compliance with emission standards during a period of planned or unplanned shutdowns, malfunctions and ensuing startups if certain conditions have been met. For Kentucky sources located in Jefferson County, the Kentucky SIP contains the 1996 version of Louisville Metro Air Pollution Control District (LMAPCD) Regulation 1.07, which provides that temporary excess emissions due to startup, shutdown, malfunction or emergency are considered violations unless “based upon a showing by the owner or operator of the source and an affirmative determination by the District, the applicable requirements of this regulation are satisfied.” (The LMAPCD removed this language and made other revisions to Regulation 1.07 in 2005. The revised regulation was submitted to EPA in March, 2011; however, EPA has not yet approved the revised regulation as part of the Kentucky SIP. EPA considered only the 1996 regulation in this proposed action.) In the Indiana SIP, 326 IAC 1-6-4(a) provides that excess emissions during malfunction periods are not considered a violation if the source demonstrates compliance with a number of conditions. (The Indiana provision is not applicable to Title V sources or sources holding Federally Enforceable State Operating Permits.)

In June 2011, the Sierra Club petitioned EPA requesting elimination of such exemptions in the SIPs of 39 states. Sierra Club also petitioned EPA to prohibit affirmative defenses in SIPs and to discontinue reliance on interpretive letters from states intended to clarify any potential ambiguity in a SIP submission. In a notice appearing in the February 22, 2013 Federal Register, EPA proposed to grant the petitions regarding 36 states, including Kentucky and Indiana, and to find that the SIPs of those 36 states are inadequate to meet the requirements of the Clean Air Act (SIP call). EPA further proposes to deny both the Sierra Club request to prohibit affirmative defenses in SIPs and the request that EPA discontinue reliance on interpretive letters from states for clarification of any SIP submission ambiguity.

If the SIP call becomes final, EPA has proposed to give states 18 months from promulgation of the final inadequacy finding for response. EPA proposes to allow an affirmative defense in the SIP for excess emissions that occur due to unplanned events such as malfunctions; however, EPA plans to rescind its prior interpretation of the Clean Air Act that would allow an affirmative defense for excess emissions during planned periods of start-up or shutdown. However, EPA did state that: “The Clean Air Act would allow special emissions limitations or other control measures or control techniques that are designed to minimize excess emissions during start-up and shutdown.” EPA provided proposed guidance for promulgation of such limits, control measures or control techniques according to seven specific criteria that were enumerated in 1999 EPA startup, shutdown, and malfunction guidance memorandum.
With respect to malfunctions, EPA proposed that an affirmative defense should be limited to those malfunctions that are sudden, unavoidable and unpredictable. EPA also stated that an affirmative defense must provide that the defendant has the burden of proof to demonstrate all of the elements of the defense and that the demonstration has to occur in a judicial or administrative proceeding where the merits of the affirmative defense are independently and objectively evaluated. EPA recommended specific criteria for such an affirmative defense and also provided recommended regulatory language, currently used by EPA for affirmative defenses to malfunctions at facilities subject to National Emission Standards for Hazardous Air Pollutants (NESHAPs) under Section 112 of the Clean Air Act. With regard to malfunctions that occur during planned startup and shutdown periods or startup and shutdowns that occur as the result of or part of a malfunction, EPA stated that it interprets the Clean Air Act to allow narrowly drawn affirmative defense provisions in such circumstances. EPA stated its belief that the inquiry for such events should be case specific and dependent on the facts and circumstances of each event. Finally, EPA reiterated that an affirmative defense provision in a SIP cannot extend to direct final regulations, such as New Source Performance Standards or NESHAPs, adopted or incorporated by reference into a SIP. EPA stated that any affirmative defense warranted for malfunctions under those rules would be contained in the federal standards and no additional or different defense provision in a SIP would be warranted or appropriate.

In the proposal, the comment period was initially set until March 25, 2013 and extended until April 11 after a public hearing was held on March 12. EPA received numerous requests for an extension of the public comment period for 60 – 90 days beyond April 11, 2013. On April 2, EPA extended the public comment period for an additional 30 days until May 13, 2013. Industry and trade associations as well as state and local air pollution agencies in potentially affected states requested an extension arguing that the complex, far-reaching nature of the proposal and unique state specific issues required additional time to provide meaningful and comprehensive comments on all aspects of the proposal. Sierra Club requested that the comment period not be extended for an additional 60 – 90 days. In granting the 30 day extension, EPA noted that the public would now have 80 days from the date the proposal was published in the Federal Register and 89 days from the date the proposal was posted on the EPA website to submit comments.

**Update on Changes to KDAQ Regulations**

No changes to Kentucky Division for Air Quality regulations are pending at this time.

**Update on Changes to Indiana Air Rules**

**By Jennifer Kahney Thompson, Indianapolis Office**

The new Indiana Environmental Rules Board (ERB) met for the first time on February 13, 2013. The ERB did not conduct any rulemaking during its first meeting. The ERB approved the following air rulemakings during its second meeting held on March 13, 2013: Readoption of Emergency Rule Amending the federal designation for part of Dearborn County including Lawrenceburg Township, Lake County and Porter County to Nonattainment of the 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS).

