

AIR & WASTE MANAGEMENT
ASSOCIATION

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News from the Indiana Chapter of
the Air & Waste Management
Association

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Indiana NEWS

D.C. CIRCUIT REMANDS TITLE V PERIODIC MONITORING RULE

*By: Anthony C. Sullivan, Esq.,
Barnes & Thornburg LLP*

On October 7, 2005, the D.C. Circuit Court of Appeals invalidated and remanded to EPA the Title V "periodic monitoring rule" EPA adopted on January 22, 2004. See *Environmental Integrity Project, et al. v. Environmental Protection Agency*, Cause No. 04-1083 (D.C. Cir. October 7, 2005). The periodic monitoring rule attempted to clarify the Part 70 permitting rules regarding whether states could impose additional testing and monitoring requirements in cases where some testing or monitoring existed under the rules, but where the states deemed such testing/monitoring to be insufficient. Under the January 22, 2004 rulemaking, states were not allowed to add testing and monitoring requirements where some such requirements already existed under the applicable rules.

In its decision, the Court of Appeals did not address the merits of EPA's rulemaking. The decision focused on whether the final rule was a "logical outgrowth" of the proposed interim rule. The decision focused on two sections of the rule. The first, the so called "periodic monitoring" rule, provides that:

[w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), [each Title V permit must contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are

(Continued on page 4)

WINTER TECHNICAL MEETING TO FEATURE INDIANA ENVIRONMENTAL LEADERS

Leaders in the Indiana Government and business community will provide their insight on activities and priorities for 2006 at the Indiana Chapter's Winter Technical Meeting in Indianapolis. In addition, during our annual Chapter business meeting, we will be joined by Peter Hess, President-Elect of International A&WMA.

On Thursday, December 8th, the Indiana Chapter will bring together representatives of each of the offices of the Indiana Department of Environmental Management ("IDEM") as well as Commissioner Tom Easterly. Kari Evans, recently appointed Policy Director for the office of Governor Mitch Daniels and Vince Griffin of the Indiana Chamber of Commerce will provide additional insight and prospective.

The Winter Technical Meeting featuring leaders in administrative and legislative areas of Indiana government and business has become a tradition. We hope you can join us for another information-packed afternoon and stay afterwards to share some holiday cheer with your fellow Indiana Chapter members at TGI Friday's.

This session will be held at the Courtyard Marriot (across from the Eiteljorg Museum) in downtown Indianapolis. Overflow parking is available at the White River State Park across Washington Street to the north. Full information and the registration form can be found on Page 3 inside.

2005-2006 Indiana Chapter Executive Board

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From the Chairman's Corner:

By: Stephen B. Dixon

The calendar year is fast winding down, and so is my tenure as your Indiana Chapter Chair. For me, it has been a fun two-year period and I look forward to supporting the new regime by continuing to work with the Chapter's committees to bring our members interesting and informative programs. And, hopefully, we will continue to have some fun along the way.

Speaking of fun, our most recent outing was the event on October 11 down in Brown County at the Abe Martin Lodge. Mother Nature missed us by a couple of weeks on the fall foliage, but I know most of us enjoyed the location anyway. Several members stayed the night before at the lodge and had a pleasant evening at dinner in downtown Nashville. The program on the 11th provided interesting and timely information with a diverse agenda including soil vapor intrusion, RISC industrial default clean-ups, the winter '05 midwestern PM2.5 episode, Title V Task Force, and New Source Review.

We also conducted the annual business meeting for the A&WMA's East Central Section, of which the Indiana Chapter is a member. Emma Lou George with USEPA in Cincinnati is the new Section Chair, Dr. Valerian Simianu from our own Indiana Chapter is the Section Vice-Chair, and Bill Garber (City of Toledo), and Bryan Handy (KECCO, Louisville) are the Secretary and Treasurer, respectively.

We will have our Indiana Chapter business meeting on December 8 in Indianapolis as part of our annual holiday season meeting. At that time we will have the elections for the Chapter officers for the next two years. Please plan to join us – we need your votes. You will also have the opportunity to meet the most recently appointed IDEM leaders and hear what they think next year holds for the Indiana environment. At the end of our program, we will have a mixer (food and “beverages”!) where you can meet your fellow members and learn how you can help the Chapter with its programs next year.

