

Comments on IDEM's 2nd Notice Draft Rule (Antidegradation) from Environmental Coalition

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LSA Document #08-764 (Antidegradation)
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Dear Ms. Stevens, Mr. Easterly, Mr. Pigott, and Ms. Mettler:

You have requested comments on IDEM's draft antidegradation rule ("Draft Rule") in your second notice of comment period for the antidegradation rulemaking posted on December 16, 2009, LSA Document # 08-764. The Alliance for the Great Lakes, Conservation Law Center, Environmental Law and Policy Center, Hoosier Environmental Council, Natural Resources Defense Council, and Sierra Club Hoosier Chapter offer the following comments pursuant to IDEM's second notice. These organizations either have members in Indiana and

surrounding states who will be directly affected, and potentially injured, by the implementation of Indiana's antidegradation rules, or they represent such organizations. They are also affected by the continuing failure of Indiana to adopt antidegradation rules that comply with the Clean Water Act.

Our organizations have been involved in antidegradation policy development efforts in Indiana for many years. We have participated throughout IDEM's workshop and rulemaking process initiated in 2007 and submitted formal comments to IDEM dated April 9, 2008, June 23, 2008, October 15, 2008, November 13, 2008, and May 7, 2009. These comments should be considered part of the administrative record and should be read together with the present comments for the full position of the undersigned environmental organizations.

The purpose of a state antidegradation program, and the key principle of antidegradation policy, is to maintain and protect existing water quality, even where that water quality is better than applicable water quality criteria. The United States Environmental Protection Agency (EPA) Region VIII Guidance states this principle directly:

Antidegradation recognizes that existing water quality has inherent value worthy of protection. Thus, unlike other aspects of water quality standards that are directed toward attainment of fully-protective levels of water quality (as defined by the applicable criteria), the purpose of antidegradation is to maintain and protect *existing* levels of water quality.¹

Another way of stating this principle is with reference to the available assimilative (loading) capacity of a waterbody.² EPA views the assimilative capacity of a waterbody as "a valuable natural resource."³ In order to protect this valuable resource, federal law requires states to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 C.F.R. §131.12(a). States must submit these policies and procedures to EPA for review and approval consistent with federal law. 40 C.F.R. §131.6.

¹ U.S. EPA Region VIII Guidance: Antidegradation Implementation (August 1993), Page iii (emphasis added).

² Assimilative capacity can be defined as the amount of loading of a particular pollutant into a waterbody that can be allowed while at the same time protecting uses of the waterbody and assuring that the new or increased loading does not cause or contribute to a violation of water quality standards.

³ Ephraim King, Director Office of Science and Technology, U.S. EPA, in guidance letter to Water Management Division Directors dated August 10, 2005.

As explained in detail in the body of these comments, the Draft Rule is not consistent with the Clean Water Act and is not properly approvable by EPA. The following bullet points summarize some of the major points from our detailed comments.

- The Draft Rule covers only pollutants that will have a “potentially detrimental effect on the designated or existing uses,” which is equivalent to asking whether the discharge will have a “reasonable potential” to violate established state water quality criteria. See 327 IAC 2-1.3-2(43). Applying antidegradation only where a pollutant may have a “detrimental effect” so defined fails to protect the assimilative capacity of receiving waters (i.e. the increment of water quality that is better than the levels necessary for protecting designated uses) and therefore violates 40 C.F.R. §131.12(a)(2). This definition will also apparently exempt from antidegradation controls increased discharges of nitrogen, phosphorus, sediment and other important pollutants that currently lack numeric water quality criteria in Indiana, even though these pollutants are well-known as major causes of impairment of Indiana water bodies and water bodies downstream from Indiana, including the Gulf of Mexico.
- The Draft Rule allows dischargers to avoid a full analysis of alternative treatment techniques by accepting limits based on a number of conditions labeled as “BADCT.” See 327 IAC 2-1.3-2(3) and 327 IAC 2-1.3-6(d)(1). Even assuming that such an approach might be acceptable in theory, the current proposal if adopted would allow much unnecessary new pollution, in clear conflict with 40 C.F.R. §131.12(a)(2).
- The Draft Rule fails to comply with EPA policy and recent court decisions regarding “de minimis” discharges. In the current version, dischargers can avoid antidegradation review by demonstrating “insignificant” impact on loading capacity. See 327 IAC 2-1.3-4(b). The calculations are complicated and will be difficult and expensive to implement. Furthermore, the current draft’s de minimis procedures conflict with the legal requirement that a de minimis exception – if appropriate at all – should only apply “when the burdens of regulation yield a gain of trivial or no value.” See *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 483, 491 (6th Cir. 2008). As in the Kentucky case, IDEM here has failed to carry its burden of justifying why the scenarios described in the draft rule are “truly de minimis” based on an “assessment of particular circumstances” in the record. *Id.* at 491.

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- The Draft Rule contains a number of exemptions that have not and cannot be justified in the record. See 327 IAC 2-1.3-4(b)(4). In order to approve Indiana's rules, EPA would need to provide detailed technical analysis of the combined effect of all of these exemptions and determine whether all of the "Tier-2-review exemptions together permit significant degradation." *Kentucky Waterways*, 540 F.3d at 492. IDEM has presented no evidence that any of the four "exemptions," as a class of loadings, will have a de minimis impact upon the water quality of the impacted waters or are necessary to accommodate important social or economic development.
- The Draft Rule fails to clarify how antidegradation reviews will be conducted for general permits aside from a generic statement that "the department shall complete an antidegradation review of the rules of the board that authorize NPDES general permits." 327 IAC 2-1.3-1(c)(1). This language fails to ensure that activities permitted under general permits will cause only de minimis new pollution, and there is nothing in the record to show that the general permits will individually and cumulatively allow only de minimis pollution.
- The Draft Rule focuses narrowly on NPDES permits and fails to adequately address how the requirements of 40 C.F.R. §131.12 will be implemented for activities conducted pursuant to other circumstances, such as CWA §404 permits or §401 certifications.
- The Draft Rule exemptions for "short-term and temporary" lowering of water quality fail to address the fact that "short-term" discharges may still be unacceptable if they are of a sufficient magnitude to impact existing uses or significantly impact assimilative capacity. See 327 IAC 2-1.3-4(a) and 327 IAC 2-1.3-4(b)(3)(C).
- The Draft Rule inappropriately requires that "substantial weight" to be given to "any applicable determination by a governmental entity." See 327 IAC 2-1.3-6(c)(1). If construed to require IDEM to give special deference to governmental bodies whose purpose is not implementation of the CWA, this provision unlawfully delegates CWA authority and undermines the federal requirement for the delegated entity (here IDEM) to make decisions on NPDES permits after allowing full public participation in the decision.

We organize our comments at the first level by section of the Draft Rule: 327 IAC 2-1.3-1 through 327 IAC 2-1.3-8, and 327 IAC 5-2-11.2. Sections are headed by Roman numerals.

Within rule sections are section subdivisions, in their order of appearance in the Draft Rule. Section subdivisions are headed by capital letters. Each comment on a subdivision is preceded by an introduction, and if appropriate and helpful, is followed by a set of questions to help IDEM respond to our comments as well as suggested language to replace Draft Rule language. Within the comments we state where IDEM's choices are likely to be inconsistent with the Clean Water Act, EPA guidance, or Indiana law, and where IDEM's choices are ambiguous or unclear and thus are likely to frustrate efficient implementation. We have attached an amended version of the Draft Rule incorporating our suggested language as Attachment A.

We request that IDEM, as required by federal law, provide detailed responses to these comments and questions so that all parties are able to plan their activities with certainty and so that U.S. EPA has an adequate record for its review of the proposed antidegradation implementation procedures under 33 U.S.C. §1313(c)(3). EPA's minimum public participation procedures for the revision of water quality standards require the State to provide specific responses to public comments, which are then made part of the record for EPA's evaluation. (*See* 40 C.F.R. Part 25). One of the objectives of these requirements is "[t]o assure that government action is as responsive as possible to public concerns." (40 C.F.R. §25.3). Further, it is imperative that IDEM not adopt procedures that will lead to unnecessary controversy in the future and that EPA not be asked to approve procedures that could be construed or implemented in a manner that is inconsistent with the Clean Water Act. Moreover, such clarity is also necessary to allow EPA to draft properly its decision document regarding the procedures which will have to address these issues.

I. SECTION 1: 327 IAC 2-1.3-1 APPLICABILITY OF ANTIDEGRADATION STANDARDS AND IMPLEMENTATION PROCEDURES.

A. 327 IAC 2-1.3-1(b): Applicability of rule

INTRODUCTION

Draft Section 1(b) states as follows:

Except as provided under section 4 of this rule, the antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a pollutant of concern to a surface water of the state.

COMMENTS

Draft Section 1(b) includes some situations and excludes others. The inclusions should be much broader than the exclusions. To be consistent with the Clean Water Act, the antidegradation implementation procedures should apply to all regulatory decisions that result in new or increased loadings of pollutants, whether or not the new or increased loadings are associated with a new, renewed, or modified NPDES permit limit. IDEM recognized this in its responses to comments from its first comment period for the antidegradation rulemaking:

The draft rule includes a trigger to conduct an antidegradation review when there is a new or increased loading of a pollutant of concern that results in a significant lowering of water quality in the receiving water body. There are some proposed discharges that will result in an increased loading of a pollutant of concern although there is no need for a new or modified NPDES permit limit. When those proposed discharges will result in a significant lowering of water quality, IDEM believes, an antidegradation review is warranted. The trigger proposed in the draft rule allows for an antidegradation review when there is increased loading that will significantly lower water quality, whether or not there is a need for a new or modified NPDES permit limit.⁴

Draft Section 1(b) expressly narrows the scope of entry into the rule to exclude the so-called "exemptions" located in Draft Section 4. For example, Section 4(b)(2)(A) exempts from Section 6 of the rule new or increased loadings of a pollutant "within the existing capacity and processes that are covered by an existing applicable permit." Section 4(b)(2)(A) exemption would presumably not apply to situations where there is no existing permit; where there is a change in existing capacity and processes covered by the permit; or otherwise where a new, renewed, or modified permit limit is required for the new or increased loading.

Draft Section 1(b) is incomplete, however. In addition, Section 1(b) should include pollutant loadings from projects requiring CWA §401 water quality certifications for federal permits, such as Coast Guard Section 10 permits, Federal Energy Regulatory Commission permits, and U.S. Army Corps of Engineers Section 404 permits. IDEM omits mention of CWA §401 certification from Section 1(b) (and from the Draft Rule entirely), even though antidegradation clearly applies to §401 certifications. It is IDEM's stated position that "in most cases, the avoidance and

⁴ IDEM Second Notice of Comment Period, LSA Document #08-764, DEVELOPMENT OF NEW RULES AND AMENDMENTS TO RULES CONCERNING ANTIDegradation STANDARDS AND IMPLEMENTATION PROCEDURES, December 16, 2009, page 5.

minimization and mitigation necessary to satisfy the CWA 401 certification and 404 permit requirements will also satisfy antidegradation demonstration requirements.”⁵ But there is no indication in the record that IDEM has attempted to show that there is any truth to that blanket statement. As with general permits, if IDEM wants to exempt individual §401 certifications from antidegradation review, it must formally show in the administrative record that all such certifications will satisfy antidegradation demonstration requirements. EPA should not accept IDEM's claim without an analysis of whether the §401 certification process satisfies the antidegradation demonstration.

Questions

- Where in the record has IDEM shown with any formal analysis that the avoidance and minimization and mitigation necessary to satisfy the CWA §401 certification and §404 permit requirements will also satisfy antidegradation demonstration requirements? If not, why not? If so, where can the public obtain a copy of this analysis?

Suggested Rule Language

(b) Except as provided under section 4 of this rule, the antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a pollutant of concern to a surface water of the state, including but not limited to new or increased loadings authorized by NPDES permits, section 401 certifications, and section 404 permits.

B. 327 IAC 2-1.3-1(c): General permits

INTRODUCTION

Draft Section 1(c) states as follows:

- (c) For activities covered by an NPDES general permit authorized by rule, the following apply:
- (1) The department shall complete an antidegradation review of the rules of the board that authorize NPDES general permits.
 - (2) The board may modify those rules for purposes of antidegradation compliance.
 - (3) After an antidegradation review of a rule is conducted, activities covered by an NPDES general permit authorized by that rule are not required to undergo an additional antidegradation review.

⁵ IDEM Second Notice of Comment Period, LSA Document #08-764, page 7.

COMMENTS

The Draft Rule fails to clarify how antidegradation reviews will be conducted for general permits aside from a generic statement that “the department shall complete an antidegradation review of the rules of the board that authorize NPDES general permits.” 327 IAC 2-1.3-1(c)(1). IDEM must explain how it intends to apply antidegradation to activities authorized under general permits. See *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732, 761-62 (S.D. W. Va. 2003) (rejecting West Virginia’s exemption of activities covered under general permits from antidegradation review); see also U.S. EPA Region VII letters to Missouri Department of Natural Resources (dated 2/15/07 and 3/18/08) (requesting “additional information and clarity” on how Missouri will apply antidegradation to general permits, including clarification of the steps Missouri will take when it has “data or information indicating that a water body is being impacted by pollutants that could be discharged from facilities or activities covered under a general permit”). It is not acceptable for IDEM to simply require an antidegradation review of the board’s general permit rules at some future point in time without describing what these antidegradation rules will actually require. The record fails to provide EPA with any means to determine whether these future procedures will comply with 40 C.F.R. §131.12 for activities covered by NPDES general permits. See *Kentucky Waterways*, 540 F.3d at 494 (requiring EPA to approve or deny a state’s implementation procedures based on the record in front of the agency).

Also, the draft language fails to ensure that activities permitted under general permits will cause only de minimis new pollution, and there is nothing in the record to show that the general permits will individually and cumulatively allow only de minimis pollution. As explained in *Kentucky Waterways*, EPA may not rely on a state’s “commitment” that it will comply with antidegradation requirements. See *Kentucky Waterways*, 540 F.3d at 494.

Questions

- Where in the record does IDEM indicate how antidegradation reviews for activities authorized by NPDES general permits will be conducted?
- Where in the record has IDEM shown that activities permitted under general permits will cause only de minimis new pollution?

Suggested Rule Language

(c) For activities covered by an NPDES general permit authorized by rule, the following apply:

(1) The department shall complete an antidegradation review of the rules of the board that authorize NPDES general permits in order to ensure that individual and/or cumulative uses of the general permit will not have the potential to significantly degrade water quality of the State. The board shall describe in writing how the general permit or control program meets the antidegradation requirements of this Section at the time each general permit or program is approved.

(2) The board shall modify those rules for purposes of antidegradation compliance in cycles not to exceed five years.

(3) General permits may not be used to authorize activities that result in a lowering of water quality in outstanding national resource waters or outstanding state resource waters.

(4) After an antidegradation review of a rule is conducted, activities covered by an NPDES general permit authorized by that rule are not required to undergo an additional antidegradation review, provided that a public notice of intent to proceed under a general permit is published in a local paper and on the Department's webpage including:

(A) a list of the facilities involved and the receiving waters they may affect, and

(B) the method by which public comments will be considered.

(5) Where it appears, based on public comment or the Department's own determination, that an individual use or multiple cumulative uses of a general permit may result in a significant lowering of water quality, the Department shall either require additional conditions for individual coverage which will prevent such degradation or require an individual permit.