The following rulemakings previously adopted by the Indiana Air Pollution Control Board (APCB) became effective in the first quarter of 2013:

1. LSA #12-467(E), Emergency Rule Amending the federal designation for part of Dearborn County including Lawrenceburg Township, Lake County and Porter County to Nonattainment of the 2008 8-hour ozone NAAQS (effective January 15, 2013);

2. LSA #12-510, Amendments to 326 IAC 1-3-4, Ambient Air Quality Standards: (a) amends 326 IAC 1-3-4 to incorporate portions of 40 CFR 50.11 to update its references to the primary and secondary NAAQS for oxides of nitrogen, with NO\textsubscript{2} as the indicator; (b) amends 326 IAC 1-3-4 to incorporate portions of 40 CFR 50.5 to update its references to the secondary NAAQS for sulfur oxides (SO\textsubscript{2}); (c) amends 326 IAC 1-3-4 to revise the 24-hour PM\textsubscript{2.5} standard; (d) amends 326 IAC 1-3-4 to remove the annual PM\textsubscript{10} secondary standards; and (e) amends 326 IAC 1-4-1 to add a definition of PM\textsubscript{2.5} to the rules concerning attainment designations (effective January 18, 2013).

3. LSA #07-352, Volatile organic compounds (VOC) Organic Solvent Degreasing Operations Rule:
(a) extends the material requirements for cold cleaner degreasers at 326 IAC 8-3-8 to all cold cleaner degreasers located in any county in the state; (b) eliminates the grandfathering of organic solvent degreasing operations in Indiana at 326 IAC 8-3-1; (c) amends applicability of 326 IAC 8-3-1, repeals sections 326 IAC 8-3-2, -3, and -4 and consolidates requirements into 326 IAC 8-3-5, -6, and -7; (d) exempts solvent degreasing operations not located in Clark, Floyd, Lake or Porter Counties from the following: (i) the operational and control requirements of 326 IAC 8-3-5, -6, and -7 if subject to 326 IAC 20-6-1 (NESHAP for Halogenated Solvent Cleaning) or if uses only organic solvents that contain less than 1 percent VOCs by weight; (ii) the material requirements of 326 IAC 8-3-8 if the cold cleaner degreaser is subject to 326 IAC 20-15-1 (NESHAP for Aerospace Manufacturing and Rework Facilities) or if uses aqueous cleaning solvents as defined in 326 IAC 8-3-0.5 (effective March 1, 2013).

4. LSA #11-774, Amendments to Rules Concerning Attainment of the Lead NAAQS: (a) amends the attainment classifications at 326 IAC 1-4 consistent with EPA’s final unclassifiable/attainment designations in Indiana and nonattainment designation in Delaware County; (b) includes administrative changes to 326 IAC 15, including deleting sources that are no longer operating; (c) adds emission standards for secondary lead smelters at 326 IAC 20-13.1; (d) makes changes to address the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Secondary Lead Smelting; and (e) includes an expedited compliance schedule of certain NESHAP requirements for Exide Technologies, Inc. in Delaware County (partially effective March 1, 2013, October 1, 2013, and January 14, 2014).

Update on Changes to LMAPCD Regulations

By Bradley E. Dillon, Louisville Office

In February 2013, LMAPCD published for public comment a significant number of revisions to its permitting regulations, including fees. The changes, revising Regulations 1.02, 2.02, 2.03, 2.08, 2.16, 2.17 and 5.0, are expected to clarify some long-standing uncertainties in the regulations, e.g., what qualifies as an exempt activity, and are generally supported by industry. The formal written comment period ended on March 25, 2013. The LMAPCD Board also took public comments at a hearing on April 10, 2013. The Board could vote to approve the amendments at its regular meeting on April 17, or delay a decision based on the public comments.

NAAQS

EPA Proposes to Designate Areas of Kentucky and Indiana as Nonattainment for the 2010 SO2 NAAQS

By Kelly D. Bartley, Lexington Office & Jennifer Kahney Thompson, Indianapolis Office

In the February 15, 2013 Federal Register, EPA proposed the designation of 30 areas in 16 states, including areas in both Kentucky and Indiana, as nonattainment for the 2010 Sulfur Dioxide (SO2) National Ambient Air Quality Standards (NAAQS). On June 2, 2010, EPA revised the primary SO2 NAAQS to establish a new one-hour standard of 75 parts per billion (ppb). In the same rulemaking, EPA revoked the two prior, significantly less stringent, primary standards of 140 ppb evaluated over 24-hours and 30 ppb evaluated annually, on the basis that those standards would not add additional public health protection given the new one-hour standard. EPA announced that all areas proposed for designation as nonattainment in the February notice are located in areas where existing 2009-2011 monitoring data indicate violations of the standard.

The Clean Air Act requires EPA to complete initial designations within two years of promulgating a new or revised NAAQS. In July 2012, pursuant to authority granted under the Clean Air Act, EPA announced that it had insufficient information to complete designations within the two year time frame and extended the deadline to June 3, 2013. Pursuant to an extension, comments on the proposed designations were due April 8, 2013.