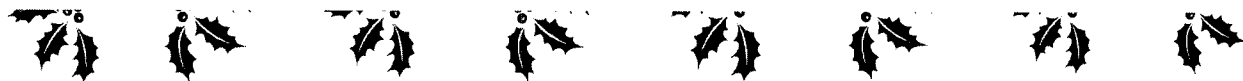
I have been telling my Chapter committee chairs that they need to recruit more people to help. Our Programs Committee always needs new ideas and people to help with arrangements for events. We want to expand the opportunities for outreach to schools, and for our members' professional development through our Education Committee. We have an excellent newsletter that is the product of our Publications Committee – but they can always use help with timely and meaty articles, and with coordinating the newsletter preparation. And what about our great website (www.inawma.org), sponsored by M3V?

I'm taking up too much room here, so I will close and look forward to rubbing elbows with you at our December 8 holiday meeting. But before I close, I want to remind everyone that A&WMA's 99th Annual Conference and Exhibition (ACE) is still scheduled for New Orleans in June, 2006. They may have been battered this fall by Mother Nature, but the environmental professionals in that great city are still committed to providing a great program (and I am sure, a great party). Please plan to attend (there are no hurricanes in June).

Our *thanks* to

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www.inawma.org



You're Invited to our Winter Technical Meeting!
Thursday, December 8, 2005
12:30 pm - 4:30 pm



The Indiana Chapter of the Air & Waste Management Association is pleased to announce our 4th Annual Winter Technical Meeting. Our environmental leaders in Indiana government and business will provide members and guests insight on 2006 activities.

Where: Courtyard Marriott (across from Eiteljorg Museum)
 501 West Washington Street, Downtown Indianapolis
 Overflow parking at White River State Park (north side of Wash. St.)

When: Thursday, December 8, 2005
 Registration from 12:30 pm - 1:00 pm

Program: Speakers

1:00 pm	<ul style="list-style-type: none"> • IDEM Representative, Office of Water Quality • Bruce Palin, Asst. Comm., IDEM Office of Land Quality • Daniel Murray, Asst. Comm., IDEM Office of Pollution Prev. & Technical Assistance
2:00 pm	<i>Chapter Annual Business Meeting – Guest Speaker Peter Hess, Pres.-Elect A&WMA</i>
2:30 pm	<ul style="list-style-type: none"> • Vince Griffin, V.P., Energy & Environmental Affairs, Indiana Chamber • Paul Dubenetzky, Asst. Comm., IDEM Office of Air Quality • Matt Klein, Asst. Comm., IDEM Office of Compliance & Enforcement • Tom Easterly, Commissioner, IDEM • Kari Evans, Policy Director, Office of Governor Mitch Daniels
4:30 pm	Holiday Cheer at TGI Friday's to follow !!!

Cost: \$20.00 Members - \$25 Non-members - \$15 Students and Government
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(Continued from page 1)

representative of the source's compliance with the permit, as reported pursuant to [§ 70.6(a)(3)(iii)]. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of [§ 70.6(a)(3)(i)(B)].

40 C.F.R. § 70.6(a)(3)(i)(B) (emphasis and bracketed material added).

The second provision, the so-called "umbrella rule," requires that each Title V permit contain

[c]onsistent with paragraph (a)(3) of this section [*i.e.*, the "periodic monitoring" rule], compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.

40 C.F.R. § 70.6(c)(1) (bracketed material added).

EPA had previously interpreted these provisions to mean that (1) if there was *no* periodic monitoring required for an emission unit, the "periodic monitoring" rule could be used to impose monitoring requirements, and (2) if there were some monitoring requirements, the "umbrella rule" could be used to enhance the monitoring requirements. Some persons objected to EPA's interpretation and argued that the "umbrella rule" could only be used where there were *no* applicable monitoring requirements, and could not be used to enhance existing monitoring requirements.

On September 17, 2002, EPA published a proposed rule to codify *its* interpretation. *See* 67 Fed. Reg. 58,561. In its clarification, EPA proposed to remove the phrase "[c]onsistent with paragraph (a)(3) of this section" from the umbrella rule. In the final rule issued on January 22, 2004, however, EPA reversed course and concluded that the umbrella rule could *not* be used to supplement compliance monitoring requirements if there were some existing requirements.