II. SECTION 2: 327 IAC 2-1.3-2 DEFINITIONS.

A. 327 IAC 2-1.3-2(3): Definition of "BADCT"

INTRODUCTION

Draft Section 2(3) states in part as follows:

(3) "Best available demonstrated control technology" or "BADCT" means wastewater treatment capable of meeting the following effluent limitations or design criteria . . .

COMMENTS

The Draft Rule allows dischargers to avoid a full analysis of alternative treatment techniques by accepting limits based on a number of conditions labeled as “Best Available Demonstrated Control Technology” or “BADCT.” Even assuming that such an approach might be acceptable in theory, the current proposal, if adopted, would allow much unnecessary new pollution, in clear conflict with 40 C.F.R. § 131.12(a)(2).

There are several problems with the definition of BADCT – these problems are discussed now. Additional discussion on the problems with the proposed implementation of BADCT is contained in the discussion below for Section 6(d)(1) of the Draft Rule.

First, the definition lists a number of effluent limits for pollutants that are commonly associated with sewage treatment plants. The current proposal requires only certain domestic pollutants to be treated out of the many pollutants that can be treated in domestic wastewater. The definition fails to contain limits on many other pollutants for which there are feasible control technologies and that are known to impair Indiana waterbodies and waterbodies downstream from Indiana dischargers. Most notably no BADCT limit is set for phosphorus although numerous POTWs (Publicly Owned Treatment Works) discharging in the Great Lakes Basin (including Indiana POTWs) have been meeting a limit of 1.0 mg/L phosphorus for decades. Recently, the Environmental Appeals Board in *City of Attleboro, MA Department of Wastewater* upheld a limit of 0.1 mg/L for phosphorus, so even this more stringent limit is technically feasible.

Second, the level of treatment required, even of the pollutants that must be treated, is not even close to the “best” treatment that has been shown to be feasible for those pollutants. There are certainly POTWs consistently meeting limits tighter than those set by BADCT for CBOD, TSS, ammonia, and total residual chlorine (TRC). The BADCT limit for chlorine, in fact, does not even meet the current Indiana TRC water quality standard and would allow violation of state water quality standards under some critical low flow conditions. The BADCT TRC limit appears to be based on outdated detection limits.

Third, in part (B) the definition allows IDEM to set BADCT on a “case-by-case basis” or through “best professional judgment” for lagoons, land application discharges, constructed wetlands, CSOs, and other “alternative treatment technologies.” This discretion essentially swallows the rule and conflicts with the requirement that any permitted lowering of water quality be demonstrated to be “necessary” (see 40 C.F.R. § 131.12(a)(2)). The theoretical concept of BADCT is that it replaces a rigorous professional evaluation of different treatment options (i.e., the “necessary” analysis of the antidegradation demonstration). There is no indication or justification that setting BADCT on a “case-by-case basis” or through “best professional judgment” can adequately replace such an evaluation.

Fourth, the Draft Rule does not, but should, specify procedures for determining best available treatment technology and for updating BADCT when control technology improves.

Questions

- Why did IDEM omit phosphorus standards from the BADCT definition?
- What other wastewater pollutants for which there are feasible control technologies did IDEM decide to omit from the definition of BADCT, and why did IDEM omit them from the definition?
- Are the limitations in the definition of BADCT at least as strict as limitations included in any current NPDES permit in Indiana or surrounding states? If not, why not?
- Why did IDEM omit a procedure for updating BADCT when control technology improves? How will the limits be updated?
- How will best available treatment technology be determined? Through the alternatives analysis?
- Will setting BADCT on a “case-by-case basis” or through “best professional judgment” provide a means for determining “necessity” in compliance with 40 C.F.R. §131.12(a)(2)?
- How does IDEM intend to satisfy the Clean Water Act’s public participation requirements when setting BADCT limits?

Suggested Rule Language

Delete the BADCT definition and exception for increased loadings using BADCT unless entirely reworked in concept and language.

B. 327 IAC 2-1.3-2(15): Definition of "degradation"

INTRODUCTION

Draft Section 2(15) states as follows:

(15) "Degradation" means, with respect to an NPDES permit for purposes of an antidegradation demonstration, the following:

(A) For an ONRW, any new or increased discharge of a pollutant of concern, except for a short-term, temporary increase as described under section 4(a) of this rule.

(B) For an HQW, including an OSRW, any new or increased loading of a pollutant of concern, except as provided under section 4 of this rule, to a surface water of the state that results in a significant lowering of water quality for that pollutant of concern.

COMMENTS

Antidegradation applies to any action resulting in a lowering of water quality and that is required to comply with water quality standards. IDEM should define degradation more broadly, rather than just in reference to the NPDES program.

Moreover, the acceptability and legality of this definition will depend on resolution of the issues identified in the comments on Section 4, since the draft definition explicitly references the Section 4 exemptions and some of the draft exemptions are inconsistent with the Clean Water Act.

Questions

- Why is the definition of degradation limited to the NPDES program, given that antidegradation policy applies to other water quality programs as well?
- How will Indiana's water quality management programs other than NPDES be addressed with respect to antidegradation?

Suggested Rule Language

(15) "Degradation" means, for purposes of an antidegradation demonstration, the following:

(A) For an ONRW, any new or increased discharge of a pollutant of concern, except for a short-term, temporary, and limited increase as described under section 4(a) of this rule.

(B) For an HQW, including an OSRW but excluding an ONRW, any new or increased loading of a pollutant of concern, except as provided under section 4 of this rule, to a surface water of the state that results in a significant lowering of water quality for that pollutant of concern.

C. 327 IAC 2-1.3-2(18): Definition of “discharge”

INTRODUCTION

Draft Section 2(18) states as follows:

(18) "Discharge" or "direct discharge", when used without qualification, means a discharge of a pollutant of concern.

COMMENTS

The term “discharge” in the Clean Water Act is with reference to a “pollutant.” IDEM’s definition is unclear when considered with its definition of “pollutant of concern,” which is defined as a “pollutant” expected in a “discharge.” Thus, it is unclear whether a discharge can contain a pollutant that is not a “pollutant of concern.” In any case, we do not see why a definition of discharge is needed in the rule.

Questions

- Why does the rule require a definition of “discharge”?
- Given that Section 1(b) of the Draft Rule limits the applicability of the rule to “pollutants of concern,” why not define “discharge” to be consistent with federal law and regulations?

Suggested Rule Language

(18) "Discharge" or "direct discharge", when used without qualification, means a discharge of a pollutant.

D. 327 IAC 2-1.3-2(43): Definition of “pollutant of concern”

INTRODUCTION

Draft Section 2(43) states as follows:

(43) "Pollutant of concern" means a pollutant that is reasonably expected to be present in:
(A) a discharge based on the source and nature of the discharge; and
(B) the receiving water in sufficient amounts to have a potentially detrimental effect on the designated or existing uses of the receiving water.

COMMENTS

The first part of the definition in Subsection (43)(A) reflects the discussion and agreement of the subgroup in the stakeholder meetings. The subgroup accepted this language as long as IDEM clarifies the process for identifying new pollutants of concern in companion

guidance. But Subsection (43)(B) adds a second component that is contrary to the Clean Water Act.

The plain language of part (B) says that a pollutant is a POC only if it is expected to be present in the receiving water at a concentration at or approaching that which would adversely affect uses – i.e., at a concentration with a “reasonable potential” to violate established state water quality criteria. That is, a new or increased loading would not be subject to any antidegradation review unless the loading plus any existing amounts of the pollutant in the receiving water have the potential to harm aquatic organisms or make water undrinkable or unswimmable. But this definition completely contradicts the purpose of antidegradation, which is to protect water quality while it is still better than the levels necessary to protect designated and existing uses.⁶ Waiting until there is a potentially “detrimental effect” before conducting antidegradation review misses the whole point that antidegradation is meant to keep clean waters clean.

This definition may also exempt from antidegradation controls increased discharges of nitrogen, phosphorus, sediment, and other important pollutants that currently lack numeric water quality criteria in Indiana, even though these pollutants are well-known as major causes of impairment of Indiana water bodies and water bodies downstream from Indiana, including the Gulf of Mexico.⁷

The only concept that is consistent with the Clean Water Act is that for a pollutant to be a pollutant of concern there should be evidence that the pollutant could affect designated uses at some future loadings and concentrations, regardless of the actual or current loading in the receiving water and regardless of whether a water quality standard has been promulgated for that pollutant. Antidegradation is intended to preserve existing levels of water quality, regardless of whether the degradation is caused by one large discharge or many small discharges over time.

⁶ See Memorandum of Ephraim King August 10, 2005 (protection of assimilative capacity is major purpose of antidegradation).

⁷ State – EPA Nutrient Innovations Task Group, *An Urgent Call to Action – Report of the State-EPA Nutrient Innovations Task Group* August 27, 2009 pp. 2-11; Committee on the Mississippi River and the Clean Water Act, National Research Council. Mississippi River Water Quality and the Clean Water Act: Progress, Challenges, and Opportunities. Washington D.C. National Academies Press, 2008. http://www.nap.edu/catalog.php?record_id=12051; IDEM Clean Lakes Program, NLA Results show many Indiana Lakes with Algal Toxins, Water Control, Fall 2009 Vol. 21, No. 3. (Ex.6)

Thus, a substance currently found at relatively small concentrations in a discharge or waterbody should not escape antidegradation review simply because the likely concentrations are currently too low to adversely affect designated uses. IDEM must maintain assimilative capacity for these substances well before they reach such harmful concentrations.

Questions

- Does IDEM intend to require an antidegradation review of a new or expanded discharge of pollutants only where that discharge has a “reasonable potential” to violate established water quality standards? If not, what purpose is served by the language in 327 IAC 2-1.3-2(43)(B)? If so, how is this approach consistent with the purpose of antidegradation to preserve loading capacity?
- Would changing 327 IAC 2-1.3-2(43)(B) to the suggested language better serve this purpose?
- How does IDEM plan conduct antidegradation reviews for new or increased loadings of pollutants that do not currently have established numeric water quality criteria, such as phosphorus and nitrogen?

Suggested Rule Language

To more accurately reflect the proper concept for this definition, Subsection (43) should state as follows:

(43) “Pollutant of concern” means a pollutant that is reasonably expected to be present in a discharge based on the source and nature of the discharge.

This suggested language was the consensus language arrived at during the stakeholder working group sessions for this rulemaking. See Attachment B.

E. 327 IAC 2-1.3-2(60): Definition of “total loading capacity”

INTRODUCTION

Draft Section 2(60) states as follows:

(60) "Total loading capacity" expressed as a mass loading rate for the waterbody in the area where the water quality is proposed to be lowered means the product of the applicable water quality criterion multiplied by the:

- (A) sum of the existing effluent flow, the proposed new or increased effluent flow, and the stream design flow used in the calculation of the WQBELs; or
- (B) alternate mixing zone volume approved for a discharge.

COMMENTS

The way that total loading capacity is defined in the Draft Rule is not likely to protect Lake Michigan in particular from significant increases in pollution.

For streams, the total loading capacity (TLC) for a pollutant would be calculated as follows:

$$\text{WQC} \times [(\text{existing effluent flow}) + (\text{proposed new or increased effluent flow}) + (\text{stream design flow})]$$

where WQC is the applicable water quality criterion. If the units of WQC are mg/liter and the flows are in units of liters per day, then TLC is in mg per day.

For discharges to Lake Michigan, which will likely be subject to an alternate mixing zone, the TLC for a pollutant would be calculated as follows:

$$\text{WQC} \times [(\text{alternate mixing zone volume})]$$

If the units of WQC are mg/liter and the mixing zone volume is in units of liters, then TLC is expressed in milligrams (i.e., mass). But this is not a "mass loading rate," which is required for the proposed definition of TLC. The proper quantity for Lake Michigan, to be consistent with the proposed definition, is the flow (i.e., volume per time) within an alternate mixing zone.

The determination of whether a lowering of water quality is de minimis in Section 4(b)(1) of the Draft Rule relies on the calculation of TLC. Regardless of whether TLC is calculated with units of mass or with units of mass per time, it appears questionable whether the approach used in the Draft Rule to calculate TLC will provide a meaningful determination of a de minimis threshold for new or increased discharges into Lake Michigan. Thus, the proposed definition of TLC may not protect Lake Michigan from significant increases in pollution loadings unsupported by an antidegradation demonstration. See our comments below on Draft Section 4(b)(1).

Questions

- How will the proposed approach to determining loading capacity be applied to new and increased discharges into Lake Michigan?
- What is the likely range of volumes for alternate mixing zones in Lake Michigan?
- How will this approach prevent significant lowering of water quality in Lake Michigan?

- How will the proposed approach to determining loading capacity be applied to pollutants that lack numeric water quality criteria, in streams and lakes?
- How will this approach prevent significant lowering of water quality due to pollutants that lack numeric water quality criteria?

Suggested Rule Language

The de minimis for Lake Michigan and other outstanding state resource waters should be set equal to the background concentration or “reference water quality.” See proposed de minimis language and rationale in Attachments A and B.

III. SECTION 3: 327 IAC 2-1.3-3 ANTIDEGRADATION STANDARDS.

A. 327 IAC 2-1.3-3(c): Tier 2.9 standard

INTRODUCTION

The Draft Rule divides the Tier 2.9 standard into three categories:

1. 327 IAC 2-1.3-3(c)(1) applies to BCCs in OSRW (Outstanding State Resource Water) waterbodies and portions of their tributaries within the Great Lakes Basin (includes Lake Michigan). No new or increased loading of a BCC is allowed unless the loading is exempted as nonsignificant under Section 4 of the rule.
2. 327 IAC 2-1.3-3(c)(2) applies to BCCs in OSRW waterbodies and portions of their tributaries outside the Great Lakes Basin. The standard applied is the same as the Tier 2 standard with its necessary and importance tests, with the additional requirement under Ind. Code §§ 13-18-3-2, 13-18-3-14, and 13-11-2-50.5 that the applicant implement or fund a water quality improvement project.
3. 327 IAC 2-1.3-3(c)(3) applies to non-BCC pollutants in OSRW waterbodies and portions of their tributaries within or outside the Great Lakes Basin (includes Lake Michigan). The standard is the same as in 327 IAC 2-1.3-3(c)(2).

COMMENTS

The standard applied in 327 IAC 2-1.3-3(c)(2) is the same as the standard applied in 327 IAC 2-1.3-3(c)(3). IDEM should explain the reasoning behind this choice since subdivision (c)(2) applies to BCCs and subdivision (c)(3) applies to non-BCCs. The discharge of BCCs into OSRWs outside of the Great Lakes Basin should require more justification than the discharge of non-BCCs into OSRWs outside of the Great Lakes Basin.

The reasonableness of the Tier 2.9 standard also will depend on remedying the associated provisions in Sections 4 and 8 of the Draft Rule. In 327 IAC 2-1.3-3(c)(1), IDEM applies a relatively weak standard to BCCs in the Great Lakes Basin: *i.e.*, a new or increased loading is allowed if the applicant meets one of the exemptions in Section 4 of the Draft Rule. Because several of the exemptions in Section 4 are not appropriate, specifically the Section 4(b)(4) exemptions, the Tier 2.9 standard is unreasonably weakened. The problems with the Section 4(b)(4) exemptions also apply to the standards in 327 IAC 2-1.3-3(c)(2) (BCCs outside the Great Lakes Basin) and 327 IAC 2-1.3-3(c)(3) (non-BCCs).