Kentucky Areas Proposed for Designation as Nonattainment

Consistent with Kentucky’s recommendation to EPA, EPA announced that it intends to designate that portion of Jefferson County immediately surrounding the Louisville Gas & Electric Company Mill Creek Generating Station as nonattainment for the SO2 NAAQS. Contrary to Kentucky’s recommendation however, EPA has also proposed to designate the following census tracts in Campbell County, Kentucky (all located in the central portion of the county) as
By letter dated March 6, 2013, the Kentucky Energy and Environment Cabinet responded, stating that it “strongly opposes” the proposed partial nonattainment designation for Campbell County and pointing out that violations of the SO\textsubscript{2} standard in Campbell County are due almost entirely to emissions from the W.C. Beckjord Generating Station located approximately 10 miles east of the Campbell County monitor in Clermont County, Ohio. According to Cabinet information, 2012 SO\textsubscript{2} emissions from the Beckjord station were 67,068.84 tons as compared to 88.8 tons in all of Campbell County. As a result, the Cabinet argued to EPA that partial designation of the county as proposed will require Kentucky to “needlessly” follow statutory steps to bring the area back into attainment when there are no programs that Kentucky could implement that would result in attainment. The Cabinet states that even if Kentucky eliminated all SO\textsubscript{2} emissions in Campbell County, current emissions as measured at the violating monitor would be reduced by only 0.2 percent. Kentucky further objected to the designation of the Kentucky census tracts located between the violating monitor and the Beckjord Station, stating that such proposal is “only by virtue of EPA’s apparent need to geographically connect the monitor to the source of the NAAQS violation.”

**Indiana Areas Proposed for Designation as Nonattainment**

EPA has proposed the following portions of the listed counties in Indiana as nonattainment for the 2010 SO\textsubscript{2} standard.

<table>
<thead>
<tr>
<th>Nonattainment Area</th>
<th>County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indianapolis</td>
<td>Marion County, IN (Wayne, Center and Perry Townships)</td>
</tr>
<tr>
<td>Morgan County</td>
<td>Morgan County, IN (Clay and Washington Townships)</td>
</tr>
<tr>
<td>Richmond</td>
<td>Wayne County, IN (Wayne Township)</td>
</tr>
</tbody>
</table>

Southwest Indiana Daviess County, IN (Veale Township)

Pike County, IN (Washington Township)

Terre Haute Vigo County, IN (Fayette, Harrison, and Otter Creek Townships)

Indiana submitted its initial designation recommendations for the 2010 revised one hour SO\textsubscript{2} NAAQS to EPA on May 11, 2011. Technical Addendums with updated recommendations followed on January 6, 2012; April 6, 2012; and January 24, 2013. EPA adopted Indiana’s recommendation to utilize smaller township areas as the boundary for the nonattainment areas, and almost all of its township recommendations. However, EPA and Indiana disagree on whether Otter Creek Township in Vigo should be included in the Terre Haute Nonattainment Area.

IDEM’s March 11, 2013 response letter agrees with the proposed designation of Fayette Township in Vigo County despite the fact that IDEM’s above-referenced recommendations did not include that township. But IDEM disagrees with the rationale used by EPA in its proposed designation of Otter Creek Township in Vigo County. IDEM points out that inclusion of Otter Creek Township is contrary to EPA’s “Guidance for 1-Hour SO\textsubscript{2} NAAQS SIP Submissions (2011)” which states that “areas with no SO\textsubscript{2} monitors would be designated as ‘unclassifiable,’ as well, absent any other appropriate data to support a designation of ‘attainment’ or ‘nonattainment.’” IDEM argues that there are no monitors or sources of SO\textsubscript{2} emissions within Otter Creek Township. The population density within Vigo County is mainly limited to Harrison Township, and the population density of Otter Creek Township does not differ significantly from the other townships surrounding Harrison Township. Thus, EPA’s inclusion of Otter Creek Township as a contiguous boundary is an insufficient justification. Rather IDEM asserts that limiting the nonattainment boundary to Fayette and Harrison Townships captures the monitors that exceed the one hour standard and all of the sources with the potential to influence measured concentrations, as well as the portion of the population likely to be affected by the concentrations near the monitors and emission sources. Therefore, IDEM has requested that EPA
February 2013 Updated Strategy for Future Designations

On February 6, 2013, EPA released an “updated strategy” calling for further rulemaking and guidance for completing initial area designations for all other areas of the United States (i.e., areas without a monitor measuring a violation of the standard). Moving away from the controversial approach previously put forth by EPA that required states to use both monitoring and modeling to determine an area’s attainment of the standard, the updated strategy calls for a dual monitoring / modeling approach that would allow states the flexibility to use either monitoring or modeling (or a mix of both) for characterization of current SO₂ concentrations. To facilitate EPA’s updated approach, EPA announced that it plans to issue updated rules and guidance for both an acceptable SO₂ monitoring network for a source or source region and acceptable SO₂ modeling for designation purposes.