In its October 7th decision, the Court determined that the final rule was too different from the proposed rule. It concluded that the final rule was not a "logical outgrowth" of the proposed rule, but instead it was a "reinterpretation." It noted that "[w]hatever a 'logical' outgrowth of this proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse." *Environmental Integrity Project* at 11. The Court vacated the final rule and remanded the rulemaking back to EPA to satisfy notice-and-comment requirements.

Therefore, until EPA properly promulgates a new periodic monitoring rule, sources will continue to be subject to the "un-clarified" existing Part 70 rules, which appear to be ambiguous regarding whether, in the Title V permit process, states can (or must) add testing and monitoring requirements that go beyond the requirements contained in the applicable rules.

This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your lawyer on any specific legal questions you may have concerning your situation. Tony Sullivan is an attorney in the Environmental Department of Barnes & Thornburg LLP's Indianapolis Office and may be reached at (317) 231-7472 or tony.sullivan@btlaw.com.

IDEM PROPOSES "INTERIM" TCE CLEANUP VALUES IN INDIANA

By: David R. Gillay, Esq., Barnes & Thornburg LLP

IDEM's Office of Land Quality ("OLQ") recently announced that it has generated new toxicity potency information (*i.e.*, cancer slope factors ("CSFs")) for the ubiquitous industrial solvent trichloroethylene ("TCE"). IDEM has not yet released these new CSFs for public comment, but we anticipate they may be *lower* than the CSFs IDEM currently uses.

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CSFs play a fundamental role when calculating cleanup or closure levels. If IDEM adopts lower CSFs, then TCE closure levels could actually *increase*. Given the widespread criticism and scientific concerns with the current CSFs for TCE, this “interim” approach should be abandoned because it creates confusion and more uncertainty for the regulated community. Instead, as discussed in more detail below, IDEM should use the pre-July 2004 CSFs.

As some of you may recall, on July 1, 2004, significant changes to IDEM’s default closure tables for its Risk Integrated System of Closure (“RISC”) program became effective. IDEM’s 2004 revised closure tables lowered TCE’s industrial cleanup standard for soil from 3 parts per *million* (ppm) to 82 parts per *billion* (ppb), and for groundwater from 260 ppb to 7.2 ppb. This dramatic change was caused by IDEM’s decision to adopt proposed CSFs for TCE contained in an EPA 2001 preliminary *draft* TCE health assessment. This draft assessment provided a range of CSFs and some EPA Regions began using the upper end of that range to calculate *screening* levels (but expressly disclaimed using the values as closure standards). IDEM now uses the upper end of the range of CSFs to calculate *closure* levels. EPA’s 2001 preliminary *draft* assessment is the subject of national debate and an on-going evaluation by the National Academy of Science (“NAS”) which will take many more months to complete. New, final peer-reviewed CSFs for TCE are not expected to be approved by EPA for at least another year.

Unlike the previous administration, IDEM now agrees that the upper end CSF value of EPA’s 2001 preliminary *draft* TCE assessment is “not the right CSF to use.” IDEM admits that without developing new CSFs, “OLQ will not have a defensible slope factor to use for determining Default Closure Levels and will be at risk from external challenge.” However, IDEM refuses to withdraw that portion of its 2004 publication that endorses or requires the use of the *draft* CSFs. Instead, IDEM hired an out-of-state contractor to develop new CSFs using a Physiologically-Based Pharmacokinetic (“PBPK”) Model. This model allegedly improves on earlier studies and may more accurately determine the cancer risk to humans from exposure to TCE.

There are many technical and legal issues associated with IDEM’s unprecedented, interim approach for TCE. For example, as mentioned previously, the NAS is reviewing the significant scientific uncertainty behind EPA’s 2001 *draft* TCE assessment. Once final, peer-reviewed CSFs are developed, EPA will update the Integrated Risk Information System (“IRIS”) database. The IRIS database consists of EPA consensus toxicity values and generally represent the best science available on which to base risk assessments. IDEM has previously stated it will immediately adopt the CSFs published in IRIS.