Questions

- Why is the standard applied in 327 IAC 2-1.3-3(c)(2) the same as the standard applied in 327 IAC 2-1.3-3(c)(3)?

Suggested Rule Language

The discharge of BCCs into OSRWs outside of the Great Lakes Basin should require more justification than the discharge of non-BCCs into OSRWs outside of the Great Lakes Basin.

IV. SECTION 4: 327 IAC 2-1.3-4 EXEMPTIONS FROM THE ANTIDEGRADATION DEMONSTRATION REQUIREMENTS.

A. 327 IAC 2-1.3-4(a): Exemption for ONRWs

INTRODUCTION

Draft Section 4(a) states as follows:

Comments on IDEM's 2nd Notice Draft Rule (Antidegradation) from Environmental Coalition

Sec. 4. (a) For an ONRW, an exemption from the antidegradation demonstration requirements included in section 6 of this rule shall be allowed only for short-term, temporary, new, or increased discharges of non-BCCs if the following conditions are met:

- (1) All reasonable methods for minimizing or preventing the new or increased loading have been taken.
- (2) The discharge will last less than twelve (12) months or three hundred sixty-five (365) days.
- (3) A proposed new or existing discharger applies for and receives authorization from the commissioner.
- (4) The discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality.
- (5) The discharge complies with the antidegradation standard outlined in section 3(d) of this rule.

COMMENTS

Exemptions from antidegradation requirements for short term and temporary lowering of water quality are consistent with the applicable federal requirements only if the exemption includes (a) a limitation on the magnitude of the impact, and (b) a procedure for responding to multiple requests for exemptions and the cumulative effects of multiple short-term impacts. IDEM's draft provision includes neither.

EPA Region VIII guidance speaks directly to the issue of an exemption for short-term loading of pollutants into ONRWs.⁸ The EPA views this exemption as requiring both a time component and a magnitude component. EPA uses the term "temporary and limited effect":

A direct or upstream source that would result in a temporary *and* limited effect on ONRW water quality may be authorized. . . . As a *non-binding* rule of thumb, activities with durations less than one month *and* resulting in less than a 5% change in ambient concentration will be deemed to have temporary and limited effects.

(Emphasis in original).⁹ The EPA guidance also sets forth several other factors that may be considered when deciding to grant this exemption:

Decisions on individual proposed activities may be based on the following factors: (a) length of time during which water quality will be lowered, (b) percent change in ambient concentrations, (c) parameters affected, (d) likelihood for long-term water quality benefits to the segment . . . , (e) degree to which achieving applicable water quality standards during the proposed activity may be at risk, and (f) potential for any residual long-term influences on existing uses.¹⁰

⁸ See U.S. EPA Region VIII Guidance: Antidegradation Implementation (August 1993), Part IV(D), Page 11.

⁹ *Id.*

¹⁰ *Id.*

IDEM's exemption for ONRWs in the Draft Rule addresses the time of the activity and effect only, and not the magnitude of effect or any other factor listed in the EPA guidance. The provision as written is not likely to sufficiently protect ONRW water quality from even a time-limited loading of pollutants unless the magnitude of the impact – both individually and cumulatively -- is considered.

Furthermore, the provision should clarify that it applies only to the Tier 3 antidegradation standard for HQWs that are in ONRWs, and does not excuse compliance with the Tier 1 antidegradation standard at 327 IAC 2-1.3-3(a).

Questions

- Why does 327 IAC 2-1.3-4(a) substantially deviate from EPA guidance on this exemption by omitting a limitation on the magnitude of the allowable effect as well as other applicable factors recommended by EPA?
- How will IDEM handle more than one request for a short-term and temporary discharge to an ORNW?

Suggested Rule Language

- (a) For an ONRW, an exemption from the antidegradation demonstration requirements included in section 6 of this rule shall be allowed only for new or increased short-term, temporary, and limited discharges of non-BCCs if the following conditions are met:
- (1) All reasonable methods for minimizing or preventing the new or increased loading have been taken.
 - (2) The discharge will last less than twelve (12) months or three hundred sixty-five (365) days.
 - (3) A proposed new or existing discharger applies for and receives authorization from the commissioner.
 - (4) The discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality.
 - (5) The discharge, by itself and along with additional discharges to the ORNW exempted under this subsection, will not result in more than a 2.5% change in the ambient concentrations of the pollutants discharged.
 - (6) The lowering of water quality will not put at risk achieving applicable water quality standards during the proposed activity or have a potential for any residual long-term influences on existing uses.
 - (7) The discharge complies with the antidegradation standard outlined in section 3(d) of this rule.

B. 327 IAC 2-1.3-4(b)(1): De minimis lowering of water quality

INTRODUCTION

The de minimis exemption contains two components: (1) a maximum percentage of the unused loading capacity that may be allocated to each applicant (“applicant de minimis”); and (2) a percentage of the total loading capacity that must remain after loading capacity is allocated to all applicants cumulatively (“cumulative cap”).

For waters not designated as ONRW or OSRW, the Draft Rule divides the de minimis exemption into three categories:

1. 327 IAC 2-1.3-4(b)(1)(A)(i)(AA) applies to non-BCC pollutants. Applicant de minimis is 10 percent of the existing unused loading capacity of the waterbody, mixing zone, or other delineated area.
2. 327 IAC 2-1.3-4(b)(1)(A)(i)(BB) applies to non-BCC toxic substances, with no water quality criterion, in waters outside the Great Lakes Basin. Applicant de minimis is 20 percent of the existing unused loading capacity.
3. 327 IAC 2-1.3-4(b)(1)(A)(i)(CC) applies to non-BCC toxic substances, with no water quality criterion, in waters within the Great Lakes Basin. Applicant de minimis is 20 percent of the existing unused loading capacity, same as in (BB).

For every request after the time of the permit issuance for the initial increase in the loading of a pollutant, the unused loading capacity remaining after the applicant's increased loading must be greater than or equal to 75 percent of the unused loading capacity established at the time of the permit issuance for the initial increase in the loading of a pollutant of concern.

For waters designated as OSRW (*i.e.*, for Tier 2.9 protected waters), the Draft Rule divides the de minimis exemption into three categories:

1. 327 IAC 2-1.3-4(b)(1)(B)(i)(AA) applies to non-BCC pollutants. Applicant de minimis is 1 percent of the existing unused loading capacity of the waterbody, mixing zone, or other delineated area.

Comments on IDEM's 2nd Notice Draft Rule (Antidegradation) from Environmental Coalition

2. 327 IAC 2-1.3-4(b)(1)(B)(i)(BB) applies to non-BCC toxic substances, with no water quality criterion, in waters outside the Great Lakes Basin. Applicant de minimis is 2 percent of the existing unused loading capacity.
3. 327 IAC 2-1.3-4(b)(1)(B)(i)(CC) applies to non-BCC toxic substances, with no water quality criterion, in waters within the Great Lakes Basin. Applicant de minimis is 2 percent of the existing unused loading capacity, same as in (BB).

For every request after the time of the permit issuance for the initial increase in the loading of a pollutant, the unused loading capacity remaining after the applicant's increased loading must be greater than or equal to 97.5 percent of the unused loading capacity established at the time of the permit issuance for the initial increase in the loading of a pollutant of concern.

COMMENTS

Generally, IDEM should consider a more streamlined alternative to the extremely complex and lengthy de minimis approach in the Draft Rule. For some circumstances and waters, a de minimis threshold set at the criterion level of the pollutant discharged at the end of the pipe, or at a predetermined dilution ratio, or at background concentration, may be easier to implement and just as protective of water quality as the loading capacity approach used in the Draft Rule. IDEM should develop the record showing whether and under what circumstances these simpler approaches to de minimis are at least as stringent as the loading capacity approach, particularly for Lake Michigan where the loading capacity approach is very problematic (see comments below).

Although U.S. EPA has approved de minimis exceptions in the past, recent events and court decisions have made clear that U.S. EPA's authority to approve de minimis exceptions is now "quite limited." See *Kentucky Waterways*, 540 F.3d at 484 n. 12. IDEM has not developed a record that would allow U.S. EPA to approve the de minimis approach proposed here. Furthermore, the regulatory complexity in these rules should be avoided as a matter of policy because it limits effective public participation, increases compliance costs for the regulated community, and requires more government resources to administer. As drafted, the Rule creates incentives for dischargers to spend time and money documenting reasons why their activities

should be exempt from antidegradation review instead of simply focusing efforts on performing Tier 2 reviews.

We provide specific comments below on the de minimis provisions presented in the Draft Rule.

Comments A: The Draft Rule's approach to applying de minimis to Lake Michigan is likely impracticable in application and is likely to allow significant increases in pollutant loadings without an antidegradation demonstration.

As discussed above for the definition of total loading capacity (TLC), the determination of whether a lowering of water quality is de minimis in Draft Section 4(b)(1) relies on the calculation of TLC. The proposed calculation of TLC for Lake Michigan uses the volume of an alternate mixing zone, which produces a result in units of mass rather than in units of mass per time. In either case, IDEM has presented no justification that the approach used in the Draft Rule to calculate TLC will provide a meaningful determination of a de minimis threshold for new or increased discharges into Lake Michigan, and protect Lake Michigan from significant increases in pollution loadings.

The de minimis approach used in the Draft Rule would be most applicable for streams with design flows much greater than effluent flows. In that case, the total loading capacity can be estimated at the time of the first antidegradation application, and the use of that capacity can be tracked as it declines due to subsequent discharges. However, there is no evidence that the approach is appropriate for large bodies of water such as Lake Michigan. As IDEM appears to recognize, the loading capacity applied to discharges into the Indiana waters of Lake Michigan cannot be based on the capacity of the entire Lake. Pollutants discharged into Lake Michigan are not uniformly dispersed into the Lake. Instead, pollutants are often transported up or down the shoreline depending on the direction of currents.

So, if the loading capacity concept is to be used for Lake Michigan, some volume or flow of water smaller than the entire Indiana portion of the Lake must be considered. Using IDEM's approach in the Draft Rule, however, each new or increased discharge into Lake Michigan will

based on the volume within different and separate alternate mixing zones, where each new alternate mixing zone starts with a clean slate. In these circumstances, how will IDEM calculate the benchmark unused loading capacity required in Draft Section 4(b)(1)? What if the first permitted alternate mixing zone (for the initial increase in loading of the pollutant), on which the benchmark unused loading capacity is to be based under Draft Section 4(b)(1), is much larger than subsequent mixing zones? In effect, as the Draft Rule is currently written, the total loading capacity and benchmark unused loading capacity will become a moving target as each new alternate mixing zone is granted.

If the concept of loading capacity is to be used for Lake Michigan, IDEM must provide evidence and justification that the proposed approach will provide a meaningful determination of a cumulative de minimis threshold and will protect Lake Michigan from significant increases in pollutant loadings unsupported by an antidegradation demonstration. IDEM should begin by explaining how the concepts of total loading capacity, benchmark unused loading capacity, and cumulative used loading capacity will be made consistent with the fact that each proposed new or increased loading into Lake Michigan will be discharged into a "new" alternate mixing zone that has not received any prior discharges.

If a de minimis approach is to be used for Lake Michigan, IDEM must provide evidence and justification that this approach will provide a meaningful determination of a cumulative de minimis threshold and will protect Lake Michigan from significant increases in pollution loadings. See *Kentucky Waterways*, 540 F.3d 466 (6th Cir. 2008). The existing record does not support IDEM's proposed method for determining a "total loading capacity" for discharges into Lake Michigan based on an alternate mixing zone.

Questions

- How will the proposed approach to determining loading capacity be applied to new and increased discharges into Lake Michigan? What are the assumptions and limitations of this approach?
- How will the cumulative cap (i.e., the "benchmark unused loading capacity") be determined for Lake Michigan if each de minimis exemption is determined based on a different and spatially separate alternate mixing zone volume?

Suggested Rule Language

The de minimis for Lake Michigan and other outstanding state resource waters should be set equal to the background concentration or “reference water quality.” See proposed de minimis language and rationale in Attachments A and B.

Comments B: The Draft Rule's cumulative cap (benchmark unused loading capacity) of 75% for non-OSRWs is unjustified and likely violates the Clean Water Act.

The IDEM Draft Rule fails to comply with EPA policy and recent court decisions regarding “de minimis” discharges. At most, IDEM only has the implied authority to create de minimis exemptions “when the burdens of regulation yield a gain of trivial or no value.” *Kentucky Waterways*, 540 F.3d.at 491. As explained by the Court, this “naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing.” *Id.*

In the current version, dischargers can avoid antidegradation review by demonstrating “insignificant” impact on loading capacity. As in the Kentucky case, IDEM here has failed to carry its burden of justifying why the scenarios described in the Draft Rule are “truly de minimis” based on an “assessment of particular circumstances” in the record. In addition to its complexity, the de minimis provision apparently allows up to 25% of the initial assimilative capacity of a waterbody to be consumed without any antidegradation review in certain situations (see Section 4(b)(1)(A)(i)(DD)). IDEM has failed to include any analysis or authority in the record suggesting that a 25% reduction in water quality could possibly be considered insignificant. EPA recently disapproved proposed Utah antidegradation rules because they allowed a cumulative de minimis of more than 10%.

In October 2008, several of the undersigned environmental groups presented IDEM with suggested language for implementing a lawful de minimis approach based on consumption of loading capacity. We've attached the proposal to these comments as Attachment B.

In addition, if IDEM intends the de minimis exemption to be available where no new or modified permit limits are involved, the benchmark unused loading capacity should be defined as a percentage of the unused loading capacity established at the time of the initial increase in the loading of a pollutant of concern to account for changes in loading that do not require a new or modified permit limit.

Questions

- Where in the record has IDEM demonstrated that the regulatory burdens of performing Tier 2 reviews for discharges allowing up to a 25% cumulative lowering of water quality would yield benefits of “trivial or no value”?
- How will IDEM track the consumption of the benchmark unused loading capacity, which is determined at the time of the initial increase in loading for the pollutant, given that the total loading capacity may increase over time with subsequent dischargers to a waterway due to additions and dominance of effluent flows (for most NPDES discharge situations into rivers and streams in Indiana, the size of the ULC will be more a function of the effluent flow size, not the stream flow)?

Suggested Rule Language

Change the cumulative cap (i.e., benchmark unused loading capacity) on de minimis discharges from 75% to 90% of the “reference water quality” (i.e. the unused loading capacity established at the time of the initial increase in the loading of a pollutant of concern), and include an adequate justification in the record. See proposed de minimis language and rationale in Attachments A and B.

Comments C: The Draft Rule's applicant de minimis of 20% of existing unused loading capacity for toxics is unjustified and likely violates the Clean Water Act.

In the Draft Rule, individual discharges of non-BCC toxic substances with no water quality criteria into non-OSRW and non-ORNW waters within and outside the Great Lakes Basin are deemed de minimis if they use less than 20% of the existing unused loading capacity of the waterbody, mixing zone, or other delineated area. As discussed above, there is no basis in the law or in the record for allowing a 20% loss of assimilative (loading) capacity to be considered insignificant or de minimis.