With regard to source thresholds, EPA continues to state that, given the resource constraints on characterizing air quality through monitoring or modeling, focusing on the largest sources of emissions for purposes of determining NAAQS attainment is appropriate. EPA announced that it expects to propose a range of threshold options based on population size and source size for a minimum level of coverage between 66 and 90 percent of national SO₂ emissions. EPA plans to issue technical assistance documents this summer followed by a final data requirement rulemaking in late 2014 requiring air agencies to characterize air quality for areas with sources covered by the relevant thresholds in support of new designation recommendations. Air agencies will then in 2015 identify those sources and areas meeting the thresholds that will use monitoring and those that will use modeling to characterize air quality. The strategy calls for new monitors to ultimately be operational by January 2017 with final designations for newly monitored areas by December 2020. The strategy calls for final attainment and nonattainment designations for modeled areas to be made by December 2017.

EPA Issues “Questions and Answers” Document Regarding Impact of Decision by U.S. Court of Appeals for the D.C. Circuit to Remand EPA’s Implementation Rule for the PM₂.₅ NAAQS

By Jack C. Bender, Lexington Office

As reported in last quarter’s issue of the Air Quality Letter, the U.S. Court of Appeals for the District of Columbia Circuit recently vacated the significant monitoring concentration (SMC) established for PM₂.₅ in EPA’s October 2010 rulemaking on the grounds that there is no authority for SMCs under the Clean Air Act. Additionally, the court vacated and remanded the significant impact levels (SILs) for PM₂.₅ that were established in EPA’s October 20, 2010 rulemaking on the grounds that the SILs may not be protective of the PM₂.₅ NAAQS in all circumstances. On March 4, 2013, EPA issued a “Questions and Answers” guidance document to provide states and regulated entities with EPA’s preliminary answers to the most common questions regarding the impact of the court’s ruling on pending and recently issued PSD permits. In general, the Questions and Answers document states that PSD permitting authorities should “immediately align their permitting actions with the [court’s] decision.”

With respect to the SMCs for PM₂.₅, EPA explained that delegated state and local permitting authorities should not rely on the PM₂.₅ SMC to allow applicants to avoid the need to compile ambient air quality monitoring data for PM₂.₅. Rather, all applicants seeking a PSD permit where direct PM₂.₅ or any PM₂.₅ precursor is emitted in a significant amount should either: (1) collect and submit the necessary ambient PM₂.₅ monitoring data; or (2) submit PM₂.₅ ambient data collected from existing monitoring networks where the permitting authority deemed such data to be representative of the air quality in the area of the source for the year preceding receipt of the application.

With respect to reliance on the PM₂.₅ SILs, EPA cautioned that reliance on the SILs alone to demonstrate that a source will not cause or contribute to a violation of the PM₂.₅ NAAQS is inadequate. However, EPA stated that permitting authorities have the discretion to select and utilize a PM₂.₅ SIL value if the record provides sufficient justification for the selected SIL value and the manner in which it will be used. The SIL values for PM₂.₅ in EPA regulations could continue to be used if the permitting authority also takes background
concentrations of PM$_{2.5}$ into account. For example, in situations where the difference between the PM$_{2.5}$ NAAQS and the monitored PM$_{2.5}$ background concentrations in the area is greater than the SIL value, in most cases, EPA expects that modeled impacts below the PM$_{2.5}$ SIL would be adequate to demonstrate that the project will not cause or contribute to a violation of the PM$_{2.5}$ NAAQS (which allows the source to forego a comprehensive cumulative modeling analysis for direct PM$_{2.5}$ and precursors). EPA also explained that as part of the cumulative analysis, an applicant may continue to show that the proposed project does not contribute to an existing violation of the PM$_{2.5}$ NAAQS by demonstrating that the proposed project’s PM$_{2.5}$ impact does not significantly contribute to an existing violation of the PM$_{2.5}$ NAAQS. EPA expects permitting authorities to consult with EPA before using SIL values for this purpose.

With respect to state implementation plans (SIPs) that contain SILs and SMCs that are inconsistent with the court’s ruling, EPA recommends that the states begin to take steps to remove those provisions from the SIPs. As noted above, EPA also warned that permits issued on the basis of such provisions going forward may be inconsistent with the Clean Air Act and subject to challenge. EPA also noted that it does not believe the court’s ruling will affect sources with final PSD permits that relied on such SIP provisions. Such permits were issued in accordance with regulations that were in effect at the time of permit issuance.

For SIP provisions that are currently pending before EPA for approval, EPA noted it would not approve any SIP provisions that are inconsistent with the court’s ruling. Thus, EPA encouraged states that have already made such SIP submissions to withdraw those portions of the submissions that were inconsistent with the court’s ruling.