Additionally, given the growing concerns with vapor intrusion associated with TCE, a federal bi-partisan effort recently demanded that EPA provide interim CSFs for TCE. To date, EPA has declined to provide interim CSFs. Given the political climate in Washington, we would not be surprised if EPA decided to provide interim CSFs for TCE in the future. If EPA does, it is unclear how IDEM would respond, especially if EPA’s interim CSFs are different than IDEM’s. This creates the plausible scenario that over the next 2 years where there may be *three* substantially different cleanup levels for TCE. These three levels would be derived from: (1) *interim* CSFs adopted by IDEM; (2) *interim* CSFs adopted by EPA; and (3) *final* CSFs published in IRIS. This simply makes no sense.

We believe the more prudent approach is for IDEM to withdraw the industrial default closure levels for TCE found in the July 2004 publication and use the prior values reflected in the 2001 and 2003 RISC default closure tables until EPA completes its review of the 2001 draft assessment and publishes final, peer-reviewed CSFs for TCE in IRIS. In the past IDEM has rejected this approach and likely will continue to do so in the future. We remind the regulated community that they have the statutory right to propose *any* CSF for TCE under a non-default scenario they believe protects human health and the environment. See IND. CODE §§ 13-25-5-8.5 and 13-12-3-2(a) and (b). We encourage you to consult legal counsel and environmental professionals to determine whether it makes sense in your particular circumstance to propose alternative CSFs.

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Recent News From EPA Affecting NSR Requirements

By: Cheryl A. Gonzalez, Esq., Barnes & Thornburg LLP

Within the last few weeks, EPA has made two important announcements for power plants subject to New Source Review.

U.S. EPA Announces Scale-Back of NSR Enforcement Actions. On October 13, 2005, U.S. EPA Administrator Stephen Johnson announced that he had ordered the agency's Office of Enforcement and Compliance Assurance ("OECA") to place a lower priority on future actions that prosecute power plants for violations of New Source Review ("NSR") rules, and concentrate on other enforcement issues instead. OECA will be changing its internal guidance to reflect the revamped enforcement priorities.

Until this announcement, pursuing coal-fired power plants had been an enforcement priority of OECA under the Clean Air Act dating back to 1999, when EPA first filed suit against ten power companies across the country alleging NSR violations. The initiative had been dubbed by EPA as "[p]erhaps the most comprehensive, coordinated enforcement effort under the Clean Air Act to date."

Importantly, despite the newly announced low priority for *future* NSR enforcement actions, the agency intends to continue to prosecute cases it already has commenced against utilities for alleged NSR violations.

U.S. EPA Proposes to Unify NSR and NSPS Emissions Tests. On October 20, 2005, EPA published in the Federal Register its proposed rule to revise the emission tests for existing electrical generating units ("EGUs") so that the test required under NSR will be the same as the test applied under the New Source Performance Standards ("NSPS"). 70 Fed. Reg. 61,081. The proposal contains a myriad of requests for comments on not only EPA's proposals to unify the NSR and NSPS emissions tests, but also on EPA's interpretations of recent decisions affecting the programs and issues related to the implementation of the revised emissions tests. However, EPA offered no actual rule language for any of its proposals; it plans on issuing a supplemental proposed rule at a later date that includes proposed language. EPA will accept comments on the proposed change to unify the NSR and NSPS emissions tests until December 19, 2005.

Highlights of the proposed rule are as follows:

1. Affected Sources. The EGUs affected by this proposal are existing fossil fuel-fired boilers and turbines serving an electric generator with a nameplate capacity greater than 25 megawatts that produce electricity for sale, *and* cogeneration facilities and single cycle gas turbines. *Id.* at 61,090.

2. Proposals for Unifying the NSR and NSPS Emissions Tests. The proposed rule presents three main options for homogenizing the emissions tests under NSR and NSPS. The three options are as follows:

Option 1: Maximum **achievable** hourly emissions test. This option would make the NSR emissions test conform to the current NSPS emissions test. The emissions test would compare the maximum hourly emissions achievable at that unit during the past 5 years to the maximum hourly emissions achievable at that unit after the facility change to determine whether an emissions increase would occur. This is EPA's preferred option, and EPA seeks comments on this proposal.