Furthermore, the uncertainty associated with a Tier II criterion value could mean that the value is either over or under protective. EPA Region V has already commented that addressing this uncertainty by adjusting the significance threshold is not justified.

Also, it is our understanding that IDEM intends that there be no de minimis as to pollutants for which there is no Tier I or Tier II criterion. This must be explained more clearly in the rule or in the documents submitted to EPA and in any documents created that implement the rule. See *Kentucky Waterways*, 540 F.3d at 490 (EPA not entitled to rely on a state's "unenforceable commitments" concerning methods for implementing a proposed rule).

Questions

- Where in the record does IDEM support its conclusion that a 20% lowering of water quality can be considered insignificant?
- What are the names of the non-BCC toxic substances to which the 20% de minimis applies?
- Why do these substances warrant a lowering of the de minimis threshold from 10% to 20%?
- How exactly will IDEM handle pollutants with no Tier I or II criterion?

Suggested Rule Language

Overhaul the de minimis approach entirely or, at a minimum, reduce the per applicant de minimis of 20% unused loading capacity to 10%, and include an adequate justification in the record. See proposed de minimis language and rationale at Attachments A and B.

Comments D: Tributaries of OSRWs are improperly excluded from the de minimis provision for OSRWs.

The term "tributary of an OSRW" is defined in Draft Rule Section 2(63), but it appears that this term is not used within the substantive parts of the Draft Rule. It is not clear whether IDEM intends to apply the OSRW de minimis exemption in Section 4(b)(1)(B) to any new or increased discharges into tributaries of OSRWs. IDEM has taken the position that tributaries to OSRWs are designated as HQWs.¹¹ The Draft Rule appears to apply the OSRW de minimis

¹¹ IDEM Second Notice of Comment Period, LSA Document #08-764, page 5.

exemption in Section 4(b)(1)(B) only to discharges directly into OSRWs but not to discharges into OSRW tributaries, even where those discharges into the tributaries may result in a lowering of water quality in the downstream OSRW. Applying a de minimis exemption to OSRWs but not to their tributaries will create inconsistent and unintended results.

For example, assume that a new discharge into a tributary a short distance upstream from the OSRW Lake Michigan results in a lowering of water quality in both the tributary and the Lake.¹² If the HQW Section 4(b)(1)(A) is applied to the tributary, the new loading would be allowed to take 10% of the tributary's unused loading capacity without being deemed "significant.". But the new loading of the pollutant also will flow the short distance downstream into the Lake and use up loading capacity in the Lake. How much of the Lake's loading capacity will be used up? It depends on several factors. But the amount of loading deemed de minimis in the tributary (10% of unused capacity in the tributary) can potentially compromise the unused loading capacity limit of 1% for the Lake. That is, the new loading causes a significant lowering of water quality in the downstream OSRW even though the loading is deemed nonsignificant (de minimis) at the point of discharge into the tributary. Such a situation obviously must be avoided; this situation is best avoided by applying OSRW Section 4(b)(1)(B) to the tributaries of OSRWs if the loading may result in a lowering of water quality in the downstream OSRW. A less-preferred alternative method (which requires more analysis and effort by IDEM) is to measure the amount of unused loading capacity in the OSRW taken up by the proposed discharge into the OSRW tributary.

Questions

- Why did IDEM omit tributaries to OSRWs from the de minimis provision in 4(b)(1)(B)? Is it IDEM's intent that discharges to tributaries to OSRWs should not benefit from the de minimis exemption but rather must be subject to an antidegradation demonstration?
- Does IDEM intend the de minimis exemption in 4(b)(1)(B) to apply to tributaries of OSRWs when discharges into tributaries of OSRWs may result in a lowering of water quality in the downstream OSRW? If not, why not?

¹² IDEM contemplates that a new or increased discharge to a tributary of an OSRW has the potential to cause a significant lowering of water quality in the OSRW. See IDEM Second Notice of Comment Period, LSA Document #08-764, page 5.

- If IDEM applies 4(b)(1)(A) to tributaries of OSRWs (as if they are non-OSRWs), how will IDEM ensure that a discharge using 10% of the unused loading capacity in the tributary will not use more than 1% of the unused capacity in the downstream OSRW?

Suggested Rule Language

(B) For a HQW that is an OSRW, or a tributary of an OSRW if the loading may result in a lowering of water quality in the downstream OSRW, the proposed lowering of water quality is de minimis and a Tier 2 review is not required if .

..

Comments E: Clarification is needed on applicability of de minimis.

Language sprinkled throughout Draft Section 4(b)(1) appears to apply the de minimis exemption to all new or increased loadings, whether or not associated with a new, renewed, or modified permit limit. However, Sections 4(b)(1)(A)(i)(DD) and 4(b)(1)(B)(i)(DD) require that the benchmark unused loading capacity (ULC) is based on the ULC “established at the time of the permit issuance for the initial increase in the loading of a pollutant of concern.” This provision suggests that the benchmark ULC would not apply where the initial increase in the loading of the pollutant did not bring a new or modified permit limit. There may be an increased loading of a pollutant that does not require a new or modified permit limit but which under Section 1(b) still triggers the rule. By the plain language of Draft Sections 4(b)(1)(A)(i)(DD) and 4(b)(1)(B)(i)(DD), the benchmark ULC could not be calculated in this situation, and the de minimis exemption would not be available.

IDEM needs to choose and clarify for the public whether the de minimis exemption will (a) be available only for changes in loading associated with a new or modified effluent limit in a permit, or (b) be available for all new or increased loadings of pollutants of concern. If the former, a new or increased loading of phosphorus that does not trigger an effluent limit would not be able to take advantage of the de minimis exemption. This would be consistent with Indiana Code 13-18-3-2(1)(1), which applies to OSRWs such as Lake Michigan, and which indicates that for these waters at least the de minimis exemption is not available for changes in loadings not associated with a new or increased permit limit.¹³

¹³ Indiana Code §§ 13-18-3-2(k) and (l) state as follows, with the critical language in bold:

Questions

- Is the de minimis exemption available (a) only for changes in loading associated with a new or modified effluent limit in a permit, or (b) for all new or increased loadings of pollutants of concern?
- If the latter, how is that consistent with Indiana Code 13-18-3-2(1)(1)?
- How does IDEM intend to apply the de minimis exemption, if at all, to pollutants that currently lack numeric water quality criteria, such as phosphorus and nitrogen?

Suggested Rule Language

See proposed de minimis language and rationale at Attachments A and B.

C. 327 IAC 2-1.3-4(b)(2)(D): Exemption for POTWs

INTRODUCTION

Draft Section 4(b)(2)(D) states in relevant part:

-
- (k) For a water body designated as an outstanding state resource water, the board shall provide by rule procedures that will:
- (1) prevent degradation; and
 - (2) allow for increases and additions in pollutant loadings from an existing or new discharge if:
 - (A) there will be an overall improvement in water quality for the outstanding state resource water as described in this section; and
 - (B) the applicable requirements of 327 IAC 2-1-2(1) and 327 IAC 2-1-2(2) and 327 IAC 2-1.5-4(a) and 327 IAC 2-1.5-4(b) are met.
- (l) The procedures provided by rule under subsection (k) must include the following:
- (1) **A definition of significant lowering of water quality that includes a de minimis quantity of additional pollutant load:**
 - (A) **for which a new or increased permit limit is required;** and
 - (B) below which antidegradation implementation procedures do not apply.
 - (2) Provisions allowing the permittee to choose application of one (1) of the following for each activity undertaken by the permittee that will result in a significant lowering of water quality in the outstanding state resource water:
 - (A) Implementation of a water quality project in the watershed of the outstanding state resource water that will result in an overall improvement of the water quality of the outstanding state resource water.
 - (B) Payment of a fee, not to exceed five hundred thousand dollars (\$500,000), based on the type and quantity of increased pollutant loadings, to the department for deposit in the outstanding state resource water improvement fund established under section 14 of this chapter for use as permitted under that section.
 - (3) Criteria for the submission and timely approval of projects described in subdivision (2)(A).
 - (4) A process for public input in the approval process.
 - (5) Use of water quality data that is less than seven (7) years old and specific to the outstanding state resource water.
 - (6) Criteria for using the watershed improvement fees to fund projects in the watershed that result in improvement in water quality in the outstanding state resource water.

4(b)(2) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule do not require the submission of information beyond what is required to comply with the discharger's existing applicable permit:

* * *

(D) A new or increased loading of a pollutant of concern at an outfall discharging to a water of the state due to increasing the sewerage area, connection of new sewers and users, or acceptance of trucked-in wastes, such as septage and holding tank wastes, by a POTW, provided that there is no:

- (i) increase in the existing NPDES permit limits;
- (ii) increase beyond the treatment capacity of the facility; or
- (iii) significant change expected in the characteristics of the wastewater discharged.

COMMENTS

This provision has two problems.

First, it would allow exemptions for new or increased loadings of pollutants simply because the pollutants are not limited in the existing NPDES permit. According to IDEM's stated position in its responses to the first comments, the lack of a current effluent limit should not exempt a pollutant loading from antidegradation review. An example of the problem is provided by the circumstances of the City of Jeffersonville Wastewater Treatment Plant, which sought a permit to relocate an outfall to another stream, thereby increasing the pollutant loading in the new receiving stream. A comment letter on NPDES permit IN0023302 requested a demonstration that the degradation of the receiving water was "justifiable on the basis of necessary economic or social factors" (the current antidegradation language that applies outside of Indiana's Great Lakes Basin), and asked whether phosphorus treatment was considered as an alternative to reduce phosphorus loading to the receiving stream. IDEM's responsiveness summary included with the issued final permit stated:

Phosphorus limitations are not included in the permit. Therefore no antidegradation demonstration for phosphorus is required.

Now, the fact that there is no phosphorus limit in the permit is certainly not an excuse for failing to determine whether a phosphorus limit should be in the permit to prevent non-de minimis and unnecessary degradation of water quality from the modified phosphorus discharges. This lack of a current limit is not one of the justifications on which an "exemption" can be validly based. However, Draft Rule Section 4(b)(2)(D) would exempt the City of Jeffersonville's new

phosphorus loading from antidegradation review, because the situation satisfies the Draft Section's subdivisions (i), (ii), and (iii), even though a new outfall and new stream were involved (i.e., (i) there was no increase in the existing NPDES permit limits (because there were no permit limits for phosphorus), (ii) there was no increase beyond the treatment capacity of the facility, and (iii) there was no significant change expected in the characteristics of the wastewater discharged).

Based on the list of examples in Draft Rule Section 4(b)(2)(A), that subdivision presumably would not exempt new or increased loadings of pollutants just because they are not limited in the existing NPDES permit. If it would, then the above criticism would apply to 4(b)(2)(A).

Second, exemption 4(b)(2)(D) lacks a key prohibition on loading of BCCs from nondomestic wastes. In fact, the current interim antidegradation rules at 327 IAC 5-2-11.3(b)(1)(C)(iii)(FF) and 327 IAC 5-2-11.7(b)(4) contains the necessary fourth condition:

- (i) increase in the existing NPDES permit limits;
- (ii) increase beyond the treatment capacity of the facility;
- (iii) significant change expected in the characteristics of the wastewater discharged; or
- (iv) increased loading of BCCs from nondomestic wastes.

IDEM obviously considered this fourth requirement to be important when the agency promulgated the interim antidegradation rules. Exemption 4(b)(2)(D) applies to both BCCs and non-BCCs, so it is important to prohibit increased loading of BCCs from nondomestic wastes. Moreover, during the rulemaking subgroup discussions, the municipality representatives agreed that this fourth requirement was appropriate.

Moreover, this exemption should, in combination with other exemptions in Section 4(b), result in no more than a de minimis lowering of water quality. In order to approve Indiana's rules, EPA would need to provide detailed technical analysis of the combined effect of all of these exemptions and determine whether all of the "Tier-2-review exemptions together permit significant degradation." *Kentucky Waterways*, 540 F.3d at 492.

Questions

- Do the Section 4(b)(2) exemptions apply to situations where there is no existing permit or where a new, renewed, or modified permit is required for the new or increased loading?
- Is IDEM exempting from antidegradation review a new or increased loading of a pollutant that lacks a current effluent limit, even when that change in loading could be reduced through treatment technology? If so, why?
- Why did IDEM omit the requirement of no "increased loading of BCCs from nondomestic wastes" from Exemption 4(b)(2)(D) even though that requirement is set forth in the interim rules?
- Is it IDEM's position that Exemption 4(b)(2)(D), cumulatively with the other exemptions in Section 4(b), would lower water quality within a waterbody by only a de minimis amount?

Suggested Rule Language

4(b)(2) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule do not require the submission of information beyond what is required to comply with the discharger's existing applicable permit:

* * *

- (D) A new or increased loading of a pollutant of concern limited in an existing NPDES permit, at an outfall discharging to a water of the state due to increasing the sewered area, connection of new sewers and users, or acceptance of trucked-in wastes, such as septage and holding tank wastes, by a POTW, provided that there is no:
- (i) change in the outfall or in the receiving water;
 - (ii) increase in the existing NPDES permit limits;
 - (iii) increase beyond the treatment capacity of the facility;
 - (iv) significant change expected in the characteristics of the wastewater discharged; or
 - (v) increased loading of BCCs from nondomestic wastes.

Alternatively, the exemption could just be deleted as unnecessary given a proper definition of degradation.

D. 327 IAC 2-1.3-4(b)(3)(C): The short-term exemption for non-ONRW waters

INTRODUCTION

Draft Section 4(b)(3)(C) states in relevant part:

4(b)(3) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of information that sufficiently demonstrates that the proposed discharge satisfies the exemption description along with the application for an NPDES permit:

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* * *

(C) A new or increased loading of a pollutant of concern for short-term, temporary, new, or increased discharges if the following conditions are met:

- (i) All reasonable methods for minimizing or preventing the new or increased loading have been taken.
- (ii) The discharge will last less than twelve (12) months or three hundred sixty-five (365) days.
- (iii) The discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality.
- (iv) The discharge complies with the antidegradation standards outlined in section 3 of this rule.

COMMENTS

First of all, it is important to recognize that this exemption would apply only where a new, renewed, or modified NPDES permit is sought for the change in loading – it would not apply to new or increased loadings not associated with a new, renewed, or modified permit (see Section 3, “The following exemptions . . . require the submission of information . . . along with the application for an NPDES permit”).

The comments for Section 4(a) above apply to this exemption also, and those comments are incorporated here by reference. To summarize, exemptions from antidegradation requirements for short term and temporary lowering of water quality are consistent with the applicable federal requirements if the exemption includes (a) a limitation on the magnitude of the impact, and (b) a procedure for responding to multiple requests for exemptions and the cumulative effects of multiple short-term impacts. Draft Section 4(b)(3)(C) includes neither. IDEM's “short-term and temporary” exemption addresses the time of the activity and effect only, and not the magnitude of effect or any other factor listed in EPA guidance. The draft provision as written is not likely to sufficiently protect water quality from even a time-limited loading of pollutants if the magnitude of the impact – both individually and cumulatively -- is not considered.

Moreover, this exemption should, in combination with other exemptions in Section 4(b), result in no more than a de minimis lowering of water quality. In order to approve Indiana's rules, EPA would need to provide detailed technical analysis of the combined effect of all of these exemptions and determine whether all of the “Tier-2-review exemptions together permit significant degradation.” *Kentucky Waterways*, 540 F.3d at 492.