**EPA Issues Draft Guidance for PM$_{2.5}$ Permit Modeling**

*By Jack C. Bender, Lexington Office*

On March 4, 2013, EPA issued for public comment its Draft Guidance for PM$_{2.5}$ Permit Modeling. The document reflects EPA’s preliminary recommendations for how a stationary source seeking a PSD Permit may demonstrate that it will not cause or contribute to a violation of the PM$_{2.5}$ NAAQS, specifically taking into account secondary formation of PM$_{2.5}$ due to emission of PM$_{2.5}$ precursors (i.e., SO$_{2}$ and/or NO$_{x}$). In issuing its revised PM$_{2.5}$ NAAQS on December 14, 2012, EPA noted that it intended to issue the revised guidance on PM$_{2.5}$ modeling to address various technical concerns with demonstrating compliance. The draft guidance for PM$_{2.5}$ permit modeling incorporates and builds upon EPA’s March 23, 2010 guidance memorandum, *Modeling Procedures for Demonstrating Compliance for PM$_{2.5}$ NAAQS*.

The 60-page draft guidance contains detailed discussion of proposed modeling protocols and approaches. The draft guidance addresses significant impact analyses, cumulative impact analyses, and PM$_{2.5}$ increment analyses. It also reflects EPA’s views as to the use of SILs and SMCs for PM$_{2.5}$ that are presented in the companion Question and Answer document that is discussed elsewhere in this issue of the *Air Quality Letter*. EPA cautions that due to the fact that the current preferred dispersion model (i.e., AERMOD), does not explicitly address secondary formation of PM$_{2.5}$, any modeling protocol developed by a permit applicant for approval by the permitting authority should be reviewed with the regional EPA office.

The draft guidance contains four assessment case scenarios for determining the extent of ambient air impact analyses that will be required.

In Case 1, no air quality analysis would be required. In this situation, direct PM$_{2.5}$ emissions are less than the 10 tpy significant emission rate (SER) and NO$_{x}$ and SO$_{2}$ emissions are each below the 40 tpy SER for those precursors.

In Case 2, only a primary air quality impact of direct PM$_{2.5}$ emissions is required. This situation arises where direct PM$_{2.5}$ emissions are greater than or equal to the 10 tpy SER, but NO$_{x}$ and SO$_{2}$ emissions are each less than the 40 tpy SER for those precursors.

Case 3 would require both a primary and secondary air quality impact analysis. This would be triggered where both direct PM$_{2.5}$ emissions and precursor emissions are greater than or equal to the respective SERs.

In Case 4, only a secondary air quality impact analysis is required. This scenario arises where direct emissions are...
PM$_{2.5}$ emissions are below the SER, but either NO$_x$ or SO$_2$ emissions are greater than or equal to the 40 tpy SER.

Of importance, the draft guidance delineates potential approaches for evaluating secondarily formed PM$_{2.5}$. Secondary PM$_{2.5}$ impacts may be assessed through: a qualitative assessment; a hybrid of a qualitative and a quantitative assessment; or a full quantitative photochemical grid modeling exercise. These concepts are explained in detail in the draft guidance which includes examples of qualitative assessments of the potential impacts of secondary PM$_{2.5}$ formation. EPA also notes that, in those rare cases where it is deemed necessary to estimate secondary PM$_{2.5}$ impacts with a full quantitative photochemical grid modeling, the candidate model for use in estimating single source impacts should meet the general criteria for an alternative model as outlined in Appendix W. The draft guidance provides that PSD modeling of secondarily formed PM$_{2.5}$ should be viewed as a screening level analysis under Appendix W, analogous to the screening nature of the guidance in Appendix W regarding dispersion modeling for nitrogen dioxide impacts.

EPA has also clarified and revised its recommended approach for combining the modeled and monitored concentrations of PM$_{2.5}$ for comparison to the PM$_{2.5}$ NAAQS. Because the proposed modeling guidance takes into account secondary PM$_{2.5}$ formation, EPA has proposed a departure from the March 23, 2010 clarification memo to allow as a First Tier that the modeled design value (based on the multi-year average of the 98th-percentile of 24-hour values) be added to the monitored design value from a representative monitor. The modeled design value would include, as appropriate, the primary and secondary projected PM$_{2.5}$ impacts. (Monitored design values already account for secondary PM$_{2.5}$ formation.)

Any entity that is considering constructing or modifying a source that may be major for PM$_{2.5}$ should closely study EPA’s new guidance for PM$_{2.5}$ impact modeling. The express consideration of secondary PM$_{2.5}$ formation in conjunction with the more stringent primary annual PM$_{2.5}$ standard that was recently adopted creates significant incentives to evaluate project approaches that can avoid PSD review for PM$_{2.5}$ emissions. In many areas, background ambient PM$_{2.5}$ concentrations are already very close to the revised annual PM$_{2.5}$ NAAQS. In such cases, for projects that are major for PM$_{2.5}$ due to either the emission of direct PM$_{2.5}$ or precursors, it may not be possible to avoid a cumulative impact analysis, and demonstrating compliance with the NAAQS may be very difficult.