Option 2: Maximum **achieved** hourly emissions test. This is an adjusted version of the existing NSPS test, and would compare the highest hourly rate at which the unit actually emitted a pollutant at any time during the five-year period immediately prior to the facility change to the maximum hourly emissions achieved at a unit after the modification. In addition to comments on this proposed option, EPA also seeks comments addressing whether – if this option is adopted – the NSPS emissions test requirements also should be changed to include a maximum achieved hourly emissions test either in lieu of the current NSPS test (maximum achievable hourly emissions test) or in addition to the current NSPS test.

Option 3: Output-based emissions test. This test option is designed to **recognize energy efficiency** as a form of pollution prevention. This test would establish an NSR emissions increase test based on mass of emissions per unit of energy output rather than an hourly emissions rate. EPA is requesting comments on the desirability and feasibility of using such a test. EPA also is seeking comments addressing whether – if

(Continued on next page)

this option is adopted – the NSPS emissions test requirements also should be changed to include an output-based emissions test either in lieu of the current NSPS test (maximum achievable hourly emissions test) or in addition to the current NSPS test.

3. Treatment of Netting. EPA also is soliciting comments on whether to retain “netting” (the method used by sources to sum the pollution increases and decreases at a source to determine whether pollutant increases from a change will result in a significant emissions increase), if the NSR program adopts the maximum achievable emissions test currently applied in the NSPS program.

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IMPORTANT RISC UPDATES

By: David R. Gillay, Esq., Barnes & Thornburg LLP

IDEM recently announced three important updates to its Risk Integrated System of Closure (“RISC”) program. IDEM announced that: (1) the RISC default closure tables will be updated in 2006; (2) the Total Petroleum Hydrocarbon (“TPH”) policy will soon be released for public comment; and (3) a vapor intrusion pilot program is available.

Revised Default Closure Level Tables: On January 30, 2006, IDEM plans to release a revised version of the RISC default closure level tables. This revision will include new toxicology information and new compounds. Unlike the January 2004 revision, IDEM will provide further information through the RISC listserv and the RISC web site prior to January 30. IDEM will allow a 6-month grace period for using the new 2006 closure levels or the current 2004 closure levels. On July 30, 2006, the grace period will end, and the new values will be in effect until at least 2008. It is our understanding that IDEM intends that the regulated community follow the transition policy it provided when it released the RISC guidance in February of 2001.

Total Petroleum Hydrocarbons (“TPH”): After years of internal debate, IDEM has developed a process to determine health based closure levels for TPH. This process provides default and nondefault closure levels which are significantly higher than the current TPH closure levels. IDEM intends to release a draft of this process and will finalize this process as a non-rule policy document (“NPD”) pursuant to the statutory procedure. IDEM would like to present this to the Solid Waste Management Board in February of 2006.

Vapor Intrusion: IDEM has developed an interim vapor intrusion pilot program. This Program recommends investigative and data collection techniques. Data from this Program will be analyzed and used to refine the screening levels and other aspects of the program. IDEM has developed methods for BTEX (benzene, toluene, ethyl benzene, and xylene) constituents which will be released soon. IDEM also is finalizing methods applicable to chlorinated sites. IDEM will provide further details through the RISC listserv and RISC web site. At the federal level, scientists from EPA’s National Exposure Research Laboratory have raised concerns that the Johnson-Ettinger model used for screening decisions does not address some uncertainties of the risks posed by vapor intrusion. EPA plans to convene a public meeting in the spring of 2006 to discuss this issue. It is unclear if (or how) IDEM’s pilot program will address such uncertainties.

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A&WMA
Specialty Conferences
Conferences & Courses

2006 Waste Management National Meeting

January 18 - 20, 2006
Arlington, VA

Canadian Clean Air Policy Conference

January 23 - 25, 2006
Ottawa, Ontario, CANADA

Vapor Intrusion - The Next Great Environmental Challenge

January 25 - 27, 2006
Philadelphia, PA

Associated Professional Development Course

AIR-231; Characterization and Evaluation of Vapor Intrusion
January 24, 2006, 8:00 a.m. to 5:00 p.m.