Questions

- Why does 327 IAC 2-1.3-4(b)(3)(C) substantially deviate from EPA guidance by omitting a limitation on the magnitude of the allowable effect as well as other applicable factors recommended by EPA?
- How will IDEM handle more than one request for a short-term and temporary discharge to a waterbody?
- Is it IDEM's position that Exemption 4(b)(3)(C), cumulatively with the other exemptions in Section 4(b), would lower water quality within a waterbody by only a de minimis amount?

Suggested Rule Language

4(b)(3) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of information that sufficiently demonstrates that the proposed discharge satisfies the exemption description along with the application for an NPDES permit:

* * *

(C) A new or increased loading of a pollutant of concern for new or increased short-term, temporary, and limited discharges is allowed if all of the following conditions are met:

- (i) All reasonable methods for minimizing or preventing the new or increased loading have been taken.
- (ii) The discharge will last less than twelve (12) months or three hundred sixty-five (365) days.
- (iii) A proposed new or existing discharger applies for and receives authorization from the commissioner.
- (iv) The discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality.
- (v) The discharge, by itself and along with additional discharges to the waterbody exempted under this subsection, will not result in more than a 2.5% change in the ambient concentrations of the pollutants discharged.
- (vi) The lowering of water quality will not put at risk achieving applicable water quality standards during the proposed activity or have a potential for any residual long-term influences on existing uses.
- (vii) The discharge complies with the antidegradation standard outlined in section 3 of this rule.

E. 327 IAC 2-1.3-4(b)(3)(E): Exemption for non-contact cooling water

INTRODUCTION

Draft Section 4(b)(3)(E) states in relevant part:

4(b)(3) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of information that sufficiently demonstrates that

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the proposed discharge satisfies the exemption description along with the application for an NPDES permit:

* * *

(E) When all reasonable methods for minimizing or preventing the new or increased loading have been taken, a new or increased discharge of noncontact cooling water that will not do the following:

(i) Increase the temperature of the receiving water or waters outside of the designated mixing zone, where applicable.

(ii) Increase the loading of BCCs.

(iii) Require numeric water quality-based effluent limitations (WQBELs) for toxic substances or WET as determined under 327 IAC 5-2-11.5.

COMMENTS

This exemption should, in combination with other exemptions in Section 4(b), result in no more than a de minimis lowering of water quality. In order to approve Indiana's rules, EPA would need to provide detailed technical analysis of the combined effect of all of these exemptions and determine whether all of the "Tier-2-review exemptions together permit significant degradation." *Kentucky Waterways*, 540 F.3d at 492.

Since "or" is not used in the list E(i) through E(iii), the sentence in 4(b)(3)(E) should be changed to clarify the provision:

Questions

- Is it IDEM's position that Exemption 4(b)(3)(E), cumulatively with the other exemptions in Section 4(b), would lower water quality within a waterbody by only a de minimis amount?

Suggested Rule Language

(E) . . . A new or increased discharge of noncontact cooling water that will not do any of the following: . . .

F. 327 IAC 2-1.3-4(b)(4)(A)-(D): Exemptions for pollutant offsets and trading

GENERAL COMMENTS

Section 4(b)(4) sets forth four exemptions based on pollutant offsets and trading. The situations presumably covered under 4(b)(4) are not appropriate as exemptions under the Clean Water Act and EPA guidance. Even if they were appropriate as exemptions, they should not apply to BCCs or to Lake Michigan.

An “exemption” from the Tier 2 antidegradation demonstration, to be consistent with the perspectives of EPA and the courts, must be associated with one of two types of situations: (1) changes in loading result in a *de minimis* decrease in water quality in the receiving waterbody over the range of likely loadings; and (2) an outside procedure that sufficiently substitutes for an antidegradation demonstration is applied. The four “exemptions” in Section 4(b)(4) of the Draft Rule are not appropriate as exemptions from antidegradation review because IDEM has not made any showing that they meet either of the above criteria.

In order to approve Indiana's rules, EPA would need to provide detailed technical analysis of the combined effect of all of these exemptions and determine whether all of the “Tier-2-review exemptions together permit significant degradation.” *Kentucky Waterways Alliance*, 540 F.3d at 492. EPA Region 7, for example, has stated its position on exemptions as follows:

[A]ny exemptions from the antidegradation review process must be based upon a well-founded determination that the pollution discharges permitted under such exemptions will have a truly *de minimis* impact upon the water quality of such impacted waters.¹⁴

IDEM has presented no evidence that any of the four “exemptions,” as a class of loadings, will have a truly *de minimis* impact upon the water quality of the impacted waters. In order for a class of new or increased loadings to be exempted from antidegradation review, IDEM must show that all situations in that class likely will have a *de minimis* impact on water quality. As we argue below for each of the four Section 4(b)(4) exemptions individually, that showing has not, and in most cases cannot, be made.

Furthermore, the Exemption Justification in Draft Section 5 as written does not sufficiently substitute for the antidegradation demonstration requirements in Sections 6 and 7 of the Draft Rule for significant loadings. Compared to the antidegradation demonstration requirements, the Exemption Justification uses a much diluted “necessary” test to analyze alternatives to the proposed new or increased loading. (Compare Section 5(c)(3) of the Draft Rule with the much more extensive “necessary” test set forth in Section 6 of the Draft Rule.) Critically, the

¹⁴ Region 7 EPA letter dated March 25, 2009 to the general counsel of the Iowa Department of Natural Resources, in response to a legislative bill setting forth exemptions to antidegradation review.

Exemption Justification does not require any information on, or analysis of, the social or economic importance of the actions to be exempted. Instead, the Exemption Justification requires only that the applicant show that the proposed discharge meets the description of the exemption as written in Section 4.

In IDEM's responses to the first public comments, the agency appears to take three positions in an attempt to justify the Section 4(b)(4) exemptions. We briefly address each of those positions now.

First, IDEM takes the position that “[i]n situations where there is a clear social or economic benefit to the environment or the affected community, the burden of making that demonstration should be very low”¹⁵ and “[a]ctivities listed as exemptions in the draft rule are considered to be activities that allow certain important necessary social activities to occur while protect[ing] water quality is achieved.”¹⁶ This position is the basis for IDEM's application of the Section 5 Exemption Justification, instead of the Section 6 antidegradation demonstration, to at least the 4(b)(4)(C) and 4(b)(4)(D) “exemptions.” However, to properly and legally reduce the applicant's burden of demonstrating that the exempted activities are “necessary to accommodate important social or economic development,” IDEM would need to do one of the following:

- (a) make a formal and public showing in the record that all of the situations covered by the exemptions are necessary to accommodate important social or economic development; or
- (b) make a formal and public showing in the record that all of the situations covered by the exemptions meet a subset of the factors in the Section 6 demonstration, while in addition include the remaining Section 6 factors in the Section 5 Exemption Justification.

Unfortunately, IDEM has done neither. What IDEM has done is to select several generalized situations, and without any formal (or public) analysis or showing that these situations uniformly meet one or more of the factors in the Section 6 antidegradation demonstration, has deemed them exempt from the Section 6 demonstration. To make matters worse, the 4(b)(4) “exemptions” are written so broadly that IDEM will not be able to generalize that all discharges falling under

¹⁵ IDEM Second Notice of Comment Period, LSA Document #08-764, page 5.

¹⁶ *Id.*, page 17.

4(b)(4) will likely be necessary to accommodate important social or economic development. Without the proper showing by IDEM, EPA has no justification for approving the “exemptions” from antidegradation review.

Second, in its responses to the first public comments criticizing the Section 4(b)(4) exemptions, IDEM takes the position that “IDEM does not support a pollutant trading proposal that results in a significant lowering of water quality in the receiving water.”¹⁷ In fact, the activities IDEM has included in Section 4(b)(4) are most definitely pollutant trading proposals, and exemptions 4(b)(A), (C), and (D) in particular are not limited to be less than de minimis. Let us be clear. IDEM's response says nothing more than “IDEM does not support an exemption that results in a non-exempted lowering of water quality in the receiving water” – IDEM's statement is a tautology.¹⁸ IDEM defines as “nonsignificant” any lowering of water quality associated with any activity that it decides to put into Section 4, regardless of how much remaining loading capacity is consumed. According to Draft Section 12(55), the discharge can be much greater than de minimis and still be nonsignificant if some other exemption applies.¹⁹ Therefore, by definition, no activity that IDEM puts into Section 4 can possibly produce a “significant” lowering of water quality, including the 4(b)(4) exempted activities. The problem is that the word “significant” as used in the Draft Rule has no meaning independent of what IDEM decides is included in Section 4. IDEM has made no public analysis or showing that these activities in Section 4 actually are likely to produce a de minimis lowering of water quality or are necessary to accommodate important social or economic development. The activities in Section 4(b)(4) in particular are thus untethered to any independent evidence of significance. To gain EPA approval, these “exemptions” must be tethered to detailed technical analyses in the record

¹⁷ IDEM Second Notice of Comment Period, LSA Document #08-764, page 17.

¹⁸ The following definition of “tautology” is from Wikipedia: “A rhetorical tautology can also be defined as a series of statements that comprise an argument, whereby the statements are constructed in such a way that the truth of the propositions are guaranteed or that the truth of the propositions cannot be disputed by defining a term in terms of another self referentially. Consequently the statement conveys no useful information regardless of its length or complexity making it unfalsifiable. It is a way of formulating a description such that it masquerades as an explanation when the real reason for the phenomena cannot be independently derived.”

¹⁹ Draft Section 2(55) states: “‘Significant lowering of water quality’ means:

(A) there is a new or increased loading of a pollutant of concern to a surface water of the state that results in an increase in the ambient concentration of the pollutant of concern and the increased loading is greater than a de minimis lowering of water quality; and

(B) none of the provisions of section 4 of this rule applies.”

A lowering of water quality is nonsignificant if either (A) or (B) is not true.

demonstrating that the combined effect of all of these exemptions together will result in a de minimis lowering of water quality or are necessary to accommodate important social or economic development. *Kentucky Waterways*, 540 F.3d at 492. IDEM has not provided this analysis.

Third, in response to a public comment on the 4(b)(4) exemptions, including the 4(b)(4)(C) tradeoff of water and air pollution, IDEM stated that “[b]oth of the discharge situations identified in the comment require the discharger to provide an exemption justification to IDEM that is sufficient to show that the new or increased discharge will result in an overall improvement to the environment.”²⁰ The antidegradation policy, however, is not concerned with general “environmental improvement.” Rather, it is concerned with degradation of water quality. Thus, a showing that a new or increased discharge will result in an overall improvement to “the environment” does not imply that the discharge will produce a de minimis lowering of water quality or that it is necessary to accommodate important social or economic development, and cannot support EPA approval.

Finally, it is important to recognize that the Draft Rule would allow the 4(b)(4) exemptions only where a new, renewed, or modified NPDES permit is sought for the change in loading, because the Exemption Justification in Section 5(a)(2) is so limited. The exemptions would not apply to a change in loading not associated with a new, renewed, or modified permit.

SPECIFIC COMMENTS ON EACH 4(B)(4) EXEMPTION

4(b)(4)(A): Exemption for watershed offset

4(b)(4) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of an exemption justification according to section 5 of this rule:

- (A) A change in loading of a pollutant of concern:
 - (i) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the pollutant of concern from sources contributing to the same ten (10) digit watershed; and
 - (ii) with the result that there is a net decrease in the loading of the pollutant of concern to the same ten (10) digit watershed.

²⁰ IDEM Second Notice of Comment Period, LSA Document #08-764, page 16.

COMMENTS

Exemption 4(b)(4)(A) is not appropriate as an exemption from antidegradation review because although the exemption requires a de minimis loading of the pollutant over a HUC-10 watershed, it neither requires nor can ensure with any degree of certainty a de minimis lowering of water quality in the receiving waterbody. This exemption could be particularly detrimental to localized water quality in Lake Michigan, and if not deleted from the rule, it should be substantially modified and should not apply to Lake Michigan or BCCs.

Exemption 4(b)(4)(A) allows, without antidegradation review, a significant increase in loading of pollutant into a lake or stream segment as long as there is a corresponding decrease in the net loading of the pollutant somewhere within the entire HUC-10 watershed. This is presumably accomplished by reducing the loading of the same pollutant in a stream segment or lake segment different from the receiving segment. For this scenario to likely produce a truly de minimis impact upon the water quality of the impacted water, one must assume that biological impacts and risks resulting from a significant increase in loading into a particular segment will be entirely offset by a decrease in loading in other segments within the same HUC-10 watershed. And because IDEM is proposing this scenario as an exemption from an antidegradation demonstration, this assumption must hold over the range of discharges and circumstances likely encountered.

IDEM cannot assure that this assumption will hold for all discharges *a priori*, however, due to differences in localized communities of aquatic organisms, differences in absorption and reactions of pollutants across different locations of the same watershed, and incomplete mixing between different segments of the Indiana portion of Lake Michigan. For example, for a pollutant that is locally sequestered by plants and animals soon after discharge, reducing loadings in one segment of the stream may not offset the local impacts of loadings in other segments. Because different locations in the watershed may react differently to the discharge of a pollutant, the locations are not fungible, and IDEM cannot generalize that all discharges falling under Exemption 4(b)(4)(A) will likely be non-significant in impact.

For Lake Michigan in particular, this exemption would allow a significant reduction in water quality in one area of the Indiana portion of the Lake in exchange for increased quality in another area of the Indiana portion of the Lake (or possibly even in a tributary of the Lake), even if those two areas do not intermix on any reasonable timescale, without any consideration of the potentially important social or economic dimensions of such a tradeoff between locations. This exemption, if not deleted from the rule, should not apply to Lake Michigan.

Moreover, attempting to offset a new or increased loading of a BCC with a decrease in the loading of the BCC somewhere else in the watershed (or in some other area of Lake Michigan) is highly risky due to the likelihood of creating hotspots of BCC pollution.²¹ This exemption, if not deleted from the rule, should not apply to BCCs.

The language in Draft Section 5(c) of the Exemption Justification, which provides the substantive analysis that IDEM plans to apply to the Section 4(b)(4) exemptions, highlights the inappropriateness of handling an intra-watershed trade as an exemption. The Exemption Justification requires that the applicant show only that the proposed trade will “minimize the proposed lowering of water quality,” but does not require that the proposed trade will actually increase the existing water quality in the watershed, which is the requirement and promise in 4(b)(4)(A).²² The Exemption Justification should require a showing that the tradeoffs across locations will improve the water quality in the receiving waterbody (especially for OSRWs -- see also Ind. Code § 13-18-3-2(m)(2), requiring offsets to significant loadings into OSRWs with water quality improvements “that will result in an overall improvement of the water quality of *the [OSRW]*” (emphasis added)).

Application of pollution trading at the watershed scale must be done with care. See U.S. EPA, Water Quality Trading Toolkit for Permit Writers, pages 12-13 (“In general, the geographic scope of a trade should be no larger than necessary to encompass the universe of sources that contribute to a specific water quality problem that is to be addressed through trading.”); U.S.

²¹ See U.S. EPA, Water Quality Trading Assessment Handbook (EPA 841-B-04-001, November 2004), chapter II, page 6.