EPA Approves Indiana SIP Revisions to Incorporate Consent Decree Requirements

By Andy Bowman, Indianapolis Office

On March 15, 2013 EPA published approval of a revision to Indiana’s State Implementation Plan (SIP) that authorizes the Indiana Department of Environmental Management (IDEM) to include requirements from federal consent decrees in permits to construct new air emission units or modify existing emission units (i.e., source modifications) at sources subject to Title V of the Clean Air Act. As a result, any federal consent decree limitations that are incorporated into a source modification permit become “applicable requirements” as defined by Clean Air Act regulations and will survive beyond the expiration of the consent decree. According to EPA such incorporated consent decree requirements “will become permanently enforceable by both IDEM and EPA.” 78 Federal Register 16412, 16413 (March 15, 2013). Once established as an applicable requirement in a source modification permit, the requirement will be included in the source’s Title V operating permit through a permit modification.

The former Indiana Air Pollution Control Board amended 326 IAC 2-7-10.5(b) on November 2, 2011 to authorize incorporation of consent decree requirements. The state rule change became effective on March 8, 2012 (LSA Document No. 09-493(F)). The SIP approval becomes effective on May 14, 2013. For more information about the revised SIP approval is available at www.regulations.gov under Docket No. EPA-R05-OAR-2012-0650.

EPA Takes Action on Kentucky Infrastructure SIP Submissions

By Jesse M. Parrish, Lexington Office

The Clean Air Act requires each state to adopt and submit a State Implementation Plan (SIP) for the implementation, maintenance, and enforcement of each
National Ambient Air Quality Standard (NAAQS). These SIPs address a number of infrastructure requirements, including: ambient air quality monitoring and data systems, programs for enforcement of control measures, and adequate authority and resources to implement the plan. EPA proposed or finalized approval of a number of Kentucky infrastructure SIP submissions during the first quarter of 2013.

On March 7, 2013, EPA took final action to approve KDAQ’s infrastructure SIP submission concerning the 2008 8-hour ozone NAAQS with a few exceptions. (78 Federal Register 14687). With respect to Prevention of Significant Deterioration (PSD) requirements, EPA conditionally approved, in part, the SIP submission based upon a December 19, 2012 commitment letter from KDAQ. In this letter KDAQ pledged to submit at a later date specific enforceable measures for approval into the SIP to address the PSD program’s deficiencies. EPA also took final action to disapprove the SIP submission with respect to certain interstate transport requirements. KDAQ’s SIP submission relied on the Clean Air Interstate Rule (CAIR). However, EPA determined that CAIR was promulgated before the 2008 8-hour ozone NAAQS and did not address interstate transport requirements related to the 2008 8-hour ozone NAAQS. Due to recent court decisions, this disapproval does not trigger an obligation for EPA to promulgate a Federal Implementation Plan (FIP).

On February 20, 2013, EPA proposed to approve a KDAQ submission concerning the 1997 annual and 2006 24-hour fine particulate matter (PM$_{2.5}$) NAAQS and the infrastructure SIP requirement to protect visibility in other states. (78 Federal Register 11805). While Kentucky’s regional haze SIP has not been fully approved, EPA stated that it believes that the SIP submission together with previously approved SIP provisions are adequate to demonstrate compliance. The previously approved SIP provisions forming the basis for EPA’s conclusion include: provisions requiring electric generating units (EGUs) to comply with CAIR, measures in the regional haze SIP addressing best available retrofit technology (BART), and reasonable progress requirements for other sources or pollutants.

Finally, on March 26, 2013, EPA finalized its conditional approval of a KDAQ infrastructure SIP submission pertaining to the 1997 annual and 2006 24-hour PM$_{2.5}$ NAAQS and requirements for adequate provisions to prohibit emissions from interfering with another state’s required measures to prevent significant deterioration of its air quality. (78 Federal Register 18241). On July 3, 2012, Kentucky submitted a commitment letter to EPA requesting conditional approval of outstanding PSD requirements related to the New Source Review (NSR) PM$_{2.5}$ Rule and the PM$_{2.5}$ PSD Increment-Significant Impact Levels (SILs)-Significant Monitoring Concentration (SMC) Rule. EPA is relying upon this commitment to address the NSR PM$_{2.5}$ and PM$_{2.5}$ PSD Increment-SILs-SMC Rule as the basis for its conditional approval. If Kentucky fails to submit the revisions described in the commitment letter by October 3, 2013, the conditional approval will automatically become a disapproval and EPA will issue a finding of disapproval.

**EPA Approves Revisions to the Cincinnati-Hamilton Maintenance Air Quality SIP**

*By Kate E. Beatty, Indianapolis Office*

By direct final rule published January 29, 2013 (78 Federal Register 6035), EPA has approved Indiana’s and Ohio’s request to revise the Cincinnati-Hamilton 1997 8-hour ozone maintenance air quality SIP to replace the previously approved motor vehicle emissions budgets (MVEBs) with MVEBs for 2015 and 2020 developed using EPA’s Motor Vehicle Emissions Simulator (MOVES) emissions model.

The MOVES model is based on analyses of millions of emission test results and considerable advances in EPA’s understanding of vehicle emissions. Indiana submitted the SIP revision request on October 12, 2012 followed by a final submittal on December 11, 2012 after receiving no comments during the public review and comment period. The submitted revision only sought to revise the on-road mobile source inventories and not the non-road inventories, area source inventories or point sources.