Planning for the Future; Climate Change, Greenhouse Gas Inventories & Clean Energy Linkages

March 7 - 9, 2006
San Francisco, CA

WEF/A&WMA Odors and Air Emissions 2006

April 9 - 12, 2006
Hartford, CT

Guidelines on Air Quality Models; Applications and FLAG Developments - an A&WMA Specialty Conference

April 26 - 28, 2006
Denver, CO

Symposium on Air Quality Measurement Methods and Technology 2006

May 9 - 11, 2006
Durham, NC

A&WMA 2006 Annual Conference & Exhibition

June 20 - 23, 2006
New Orleans, LA

Indoor Environmental Quality: Problems, Research and Solutions

July 17 - 19, 2006
Durham, NC

The Twenty-fifth International Conference on Incineration and Thermal Treatment Technologies

May 15 - 19, 2006
Savannah, GA

EPA-DOE-EPRI-A&WMA Power Plant Air Pollutant Control "Mega" Symposium

August 28 - 31, 2006
Baltimore, MD

For further information on the Specialty Conferences or Workshops, visit the A&WMA's homepage at <http://www.awma.org/events/>

Mark Your Calendar

Indiana Manufacturers Association Conferences

OSHA 10-Hour Certification Course

December 6 - 7, 2005
IMA Conference Center - Indianapolis, IN

Fundamentals of Credit Decisions and their Effect on Business Planning

December 8, 2005
IMA Conference Center - Indianapolis, IN

2006 IMA Legislative Briefing and Reception

January 11, 2006
Marriott Hotel, Downtown Indianapolis, Indiana

OSHA 10-Hour Certification Course

February 1 - 2, 2006
IMA Conference Center - Indianapolis, IN

For more information on conferences and events, visit the Indiana Manufacturers Association home page at www.imaweb.com/meeting_desc.asp.

Indiana Chamber of Commerce Conferences

Indiana Legal Review - December 1, 2005

Hyatt Regency - Indianapolis

Supervising & Managing People - December 1 - 2, 2005

Indiana Chamber of Commerce Office - Indianapolis

Attend All Three December Safety Dates and SAVE 15% -December 6 - 8, 2005

Electrical Safety: Lockout/Tagout Workshop - December 6, 2005

Job Safety Analysis - December 7, 2005

Workshop on Strains and Sprains - December 8, 2005

Hyatt Regency - Indianapolis

How to Hire, Fire & Discipline Your Employees - December 13, 2005

The Westin - Indianapolis

Time Management & Personal Effectiveness - January 19, 2006

Indiana Chamber of Commerce Office - Indianapolis

OSHA 10-Hour Voluntary Compliance Course - January 24 - 25, 2006

Hyatt Regency - Indianapolis

OSHA 30-Hour Voluntary Compliance Course - January 24 - 27, 2006

Hyatt Regency - Indianapolis

Employee Benefits Seminar - January 25, 2006

Indianapolis - Exact location TBD

Annual Worker's Compensation Conference - January 26, 2006

Indianapolis - Exact location TBD

Spanish for the HR Professional - January 31 - February 1, 2006

Indiana Chamber of Commerce Office - Indianapolis

Employing a Hispanic Workforce: Legal & Cultural Issues - February 23, 2006

Hyatt Regency - Indianapolis

Supervising & Managing People - February 23 - 24, 2006

Indiana Chamber of Commerce Office - Indianapolis

2006 Indiana Safety & Health Conference & Exposition - February 28 - March 1, 2006

Adam's Mark - Indianapolis

Governor's Workplace Safety Awards - March 1, 2006

Adam's Mark - Indianapolis Intl. Airport

Workplace Harassment Seminar - March 8, 2006

Indianapolis - Exact location TBD

Coaching for Peak Performance - March 9 - 10, 2006

Indiana Chamber of Commerce Office - Indianapolis

Building an HR Department - April 12, 2006

Indianapolis - Exact location TBD

Principals of Safety Leadership - April 19 - 20, 2006

Indiana Chamber of Commerce Office - Indianapolis

Supervising & Managing People - May 11 - 12, 2006

Indiana Chamber of Commerce Office - Indianapolis

Attend all three May Safety Seminar dates and save 15% - May 16 - 18, 2006

Behavior-Based Safety Seminar - May 16, 2006

Hazard Recognition Workshop - May 17, 2005

Forklift Safety: Train the Trainer - May 18, 2006

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Newsletter of the Indiana Chapter

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