²² Moreover, minimization of any quantity can only be done with respect to some constraint, such as cost, but the Draft Rule fails to disclose what those constraints will be. The proposed lowering of water quality is always minimized by not discharging.

EPA Water Quality Trading Assessment Handbook, pages 16-17 (“some potential trades that could result in a general water quality improvement in a broad area may also result in acute or chronic localized impacts”); *Id.*, page 6 (“In addition to ensuring that overall pollutant reduction impacts are equivalent, trades must not create locally high loadings of pollutants or ‘hotspots’.”). Yet Exemption 4(b)(4)(A) does not include any provision that would prevent the most blatant abuses of the trading concept from occurring.

Furthermore, Exemption 4(b)(4)(A) is a deviation from the policy reflected in IDEM's interim antidegradation rules. The analogous exemptions in the interim rules 327 IAC 5-2-11.3(b)(1)(C)(iii)(DD) and 327 IAC 5-2-11.7(c)(2)(A), unlike Exemption 4(b)(4)(A), do not apply to BCCs.

Questions

- Does IDEM have any evidence or analysis that, in general for the range of likely circumstances covered under this exemption, water quality impacts resulting from a significant increase in loading into a particular stream or lake segment will be entirely offset by a decrease in loading from sources in other stream or lake segments in the same watershed? If so, where can this evidence or analysis be obtained by the public?
- Where in the record has IDEM provided a “well-founded determination” that any changes in water quality under this exemption will be de minimis, especially considering that the Exemption Justification only requires the applicant to show that the proposed trade will “minimize the proposed lowering of water quality,” rather than requiring that the applicant show that the proposed trade will actually maintain or improve existing water quality?
- Why has IDEM applied Exemption 4(b)(4)(A) to BCCs, especially given that the analogous exemptions in the current interim rules do not apply to BCCs?
- How will IDEM consider the social and economic dimensions of allowing a significant reduction in water quality in one area of Lake Michigan in exchange for increased quality in another area of the Lake (or possibly even in a tributary of the Lake), even if those two areas do not intermix on any reasonable timescale, particularly given that the exemption justification does not require such consideration?

Suggested Rule Language

4(b)(4) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of an exemption justification according to section 5 of this rule:

- (A) A change in loading of a pollutant of concern that is not a BCC to a waterbody that is not an OSRW:

- (i) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the pollutant of concern from sources contributing to the same ten (10) digit watershed; and
- (ii) with the result that there is a net decrease in the loading of the pollutant of concern to the same ten (10) digit watershed.; and
- (iii) where the applicant demonstrates that the increase in loading, combined with the simultaneous decrease in the loading of the pollutant from the other sources in the watershed, will not cause a decline in the water quality of the receiving waterbody.

4(b)(4)(B): Exemption for cross-pollutant trading

4(b)(4) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of an exemption justification according to section 5 of this rule:

* * *

(B) A new or increased loading of a pollutant of concern if the discharger demonstrates the following:

- (i) The new or increased loading is necessary to accomplish a reduction in the loading of another pollutant of concern.
- (ii) All reasonable methods for minimizing or preventing the new or increased loading have been taken.
- (iii) There will be an improvement in water quality in the receiving water or waters. An improvement in water quality will occur if the impact from the new or increased loading of the pollutant of concern is:
 - (AA) less bioaccumulative; and
 - (BB) less toxic than the reduced pollutant or pollutant parameter.

In making these determinations regarding bioaccumulation, the BAF methodology under 327 IAC 2- 1.5-13 will be used.

COMMENTS

Exemption 4(b)(4)(B) also is not appropriate as an exemption. The exemption attempts to ensure that any situation covered by the exemption will result in a nonsignificant impact by requiring that the new or increased loading of pollutant X be necessary to reduce a more bioaccumulative and more toxic pollutant Y. EPA has issued extensive guidance on pollutant trading schemes, and recommends that such schemes be applied with much caution.²³ Although IDEM may have specific applications of this exemption in mind, IDEM errs by attempting to set

²³ EPA accepts the pollutant trading concept as a tool for maintaining or improving water quality, but only for some pollutants and some situations. See U.S. EPA, Water Quality Trading Assessment Handbook (November 2004). EPA does not support trading of bioaccumulative toxics. See U.S. EPA, Water Quality Trading Toolkit for Permit Writers, Office of Wastewater Management Water Permits Division, (August 2007) EPA 833-R-07-004, page 10 (“Not all pollutants are necessarily suitable for trading. . . . EPA’s Trading Policy supports trading for TN, TP, and sediment and indicates that other pollutants may be considered for trading on a case-by-case basis. EPA does not support trading of persistent bioaccumulative toxics.”).

forth a generalized pollutant trading scheme without any evidence that the scheme will produce nonsignificant impacts across a range of pollutants, discharges, and circumstances.

IDEM's presumption that an improvement in water quality will occur if the "impact from the new or increased loading of the pollutant of concern" is less bioaccumulative and less toxic than the reduced pollutant or pollutant parameter is not warranted. It is entirely unclear how an "impact" of a loading can be more or less bioaccumulative. It is possible that IDEM is attempting to incorporate the magnitude of the changes in loading of each pollutant into this trading scheme. If so, this should be made clear in the rule language. If "impact" refers to the pollutant itself, then clearly a large increase in the load of a less bioaccumulative, less toxic pollutant may not be offset by a very small decrease of a more bioaccumulative, more toxic pollutant. This provision then would need to account for overall mass.

Also, bioaccumulativity and toxicity are not the only factors of concern. The persistence of a pollutant in the water column or sediments is often an important factor in water quality trading yet is not considered in this exemption. So is whether the pollutant has synergistic effects with other pollutants.

Even if IDEM incorporates loading mass and pollutant persistence to Exemption 4(b)(4)(B), the exemption is still inappropriate because no general presumption of the proper pollutant trade can be specified *a priori* in the rule for all waterbodies, pollutants, and situations, as IDEM attempts to do in this exemption. The problems with Exemption 4(b)(4)(B) are especially troublesome because the exemption applies to all OSRWs, all HQWs in the Great Lakes Basin, and all loadings of BCCs.

Exemption 4(b)(4)(B) should never be applied to BCCs or OSRWs. EPA recommends against pollutant trading for BCCs, and in fact the analogous exemptions in the current interim rules do not apply to BCCs (see 327 IAC 5-2-11.3(b)(1)(C)(iii)(JJ) and 327 IAC 5-2-11.7(c)(2)(B)).

Moreover, because of the relative high uncertainty in the outcome of pollutant trading, the application of this scheme in OSRWs is particularly risky. In particular, increasing one

bioaccumulative or toxic pollutant in one segment of Lake Michigan in exchange for a decrease in another bioaccumulative or toxic pollutant in another segment of Lake Michigan is a complex trading scheme and should be analyzed along with the social and economic dimensions of the trade.

In sum, cross-pollutant trading situations are most appropriately handled in a Tier 2 antidegradation demonstration where the social benefit of the trade can be weighed against the social and economic costs. If indeed a cross-pollutant trade results in a less bioaccumulative, less toxic, less persistent, and less synergistic discharge, then it will likely pass a Tier 2 antidegradation review without much trouble. However, a blanket exemption is not appropriate because it fails to account for the range pollutants, discharges, and circumstances that may be presented.

Questions

- Does IDEM have any evidence that, in general for the range of likely circumstances falling under this exemption, water quality impacts resulting from a significant increase in loading of one pollutant will be entirely offset by a decrease in loading from another pollutant simply because the increased pollutant is less bioaccumulative and toxic? If so, please disclose that evidence to the public?
- Where in the record has IDEM provided a “well-founded determination” that any changes in water quality under this exemption will be de minimis?
- Why did IDEM omit loading mass, pollutant persistence, and synergistic effects as factors in subdivision (iii)?
- Why should the exemption apply to BCCs, especially given that the comparable exemptions in the interim rules do not apply to BCCs?
- Why should the exemption apply to OSRWs?

Suggested Rule Language

Not applicable – delete Exemption 4(b)(4)(B).

4(b)(4)(C): Exemption for cross-pollutant and cross-media trading

4(b)(4) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of an exemption justification according to section 5 of this rule:

* * *

(C) A new or increased loading of a pollutant of concern that demonstrates:

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- (i) the new or increased loading is necessary to accomplish a reduction in the release of one (1) or more air pollutants;
- (ii) all reasonable methods for minimizing or preventing the new or increased loading have been taken; and
- (iii) there will be an environmental improvement, which will occur when the applicant demonstrates that the reduction in the loading of the air pollutant:
 - (AA) is necessary to meet a state or federal air quality standard or emission requirement; or
 - (BB) will substantially reduce human exposure to hazardous air pollutants or other air pollutants that are subject to state or federal air quality standards.

COMMENTS

Exemption 4(b)(4)(C) also is not appropriate as an exemption from antidegradation review. It exhibits all of the shortcomings of Exemptions 4(b)(4)(A) and 4(b)(4)(B): the spatial scale is too large, it applies to BCCs and OSRWs, and it tries to shortcut the analysis necessary for complex pollutant trading schemes. Exemption 4(b)(4)(C) has two additional problems.

First, the exemption sets forth a cross-media pollutant trading scheme. EPA Region 5, in its review of a prior IDEM draft antidegradation rule, rejected cross-media transfers of pollutants as not appropriate for an exemption from an antidegradation demonstration.

Second, Exemption 4(b)(4)(C) entirely abandons EPA's principle that any exemptions from the antidegradation review process must be based upon a well-founded determination that the pollution discharges permitted under such exemptions will have a truly de minimis impact upon the water quality of the impacted waters.²⁴ Exemption 4(b)(4)(C) requires only that there be an "environmental improvement," meaning that IDEM considers water pollution and air pollution to be fungible and able to be traded as long as the generalized "environment" is improved. There is no specific application of this cross-media trading scheme that would be appropriate as an antidegradation exemption under the antidegradation rule because by definition the application of the exemption would consistently allow significant impacts to water quality.

This does not mean that allowing significant reductions in water quality for the purpose of reducing exposure to "hazardous air pollutants or other air pollutants that are subject to state or federal air quality standards" (see Draft Section 4(b)(4)(C)(iii)(BB)) is never an important social

²⁴ Region 7 EPA letter dated March 25, 2009 to the general counsel of the Iowa Department of Natural Resources, in response to a legislative bill setting forth exemptions to antidegradation review.

and economic activity. But IDEM's over-simplified presumption that all such reductions in exposure are necessary to accommodate important social or economic development is to date unanalyzed and unjustified. Moreover, the exemption is written so broadly – significant water quality degradation will be allowed to reduce exposure to any “air pollutants that are subject to state or federal air quality standards” – that IDEM cannot show that all such reductions would pass the importance test. Nor can IDEM label the cross-media pollutant trade as a decision about “environmental improvement” and bypass the importance test altogether. Finally, the Section 5 Exemption Justification contains no analysis of social or economic importance and so cannot be used to analyze such importance on a case by case basis.

The tradeoff between air and water pollution must be evaluated in the context of a Tier 2 antidegradation demonstration that the lowering of water quality is necessary to accommodate this important public health objective. Exempting this tradeoff from an antidegradation demonstration with its necessary and importance tests is not consistent with the federal requirements. As discussed above, to properly and legally reduce the applicant's burden of demonstrating that lowering water quality in exchange for a reduction in a particular air pollutant is “necessary to accommodate important social or economic development,” IDEM would need to (a) make a formal and public showing that this exchange is necessary to accommodate important social or economic development; or (b) make a formal and public showing that this exchange meets a subset of the factors in the Section 6 demonstration, and include the remaining Section 6 factors in the Section 5 Exemption Justification.

Questions

- Where in the record has IDEM provided a “well-founded determination” that any changes in water quality under this exemption will be de minimis?
- Is it IDEM's position that the situations described in Section 4(b)(4)(C), as a class, are necessary to accommodate important social or economic development?
- Has IDEM made a formal and public analysis and showing that all of the situations covered by 4(b)(4)(C), as a class, are necessary to accommodate important social or economic development? If so, where can the public obtain a copy of this analysis and showing?
- Has IDEM made a formal and public analysis and showing that all of the situations covered by 4(b)(4)(C), as a class, meet a subset of the factors in the Section 6 demonstration, and in addition has IDEM included the remaining Section 6 factors in the

Section 5 Exemption Justification? If so, where can the public obtain a copy of this analysis and showing?

- How will the application of the Section 5 Exemption Justification show on a case by case basis that the situations described in Section 4(b)(4)(C) are necessary to accommodate important social or economic development?
- How is this exemption from an antidegradation demonstration consistent with the Clean Water Act and EPA guidance, given that application of the exemption will allow significant impacts to water quality?
- Why should the exemption apply to BCCs and OSRWs?

Suggested Rule Language

Not applicable – delete Exemption 4(b)(4)(C).

4(b)(4)(D): Exemption for socio-economic importance of public health concerns

4(b)(4) The following exemptions from the antidegradation demonstration requirements included in section 6 of this rule require the submission of an exemption justification according to section 5 of this rule:

* * *

(D) A new or increased loading of a pollutant of concern from a sanitary wastewater treatment plant constructed or expanded to alleviate a public health concern, for example, a connection of existing residences currently on septic systems when all reasonable methods for minimizing or preventing the new or increased loading have been taken.

COMMENTS

This exemption, like Exemption 4(b)(4)(C), abandons EPA's principle that any exemptions from the antidegradation review process must be based upon a well-founded determination that the pollution discharges permitted under such exemptions will have a truly de minimis impact upon the water quality of the impacted waters. Exemption 4(b)(4)(D) trades a significant lowering of water quality for improvement in public health, but this trade does not result in a de minimis impact to water quality. Improving public health may be an important social and economic development, but this analysis is properly made within the context of a Tier 2 antidegradation demonstration. Similar to the discussion above for Exemption 4(b)(4)(C), this 4(b)(4)(D) "exemption" is not a proper vehicle for situations that are deemed likely to pass the Tier 2 "importance" test but that still produce significant lowering of water quality, where there has been no showing of such importance (such as would be required for a general permit) and the Exemption Justification does not require any information on social or economic importance of

the decrease in water quality. As discussed above, to properly and legally reduce the applicant's burden of demonstrating that lowering water quality in a particular scenario is "necessary to accommodate important social or economic development," IDEM would need to (a) make a formal and public showing that this exchange is necessary to accommodate important social or economic development; or (b) make a formal and public showing that this exchange meets a subset of the factors in the Section 6 demonstration, and include the remaining Section 6 factors in the Section 5 Exemption Justification.

Questions

- Where in the record has IDEM provided a "well-founded determination" that any changes in water quality under this exemption will be de minimis?
- Is it IDEM's position that the situations described in Section 4(b)(4)(D), as a class, are necessary to accommodate important social or economic development?
- Has IDEM made a formal and public analysis and showing that all of the situations covered by 4(b)(4)(D), as a class, are necessary to accommodate important social or economic development? If so, where can the public obtain a copy of this analysis and showing?
- Has IDEM made a formal and public analysis and showing that all of the situations covered by 4(b)(4)(D), as a class, meet a subset of the factors in the Section 6 demonstration, and in addition has IDEM included the remaining Section 6 factors in the Section 5 Exemption Justification? If so, where can the public obtain a copy of this analysis and showing?
- How will the application of the Section 5 Exemption Justification show on a case by case basis that the situations described in Section 4(b)(4)(D) are necessary to accommodate important social or economic development?
- How is this exemption from an antidegradation demonstration consistent with the Clean Water Act and EPA guidance, given that application of the exemption will allow significant impacts to water quality?
- Why should the exemption apply to BCCs and OSRWs?