The emissions estimates submitted by Indiana and Ohio demonstrate that the Cincinnati-Hamilton area emissions are declining and are continuing to decline as they remain below attainment levels. As of the effective date of April 1, 2013, Indiana and Ohio must use the MOVES2010a-based budgets. The MOVES2010a-based budget contains minor revisions which do not affect the criteria pollutant emissions results from the
MOVES2010 budget released in March 2010 (see 75 Federal Register 9411).

G H G S

EPA Proposes Revisions to Greenhouse Gas Reporting Rule and Confidentiality Determinations for New or Substantially Revised Data Elements

By Jennifer Kahney Thompson, Indianapolis Office


EPA’s proposed amendments include technical amendments, amendments related to global warming potentials, and confidentiality determinations for new or substantially revised data elements. EPA is proposing to change the GHG global warming potentials (GWPs) for 19 different GHGs and decrease the GWPs for four other GHGs based on revised GWPs published by the Intergovernmental Panel on Climate Change. EPA is also proposing to add 26 new fluorinated GHGs to 40 CFR Part 98, Subpart A, Table A-1.

The proposed revisions include confidentiality determinations for 26 proposed new or substantially revised data elements other than inputs to emissions equations. EPA is proposing confidential determinations on an individual basis for 16 new or revised data elements in the following categories: (1) Unit/Process “Static” Characteristics That are Not Inputs to Emissions Equations direct emitter data category; (2) Unit/Process Operating Characteristics That are Not Inputs to Emissions Equations direct emitter data category; (3) Production/Throughput Quantities and Composition supplier data category; and (4) Unit/Process Operating Characteristics supplier data category. EPA is also proposing to assign 13 new or revised data elements to the inputs to emission equations category but is not proposing confidential determinations for them.

EPA’s fact sheet regarding the proposed rulemaking, Memorandum re: Table of 2013 Revisions to the Greenhouse Gas Reporting Rule, and Memorandum re: Proposed data category assignments and confidentiality determinations for new and substantially revised data elements in the proposed “2013 Revisions to the Greenhouse Gas Reporting Rule and Confidentiality Determinations for New or Substantially Revised Data Elements” are available at: www.epa.gov/ghgreporting/reporters/rules/index.html.

ENFORCEMENT

United States Court of Appeals for the Sixth Circuit Rules that Pre-Construction Projections of Emission Increases are Subject to an Enforcement Action by EPA

By Jack C. Bender, Lexington Office

On March 28, 2013, the United States Court of Appeals for the Sixth Circuit, in a two-to-one decision, entered a ruling that allowed EPA to proceed with a pre-construction enforcement action against DTE Energy (DTE) and Detroit Edison relating to DTE’s pre-construction emission estimates that indicated a proposed facility modification would not be major for Prevention of Significant Deterioration (PSD) review under the Clean Air Act. The Sixth Circuit reversed and remanded the case to the United States district court. In essence, the district court found that DTE’s pre-construction emission estimates under the actual-to-future-actual emission test were not subject to enforcement by EPA until after the modification was operational when post-construction emissions would be known.

In this case, DTE projected future actual emissions for a project that involved replacing significant portions of a coal-fired electric utility boiler and refurbishing other boiler components. The repair/replacement project cost $65 million. Although the utility projected a post-project emission increase of several thousand tons of SO₂ and NOₓ, it also determined that the entire emission increases fell under the “demand growth” exclusion as increases in emissions that the source was able to accommodate physically and legally prior to the project. DTE submitted its projected future actual emission calculations to the state regulatory authority prior to commencement of the project. Two months after commencement of construction began, EPA issued a Notice of Violation to DTE stating that the project...
“resulted in a significant net emissions increase” and therefore “constitutes a ‘major modification.’”

The Sixth Circuit observed that EPA could clearly bring an enforcement case against DTE under the PSD regulations if DTE failed to make the necessary projection of emissions before commencement of construction. Similarly, the court noted that, and DTE conceded, that EPA could commence an enforcement action pre-construction if blatant errors were made in the emission calculations, such as using the incorrect significant emission threshold for emission comparison purposes. The court, relying on the Supreme Court’s decision in Alaska Department of Environmental Conservation v. EPA, noted that EPA had broad statutory authority to issue orders or seek injunctive relief “as necessary to prevent the construction or modification of a major emitting facility, which does not conform to the requirements of [the PSD regulations].” That authority, the Sixth Circuit noted, also reaches to required emission projections.

The court, however, sternly rejected EPA’s arguments that it was bad faith on the part of an operator to artificially keep its post-construction emissions down in order to avoid PSD review and that the Clean Air Act did not envision allowing sources to replace parts indefinitely without losing their grandfathered status. The court noted, to the contrary, that is exactly what the Clean Air Act allows and it is up to Congress, not EPA or the courts, to make changes to the Act if it wished to eliminate grandfathering. Nevertheless, the court still found that “a pre-construction projection is subject to an enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations.” The court made “no determination as to whether defendants have complied with those projection regulations.” Thus, it appears that, as long as the pre-construction actual-to-projected-actual emission calculations are consistent with regulatory requirements and made in good faith, EPA should not be able to succeed in such an enforcement action merely because it believes the low levels of future emissions are overly optimistic. Where the demand growth exclusion is a critical part of the emission estimates that are relied upon to contend a project is “minor” for PSD purposes, it seems likely that could be a key focus of an EPA enforcement action as to whether, as a matter of fact, the projected emission increase could have been accommodated by the pre-existing source as required by the demand growth exclusion.