Suggested Rule Language

Not applicable – delete Exemption 4(b)(4)(D).

V. SECTION 5: 327 IAC 2-1.3-5 EXEMPTION JUSTIFICATION.

COMMENTS

As we have argued immediately above, none of the so-called “exemptions” in 327 IAC 2-1.3-4(b)(4), to which the Section 5 exemption justification procedure applies, are appropriate as exemptions from antidegradation review, even with a Section 5 Exemption Justification.

It is not clear whether IDEM's position is that the Section 4(b)(4) exemptions, plus the Section 5 Exemption Justification, are functionally equivalent to an antidegradation demonstration. Regardless, the Exemption Justification requirement is not substantially equivalent to the necessary and importance tests of the antidegradation demonstration. This is clear when Section 5 is compared to Section 6. First, the Section 5 Exemption Justification, unlike the antidegradation demonstration in Section 6, applies only to new or increased loadings associated with an NPDES permit. Antidegradation applies to any action in Indiana that is required to comply with WQS (activities conducted pursuant to CWA §404 and §401, plus other discharges), not just actions covered by NPDES permits. See 40 C.F.R. §131.12(a); 63 Fed. Reg. 36742, 36780 (1998). Thus, the Section 4(b)(4) exemptions are limited to situations where a new, renewed, or modified permit is associated with the new or increased loading, a subset of the situations covered by the rule. Second, compared to the antidegradation demonstration requirements, the Exemption Justification uses a much diluted “necessary” test to analyze alternatives to the proposed new or increased loading. (Compare Section 5(c)(3) of the Draft Rule with the much more extensive “necessary” test set forth in Sections 6(b)(12) and (13) of the Draft Rule.) Third, the Exemption Justification does not require any information on, or analysis of, the social or economic importance of the actions to be exempted.

Furthermore, the public notice provisions in Section 5(b) require a public meeting on an exemption justification if the proposed discharge is to an OSRW. Discharges to tributaries of OSRWs do not require a public meeting, however, even though discharges into such tributaries may have a significant impact on the water quality of the OSRW. The term “tributary of an OSRW” is defined in Draft Rule Section 2(63), but it appears that this term is not used within the substantive parts of the Draft Rule. Section 5(b) should say that a public meeting is required for any proposed discharge to an OSRW or to a tributary of an OSRW.

Finally, it is important to recognize that the Draft Rule would allow the 4(b)(4) exemptions only where a new, renewed, or modified NPDES permit is sought for the change in loading, because the Exemption Justification in Section 5(a)(2) is so limited. The exemptions would not apply to a change in loading not associated with a new, renewed, or modified permit.

Questions

- Where in the record has IDEM demonstrated that the exemptions in Section 4(b)(4), plus the Section 5 Exemption Justification, are functionally equivalent to an antidegradation demonstration?
- Why did IDEM omit tributaries to OSRWs from the requirement of a public meeting even though discharges into tributaries of OSRWs can significantly reduce the water quality in OSRWs?

Suggested Rule Language

- (b) Upon receipt of an exemption justification, the commissioner shall provide notice and request comment according to 327 IAC 5-2-11.2. The commissioner shall hold a public meeting on the exemption justification in accordance with 327 IAC 5-2-11.2 if:
- (1) the proposed discharge is to an OSRW or to a tributary of an OSRW;

VI. SECTION 6: 327 IAC 2-1.3-6 ANTIDEGRADATION DEMONSTRATION APPLICATION.

A. 327 IAC 2-1.3-6(a): Demonstration applicability

INTRODUCTION

Draft Section 6(a) states as follows:

- (a) Any existing or proposed discharger seeking a new or increased discharge that constitutes a significant lowering of water quality that is not exempt under section 4(b)(4) of this rule, must submit for consideration by the commissioner an antidegradation demonstration application that justifies that the proposed new or increased discharge is necessary for providing a social or economic benefit in the area of the discharge.

COMMENTS

IDEM inexplicably uses language that deviates from both the federal and Indiana antidegradation standard.

Questions

- Why did IDEM not use the standard language “necessary to accommodate important social or economic development in the area of the discharge” in this provision?

Suggested Rule Language

- (a) Any existing or proposed discharger seeking a new or increased discharge that constitutes a significant lowering of water quality that is not exempt under section 4 of this rule, must submit for consideration by the commissioner an antidegradation demonstration application consistent with the requirements in this section that justifies that the proposed new or increased discharge is necessary to accommodate important social or economic development in the area of the discharge.

B. 327 IAC 2-1.3-6(b): Antidegradation demonstration factors

INTRODUCTION

Federal Tier 2 antidegradation protections prohibit the lowering of water quality unless it is “necessary to accommodate important social or economic development.” 40 C.F.R. § 131.12(a)(2). EPA guidance makes clear that this includes two important questions:

- (1) Is the lowering of water quality “necessary,” i.e. has the applicant adequately documented that non-degrading or less-degrading alternatives are not available?
- (2) Will the regulated activity lead to “important” social and economic development, i.e. has the applicant adequately documented that the positive socioeconomic impact of the regulated activity, on balance, outweighs any negative socioeconomic impacts associated with the lowering of water quality?

COMMENTS

First, the proposed discharge must be “necessary.” Satisfying this inquiry demands an analysis of alternatives to the proposed discharge. The “necessary” analysis questions whether it is possible to minimize, mitigate, or avoid the proposed discharge or its impacts to water quality through technology or other means. EPA has stated that “[g]iven the variety of engineering approaches to pollution control and the emerging importance of pollution prevention, the finding

of necessity is among the most important and useful aspects of an antidegradation program and potentially an extremely useful tool in the context of watershed planning.”²⁵

Second, the activity that the applicant claims requires a new or increased discharge must accommodate important social or economic development in the area of the receiving waterbody. The demonstration of “importance” focuses on the socio-economic benefits of the proposed activity counterbalanced against the socioeconomic costs of the proposal and the projected environmental effects. This balancing concept is key. Socioeconomic development cannot be said to be “important” if the potential economic and social benefits of the project are outweighed by the overall costs to society of allowing additional pollution to the water.²⁶ Accordingly, if the negative environmental, social, and economic impacts of the action outweigh the positive environmental, social, and economic impacts, then the antidegradation application must be denied.

EPA views the antidegradation demonstration as a stringent test, a test certainly not met by every applicant:

This provision is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for ‘fishable/swimmable’ water, and both cannot be achieved. *The burden of demonstration on the individual proposing such activity will be very high.*²⁷

The most apparent result of a “significant lowering of water quality” will be a reduction in assimilative (loading) capacity for one or more pollutants of concern. This impact on assimilative capacity may not cause readily discernable harm to aquatic biota, assuming that water quality criteria are not violated, and the applicant may be tempted to conclude that there are no negative impacts. The impact to assimilative capacity may, however, harm the social and economic value that the community and industry places on maintaining high assimilative capacity. This harm must be balanced against the social and economic benefits of a proposed

²⁵ 63 Fed. Reg. 36742, 36784.

²⁶ See U.S. EPA Region VIII Guidance: Antidegradation Implementation (August 1993), page 21 (stating that the inquiry should “weigh the applicant’s demonstration against counterbalancing socioeconomic costs associated with the proposed activity, such as projected negative socio-economic effects on the community and the projected environmental effects”).

²⁷ U.S. EPA Water Quality Standards Handbook, Second Edition (August 1994), Pages 4-7 (emphasis added).

activity to determine whether the development is “important.” As noted in the Washington State procedures:

Particularly for parameters such as dissolved oxygen, bacterial pollutants, and common metals, the loss of available assimilative capacity may mean that future entities and expansions will be held to higher and more expensive treatment requirements. The less each individual activity uses of the assimilative capacity, the better the potential for cost-effective future development will be. Discussing the relative impact on the remaining assimilative capacity addresses the relative impact of the activity on the costs and opportunities for future growth.²⁸

The Washington State rules balance a number of factors to determine whether or not the proposed lowering of water quality is in the “overriding public interest.” See WAC 173-201A-320(4)(a). The Connecticut implementation procedures similarly require applicants to balance “overriding” economic or social factors against the loss or reduction of environmental quality.²⁹ Iowa’s draft implementation procedures follow a similar balancing approach, including an assessment of associated environmental related benefits or costs such as:

- Promoting/impacting fishing, recreation, tourism or other economic benefits for the Community; and
- Reserving assimilative capacity for future industry and development.³⁰

Questions

- How can IDEM assure that a proposed lowering of water quality will result in “important” social and economic development without including in Section 6(b) factors such as those suggested below?

Suggested Rule Language

IDEM omitted but should include three additional factors to Section 6(b) to ensure that the impacts of reducing assimilative capacity are sufficiently evaluated. The rules should clarify that quantitative and qualitative data are appropriate and can be considered by IDEM in determining whether social and economic development is “important.”

²⁸ Washington State Supplementary Guidance Implementing the Tier II Antidegradation Rules (July 18, 2005) WAC 173-201A-320, page 15.

²⁹ See Connecticut Anti-degradation Implementation Policy, Appendix E(IV)(2).

³⁰ See Iowa Antidegradation Implementation Procedure, Section 3.3 (available at <http://www.iowadnr.gov/water/standards/antidegradation.html>).

(15) The evaluation of the anticipated impact of the proposed lowering of water quality, using quantitative and qualitative data as appropriate, on economic and social factors, including the following:

* * *

() The value to residents in the area of the activity accommodated by the proposed reduction in loading capacity.

() The value to the community of reserving additional loading capacity for future industry, development, tourism, or environmental protection.³¹

() The potential for reduced effectiveness of government or privately sponsored conservation projects that have specifically targeted improved water quality or enhanced recreational opportunities on the proposed receiving waterbody.³²

C. 327 IAC 2-1.3-6(b)(15)(O): Provision in importance test

INTRODUCTION

Draft Section 6(b)(15)(O) states as follows:

(O) Demonstration by the permit applicant that the factors identified and reviewed under clauses (A) through (N) are necessary to accommodate important social or economic development despite the proposed significant lowering of water quality.

COMMENTS

Once again (see comments above for 327 IAC 2-1.3-6(a)), IDEM inexplicably modifies the language of the antidegradation standard. As modified, this provision is not clear. The positive and negative social or economic development impacts identified and reviewed under clause 15(A) are not necessary to accommodate development, but rather they are evidence of the importance or lack of importance of the proposed action. Also, this provision should not be limited to “permit applicants.” In contrast, Section 6(a) states that the demonstration applies to any discharger “seeking a new or increased discharge that constitutes a significant lowering of water quality” without reference to permits.

Questions

- Why did IDEM not use the standard language “necessary to accommodate important social or economic development in the area of the discharge” in this provision?

³¹ Washington State Supplementary Guidance Implementing the Tier II Antidegradation Rules (July 18, 2005) WAC 173-201A-320, page 15.

³² This factor is included in the current interim antidegradation rule at 327 IAC 5-2-11.3(b)(3)(C)(vi).

- Why should the antidegradation review of the factors in subdivision (15) apply only to “permit applicants”? Does not antidegradation review apply to a new or increased discharge regardless of whether a new or modified permit limit is sought?

Suggested Rule Language

6(b)(15)(O) should be written as follows:

Demonstration by the discharger seeking a new or increased discharge that, given the positive and negative social and economic impacts identified and reviewed under clauses (A) through (N), allowing the lowering of water quality is necessary to accommodate important economic or social development in the area.

D. 327 IAC 2-1.3-6(c)(1): Substantial weight requirement amounts to abdication of CWA authority

INTRODUCTION

Draft Section 6(c)(1) states as follows:

- (c) In determining whether a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located under antidegradation standards and implementation procedures, the commissioner:
 - (1) must give substantial weight to any applicable determinations by governmental entities; . . .

COMMENTS

Draft Section 6(c)(1) requires that “substantial weight” be given to “any applicable determinations by governmental entities.” If interpreted to require IDEM to give special deference to determinations by governmental bodies without CWA authority of whether a lowering of water quality is “necessary” or “important,” this provision improperly and illegally abdicates and delegates IDEM’s authority for a decision required under the CWA.

IDEM’s stated position on this provision, and its interpretation of Public Law 78-2009, is as follows:

The draft rule has been developed mindful of the federal requirements and other guidance. Public Law 78-2009 requires IDEM to give substantial weight to determinations by governmental entities concerning whether a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located. However, the final decision about the project’s social and economic benefits to the community resides with the commissioner.³³

³³ IDEM Second Notice of Comment Period, LSA Document #08-764, page 20.

IDEM's position on this provision highlights and exacerbates the provision's illegality. Contrary to IDEM's interpretation, it is precisely the decision concerning "whether a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located" that must be reserved exclusively to the IDEM commissioner. Decisions about the project's individual social and economic benefits, on the other hand – such as how many new jobs will be produced – may be appropriate for some level of deference if the "governmental entity" has jurisdiction and particular expertise in that subject area. Passage of Public Law 78-2009 does not shield Draft Section 6(c)(1) from illegality or disapproval by EPA.

A detailed look at Draft Section 6(c)(1) highlights its problems. The phrase "substantial weight" in law and court decisions reflects two concepts: first, substantial deference is given to a decision maker, and second, the decision maker receiving the deference is an expert on the subject of the decision.

Surely IDEM could not legally defer to another entity's determination that the permit applicant will meet the best available technology of pollution control without abdicating IDEM's delegated authority under the CWA. IDEM is clearly the expert on the "necessary" test of alternatives and must exercise its CWA authority in this subject area to satisfy federal requirements.

Similarly, IDEM could not give substantial weight to another agency's determination that the proposed polluting activity is socially or economically "important" without improperly abdicating its delegated authority under the CWA. For example, any "determination" by another governmental entity that an increase in jobs and in tax base makes a polluting activity "important" is not applicable to IDEM's Tier 2 or Tier 2.9 determination, which must weigh benefits against the costs of lowering water quality. Another entity's determination will be unlikely to consider, benefits and costs resulting from the use of assimilative (loading) capacity. In other words, no other governmental entity (other than EPA) has the expertise or the CWA jurisdiction to make a determination of the "importance" of lowering water quality.

The only decisions of other governmental entities that reasonably could be given deference in the antidegradation demonstration are those related to the individual factors in Draft Section

6(b)(15)(A) through (N). For example, IDEM could defer to an economic development body on how many jobs would be created or by how much the tax base would increase if a discharger were to change capacity or processes. IDEM would then take this information and determine whether this increase in jobs or tax base makes the proposed activity important socially or economically. If this is the type and scope of deference that IDEM is attempting to incorporate in Draft Section 6(c)(1), then it has failed.

Finally, this provision would compromise IDEM's ability to adequately weigh relevant public comment in evaluating a proposed action and render moot the federal requirement for "full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process" (40 CFR 131.12(a)(2)/132 Appendix E, I.B). For this reason also it is inconsistent with federal requirements.

Questions

- How can IDEM implement the "substantial weight" requirement without delegating or abdicating the key antidegradation decision on whether a reduction in water quality is necessary to accommodate social or economic development to a body without any Clean Water Act authority or expertise?