**Other Significant EPA Notices & Rulemakings**

1/7/13
78 FR 925
*Notice.* EPA gave notice of its decision to deny several petitions for reconsideration of its air quality attainment/nonattainment designations for the 2008 ozone national ambient air quality standards (NAAQS). The 2008 ozone NAAQS were initially promulgated in two rulemakings published in the *Federal Register* on May 21, 2012 and June 11, 2012. Following the publication of these designations, EPA received petitions for reconsideration of specific area designations from a variety of industry and environmental interests, as well as from several state regulatory authorities, including IDEM. EPA denied each of these petitions by letters dated December 14, 2012, and provided public notice of these denials in this *Federal Register* notice.

1/15/13
78 FR 2882
*Final Rule.* EPA published a final rule finding that 28 states, the District of Columbia, and Puerto Rico failed to make complete State Implementation Plan (SIP) submissions providing the basic program elements necessary to implement the 2008 8-hour ozone NAAQS. The finding by EPA that the SIPs are deficient establishes a 24-month deadline in which EPA must establish a Federal Implementation Plan (FIP) if the deficiencies are not resolved by the affected states. Kentucky, Indiana, and Ohio are not among the states identified by EPA in this notice.

1/15/13
78 FR 3085
*Final Rule.* EPA published a final rule revising the NAAQS for particulate matter (PM). EPA revised the annual PM$_{2.5}$ standard by lowering the level to 12.0 µg/m$^3$, and retained the 24-hour PM$_{2.5}$ standard of 35 µg/m$^3$. For the primary PM$_{10}$ standard, EPA retained the current levels. The secondary standards for PM$_{10}$ and PM$_{2.5}$ were not significantly revised. The final rule took effect on March 18, 2013. See article in 4th quarter 2012 issue of the *Air Quality Letter*.

1/30/13
78 FR 6674
*Final Rule.* EPA published a final rule amending the NESHAP for stationary reciprocating internal
combustion engines. The amendments include: alternative testing options for certain large (generally natural gas-fueled) spark ignition stationary reciprocating internal combustion engines, management practices for a subset of existing spark ignition stationary reciprocating internal combustion engines that operate in sparsely populated areas, and alternative monitoring and compliance options for the same engines located in populated areas. EPA also finalized changes to the number of hours that stationary engines may be used for emergency demand response, and established fuel and reporting requirements for certain emergency engines used for emergency demand response. The final rule took effect on April 1, 2013. See article in the 4th quarter issue of the Air Quality Letter. EPA issued a brief notice making certain corrections to the text of the rule on March 6, 2013. See 78 FR 14457.

1/31/13
78 FR 7138
Final Rule/Notice of Final Action on Reconsideration. EPA issued a final rule making certain changes to the major source NESHAP for new and existing industrial, commercial, and institutional boilers and process heaters. The standards were initially promulgated by EPA on March 21, 2011, but on that same date, EPA announced its intention to reconsider certain aspects of the final rule. EPA also later received several petitions for reconsideration of the final rule. The notice announces EPA’s decision following reconsideration. Among the changes, EPA revised the emission limits for: CO (a surrogate for organic HAP); HCl (a surrogate for acid gas HAP); Hg; TSM or filterable PM (a surrogate for non-Hg metallic HAP); and dioxin/furan. EPA also revised certain subcategories of sources subject to the rule. The amendments took effect on April 1, 2013.

2/12/13
78 FR 10005
Final Rule. EPA amended the NESHAP for the Portland Cement Manufacturing Industry and the standards of performance for Portland Cement Plants. The amendments were made in response to petitions for reconsideration of the standards published in 2011 and in response to a decision by the United States Court of Appeals for the District of Columbia Circuit. In the final rule, EPA retains the stack emission standards for HCl and total hydrocarbons, and amends the NESHAP and NSPS standards for PM stack emissions. The rule amended the compliance date for existing sources to September 9, 2015.
Readers are invited to provide comments, suggestions, or newsworthy materials to the editors of the newsletter listed below. All input is welcome.

Kelly D. Bartley ● Editor ● 859/288-4641 ● E-mail: kbartley@bgdlegal.com
Jack C. Bender ● Assistant Editor ● Lexington ● 859/288-4607 ● E-mail: jbender@bgdlegal.com
Bradley E. Dillon ● Assistant Editor ● Louisville ● 502/587-3668 ● E-mail: bdillon@bgdlegal.com
Jennifer Kaheyn Thompson ● Assistant Editor ● Indianapolis ● 317/686-5234 ● E-mail: jthompson@bgdlegal.com

THIS IS AN ADVERTISEMENT. It is provided as general information rather than legal advice. Indiana, Kentucky and Ohio laws do not certify specialties of legal practice.

© 2013 Bingham Greenebaum Doll LLP