Suggested Rule Language

(c) In determining whether a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located under antidegradation standards and implementation procedures, the commissioner:

(1) may give weight to any applicable determinations by governmental entities regarding individual factors in subsection (b); . . .

or delete this provision from the rule.

E. 327 IAC 2-1.3-6(c)(2): IDEM cannot rationally rely on one factor

INTRODUCTION

Draft Section 6(c)(2) states as follows:

(c) In determining whether a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located under antidegradation standards and implementation procedures, the commissioner:

* * *

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- (2) may rely on consideration of any one (1) or a combination of the factors listed in subsection (b)(15).

COMMENTS

Draft Section 6(c)(2), without further constraint, is inconsistent with the antidegradation policy set forth in 40 C.F.R. §131.12 and in Draft Section 3. There are three fatal flaws in this provision.

First, the determination of whether “a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located under antidegradation standards and implementation procedures” requires consideration of a number of factors besides those in subdivision (b)(15). The determination depends on both the “necessary” and the “importance” tests. The “necessary” test, which involves consideration of alternatives to the proposed discharge, is incorporated in subdivisions (b)(12), (13), and (14), as well as in Draft Section 6(d). No factors relevant to the “necessary test” are included in subdivision (b)(15). Thus, if the commissioner relied on only the factors in subdivision (b)(15), he or she could not apply the “necessary” test of alternatives. Thus, Draft Section 6(c)(2) as currently proposed would allow the primary determination required under antidegradation policy – that allowing the lowering of water quality is necessary to accommodate important economic or social development in the area in which the waters are located (see 40 CFR §131.12(a)(2) and Draft Sections 3(b) and (c)) – to be based solely on, for example, the number of jobs created.

Second, even if Draft Section 6(c)(2) were to be reworded and limited to the “importance” test, the selection of factors in subdivision (b)(15) omits several key social and economic factors listed in other subdivisions. Specifically, these additional social and economic factors are relegated to subdivisions (b)(6) through (10), which state as follows:

- (6) The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, considering the following:
 - (A) Threatened and endangered species.
 - (B) Important commercial or recreational sport fish species.
 - (C) Other individual species.
 - (D) The overall aquatic community structure and function.
- (7) The anticipated impact of the proposed lowering of water quality considering the following:
 - (A) Human health.

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- (B) The overall quality and value of the water resource.
- (8) The degree to which water quality may be lowered in waters located within the following:
 - (A) National, state, or local parks.
 - (B) Preserves or wildlife areas.
 - (C) OSRWs or ONRWs.
- (9) The effects of lower water quality on the social and economic value of the receiving water or waters considering the following:
 - (A) Recreation, tourism, and other commercial activities.
 - (B) Aesthetics.
 - (C) Other use and enjoyment by humans.
- (10) The extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state.

Only five of these thirteen factors overlap with the factors in the (b)(15) factors: the impact on human health ((15)(I)); the impact on the quality of life for residents in the area ((15)(K)); the impact on fishing, recreation, and tourism ((15)(L)); and the impact on threatened or endangered species ((15)(M)). Thus, Draft Section 6(c)(2), even if modified to be limited to the “importance” test, would allow the commissioner to completely ignore the following factors in his or her determination of social or economic importance:

- the overall aquatic community structure and function
- the overall quality and value of the water resource
- national, state, or local parks
- preserves or wildlife areas
- OSRWs or ONRWs
- Aesthetics
- other use and enjoyment by humans
- the extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state.

Third, even if Draft Section 6(c)(2) were to be reworded so it is limited to the “importance” test, the commissioner’s determination” that a polluting activity is socially or economically “important” must weigh any benefits against the costs of lowering water quality and using assimilative capacity, such as impacts on endangered species, fishing, and aesthetics. The determination of importance normally cannot be made based on a single factor. For example, if a determination of importance is made based solely on the number of jobs gained, we cannot gauge how many added jobs make a facility expansion “important.” We cannot know whether creating 10 new jobs is “important” without weighing that benefit against the costs of the

expansion. Similarly, we cannot know whether a decline in tourism is “important” without weighing that cost against the benefits of the expansion. A reasoned antidegradation determination cannot be made without weighing the costs and benefits, and this requires consideration of more than one factor. The effect of allowing the commissioner to make the “importance” decision based on a single factor is to grant unconstrained discretion and essentially vitiates the list of factors in Draft Section 6(b).

Questions

- Why does IDEM allow the primary determination required under antidegradation policy – that allowing the lowering of water quality is necessary to accommodate important economic or social development in the area in which the waters are located – to be based solely on factors that do not address the “necessary” test of alternatives?
- Why does IDEM segregate a number of key social and economic factors outside of subdivision (b)(15) and then allow the commissioner to make the antidegradation demonstration finding based only on one or more factors within subdivision (b)(15)?
- How can the IDEM commissioner make a reasonable antidegradation determination based on a single factor when an accurate cost-benefit analysis requires the consideration of multiple factors?

Suggested Rule Language

There are alternative ways to fix the flaws in Draft Section 6(c)(2). A simple way is the following:

(c) In determining whether a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located under antidegradation standards and implementation procedures, the commissioner:

* * *

(2) shall consider the antidegradation demonstration factors listed in subsections (b)(1) through (b)(15);

(3) shall consider information received from the public pursuant to section 7 of this rule; and

(4) may consider any other information available to the commissioner.

F. 327 IAC 2-1.3-6(d): Options for applicant

INTRODUCTION

Draft Section 6(d) states as follows:

(d) The discharger may either:

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- (1) accept effluent limits for mass and concentration based on the BADCT, when available, as established by the department; or
- (2) include as part of its antidegradation demonstration application a request for the commissioner's review and approval of an alternative treatment technique analysis that includes submission of the following information:
 - (A) The available alternative or enhanced treatment techniques, including new and innovative technologies.
 - (B) A review of how the alternative or enhanced treatment techniques available to the applicant would minimize or prevent the proposed significant lowering of water quality.
 - (C) The effluent concentrations attainable by employing the alternative or enhanced treatment techniques.
 - (D) The costs associated with employing the alternative or enhanced treatment techniques relative to the cost of treatment necessary to achieve effluent limitations based on the de minimis lowering of water quality.
 - (E) The alternative or enhanced treatment techniques selected to be employed and an explanation of why those selections were made.
 - (F) The reliability of the selected treatment alternative or alternatives, including, but not limited to, the possibility of recurring operational and maintenance difficulties that would lead to increased degradation.

COMMENTS

The theoretical concept of BADCT is that it replaces a rigorous professional evaluation of different treatment options (i.e., the “necessary” analysis of the antidegradation demonstration). Given the proposed definition of BADCT in Section 2(3) (see above comments on definition of BADCT), there is no indication or justification that setting BADCT as defined can adequately replace such an evaluation.

Under Draft Section 6(d) as written, dischargers may opt out of a full consideration of alternatives by accepting particular BADCT limits. As a result, the BADCT limit is used in the Draft Rule as a “trigger” for antidegradation review: if the applicant meets the BADCT limit, the full antidegradation demonstration is not required. (It is not clear whether the importance test is still required.) This truncation of the alternatives analysis is not consistent with federal requirements or even with section 6(b). 40 C.F.R. §131.12(a)(2) requires that the increased loading be shown to be necessary but such increased loading is not necessary if there are alternative methods of handling the wastewater through which the increased loading could be avoided or minimized. BADCT, as defined in Section 2 of the Draft Rule, does not state the best feasible treatment for any of the categories to which it is applied. Moreover, even to the limited extent that BADCT limits could accurately be said to represent “state of the art,” allowing a discharger to use BADCT limits in place of a proper antidegradation analysis would circumvent

consideration of no discharge alternatives – alternatives that involve creating less wastewater or waste and alternative discharge locations.

Further, it appears that a discharger of sanitary wastewater could avoid controlling phosphorus or nitrogen – even to levels that are recognized as feasible³⁴ – simply by accepting a permit with BADCT limits. Allowing unnecessary phosphorus and nitrogen pollution is clearly inconsistent with the Clean Water Act and prudent public policy.

On the other hand, Draft Section 6(b)(12) and (13) seems to require a broad consideration of alternatives. It is, then, difficult to reconcile Section 6(d) with Sections 6(b)(12) and (13). Similarly, it is also difficult to reconcile Section 6(d) with Section 7(c) and (d)(1). Sections 7(c) and (d)(1) appear to require the commissioner to deny a permit where less polluting alternatives are available or nondegradation alternatives have been examined without regard to the BADCT provision.

Questions

- Can any dischargers opt out of a full consideration of alternatives, including the no-discharge alternative and alternative locations, by accepting particular BADCT limits? If so, how does this comply with antidegradation policy?
- Can any dischargers opt out of an importance test in Section 6(b) by accepting particular BADCT limits? If so, how does this comply with antidegradation policy?
- Can a discharger of sanitary wastewater avoid controlling phosphorus or nitrogen – even to levels that are recognized as feasible – simply by accepting a permit with BADCT limits? If so, how does this comply with antidegradation policy?
- Is Draft Section 6(d) fully consistent with the other provisions of the Draft Rule, particularly Sections 6(b)(12) and (13), and 7(c) and (d)(1)?

Suggested Rule Language

Perhaps, some provision like proposed 6(d) could properly be adopted. However, the problems with the definition of BADCT would first have to be remedied, and Section 6(d) would have to do the following:

- assure that no-discharge alternatives, and alternative discharge locations, are considered before BADCT could be selected; and

³⁴ See Hypoxia in the Northern Gulf of Mexico, EPA Science Advisory Committee, EPA-SAB-08-003 (Dec. 2007).

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- be based on defined BADCT limits that really were close to the “state of the art” or at least actually represented the best treatment already being practiced for the relevant group of dischargers.

Based on the current record, the BADCT exception at Section 6(d)(1) should be deleted.

VII. SECTION 7: 327 IAC 2-1.3-7 COMMISSIONER'S DETERMINATION ON ANTIDEGRADATION DEMONSTRATION APPLICATION.

A. 327 IAC 2-1.3-7(a): Public meetings

INTRODUCTION

Draft Section 7(a) states in relevant part:

(a) Upon receipt of an antidegradation demonstration application, the commissioner shall provide notice and request comment according to 327 IAC 5-2-11.2. The commissioner shall hold a public meeting on the antidegradation demonstration application in accordance with 327 IAC 5-2-11.2 if:

- (1) the proposed discharge is to an OSRW;

COMMENTS

The public notice provision in Draft Section 7(a) requires a public meeting on an exemption justification if the proposed discharge is to an OSRW. Discharges to tributaries of OSRWs do not require a public meeting, however, even though discharges into such tributaries may have a significant impact on the water quality of the OSRW. The term “tributary of an OSRW” is defined in Draft Rule Section 2(63), but it appears that this term is not used within the substantive parts of the Draft Rule. Section 7(a) should say that a public meeting is required for any proposed discharge to an OSRW or to a tributary of an OSRW.

Questions

- Why did IDEM omit discharges into tributaries to OSRWs from the requirement of a public meeting, even though IDEM recognizes that discharges into tributaries of OSRWs can significantly lower the water quality within OSRWs?

Suggested Rule Language

- (a) Upon receipt of an antidegradation demonstration application, the commissioner shall provide notice and request comment according to 327 IAC 5-2-11.2. The commissioner shall hold a public meeting on the

antidegradation demonstration application in accordance with 327 IAC 5-2-11.2 if:

- (1) the proposed discharge is to an OSRW or to a tributary of an OSRW;

B. 327 IAC 2-1.3-7(f): Explanation of commissioner's decision

INTRODUCTION

Draft Section 7(f) states in relevant part:

(f) When the commissioner makes a determination on an antidegradation demonstration application, the commissioner shall public notice the antidegradation demonstration determination according to 327 IAC 5-2-11.2 and the final determination shall be:

- (1) summarized in the public notice form prepared by the commissioner; and
- (2) incorporated into the draft permit and the fact sheet that is made available for public comment under 327 IAC 5-3-9.

COMMENTS

To clarify IDEM's obligations under antidegradation and the public notice requirement, the rule should require IDEM to document, with regard to the commissioner's decision on the antidegradation demonstration: (1) which factors the commissioner considered in making his or her determination; (2) what weights these factors were given; and (3) what determinations of other governmental entities were considered.

Questions

None needed

Suggested Rule Language

(f) When the commissioner makes a determination on an antidegradation demonstration application, the commissioner shall:

- (1) state which factors the commissioner considered in making his or her determination;
- (2) state what determinations of other governmental entities were considered; and
- (3) public notice the antidegradation demonstration determination according to 327 IAC 5-2-11.2 and the final determination shall be:
 - (A) summarized in the public notice form prepared by the commissioner; and
 - (B) incorporated into the draft permit and the fact sheet that is made available for public comment under 327 IAC 5-3-9.

C. 327 IAC 2-1.3-7(g): Water quality improvement in OSRWs

INTRODUCTION

Draft Section 7(g) states as follows:

(g) In addition to the information provided in the antidegradation demonstration application according to subsection (b)(1) and (b)(2), a discharger proposing to cause a significant lowering of water quality in an OSRW shall:

- (1) implement a water quality improvement project in the watershed of the affected OSRW; or
- (2) fund a water quality improvement project in the watershed of the affected OSRW by payment of a fee into the OSRW improvement fund established under IC 13-18-3-14; for each activity undertaken that will result in a significant lowering of water quality in an OSRW. A discharger proposing to implement or fund a water quality improvement project shall submit an application as required under section 8 of this rule.

COMMENTS

Using the term watershed in this provision without specifying the HUC level³⁵ would, according to the definition of watershed in Draft Section 2(69) (which follows Ind. Code 14-8-2-310³⁶), allow an "offsetting" improvement project to be implemented hundreds of miles away from the location of the significant reduction in water quality. The HUC level must be provided in the provision, and that level should be equal to or higher than a ten-digit HUC (i.e., HUC-10, 11, or 14).

Questions

None needed

Suggested Rule Language

- (g) In addition to the information provided in the antidegradation demonstration application according to subsection (b)(1) and (b)(2), a discharger proposing to cause a significant lowering of water quality in an OSRW shall:
- (1) implement a water quality improvement project in the HUC-10 or HUC-11 watershed of the affected OSRW; or
 - (2) fund a water quality improvement project in the HUC-10 or HUC-11 watershed of the affected OSRW by payment of a fee into the OSRW

³⁵ HUC is the acronym for Hydrologic Unit Code (HUC). Every hydrologic unit is identified by a unique HUC consisting of 2 to 14 digits based on the levels of classification in the hydrologic unit system. The lower-48 states have 18 2-digit HUCs. See <http://water.usgs.gov/nawqa/sparrow/wrr97/geograp/geograp.html>.

³⁶ "Watershed", for purposes of IC 14-25 through IC 14-29, means an area:

- (1) from which water drains to a common point; and
- (2) for:
 - (A) a watercourse, that is measured to the mouth of the watercourse; and
 - (B) any part of a watercourse, that is measured to the farthest downstream point in question.

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improvement fund established under IC 13-18-3-14; for each activity undertaken that will result in a significant lowering of water quality in an OSRW. A discharger proposing to implement or fund a water quality improvement project shall submit an application as required under section 8 of this rule.

Thank you for considering and responding to our comments and questions.

Sincerely,

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