

ANTIDegradation Stakeholders' Subgroup
Meeting Summary

Date: January 6, 2009
Time: 10:00 A.M. – 1:00 P.M.
Location: IDEM's Shadeland Avenue Offices, Conference Room C

Present at the meeting:

Ann Alexander* (National Resource Defense Council), Doug Bley (Arcelor Mittal USA), Lee Botts (WPCB and Alliance for the Great Lakes), Lori Gates (Christopher Burke Engineering), John Humes (Hoosier Energy), Barton Jones (Strand Associates, Inc.), Brad Klein* (Environmental Law Policy Center), Kay Nelson (Northwest Indiana Forum), Dan Olson (Michigan City Sanitary District), Neil Parke (Eli Lilly), Dave Pfeifer* (US EPA Region 5), Gary Powdrill (WPCB), Bowden Quinn (Sierra Club), Rae Schnapp* (Hoosier Environmental Council), Craig Williams (City of Angola).

*called in via teleconference phone

Representing IDEM: Tom Easterly, Bruno Pigott, Martha Clark Mettler, Steve Roush, Dennis Clark, Shivi Selvaratnam, John Nixon, and MaryAnn Stevens.

Introductions and Review of Summary

After an introduction by each person in attendance, Martha Clark Mettler, IDEM, Office of Water Quality, Deputy Assistant Commissioner, asked if anyone had comment on the draft summary of the December 11th subgroup meeting. Dan Olson had previously e-mailed a suggested correction to MaryAnn Stevens regarding his comments on new or experimental technology. Dan indicated that what he had said was that he is inclined toward Iowa's language for new or experimental processes (page 7 of the draft summary). John Humes asked that the summary be revised to indicate that his comment regarding confidentiality of costs in the affordability analysis applies in general, not just to his specific company (page 9 of the draft summary). Both changes will be made to the summary before it is posted on the IDEM antideg Web site. (IDEM's Web site for the antidegradation rulemaking is located at <http://www.in.gov/idem/5387.htm>)

Agenda: Public Communication of Information about Antidegradation Projects

To facilitate today's discussion about antideg communication with the public and public notification, informal and formal mechanisms, Martha prepared the following document listing the basic permit process steps that may need some form of public involvement:

Opportunities for Public Participation - Who, What/Where, and When in the process should these opportunities be provided?

Basic Permit Process Steps:

1. ~ Applicant notifies the department of intent to apply for permit coverage.
2. The department determines eligibility for an anti-D exception or a general permit.
3. ~ If not eligible for an anti-D exception or a general permit, then: Applicant and/or the department collects data for the Representative Background Concentration (RBC) for applicable POCs.

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4. The department develops draft permit effluent limits based on effluent guidelines, the applicable Water Quality Standards (WQS), RBC and antidegradation requirements.
 5. Applicant submits an antidegradation demonstration and simultaneously or subsequently applies for a permit.
 6. The department develops final permit effluent limits for the POCs; and the Draft permit is provided to the public for comment.
 7. The department issues permit to applicant after the public participation process.
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Discussion

To clarify, the beginning point of the discussion about public notification is existing rule language of 327 IAC 5-2-11.2 as modified in the latest draft of the antideg rule (dated 8-4-08).

Bowden Quinn started the discussion stating there needs to be some form of notice given to the public to indicate that IDEM has received communication from a potential applicant who has indicated intent to apply for a permit or modification. The industrial representatives said it would be unwieldy for IDEM to track every phone call from potential permit applicants who are just seeking general information about what the process may entail if they pursue a permit or modification. John Humes also said revelation of those types of communications could cause some industries to decide against locating in Indiana. He cited the Toyota plant that he said would have located in Kentucky if its early communications with IDEM had been made public before the company made its final location decision.

Brad Klein stated that the public should be involved early in the process and decisions that are involved in antidegradation considerations. He believes open communication among IDEM, the applicant, and the public is critical to develop a cooperative interaction. Brad referenced Ohio rules that allow public notice and an informational fact sheet provided before the draft permit is public noticed with an opportunity for a public hearing. He also referred to Iowa's process where discussion between the applicant and the public occurs early in the assessment of alternatives with that assessment discussion then included in the permit application.

Martha interjected at this point to ask for distinctions between formal and informal types of public notification or involvement. Formal public notification would entail an official comment period and the opportunity for the public to request a public hearing. A fact sheet, as in Brad's Ohio example, would be an informal type of public notification. Martha then asked if, in the pursuit of informal notification, the development of a fact sheet or the posting of the antidegradation demonstration and permit application is preferable.

Lee Botts wanted to back up further and ask that groundwork be laid during the process of this antidegradation rulemaking so that, by the time the rule is adopted, the public has received outreach from IDEM to explain the process that the rule allows or requires of applicants and the public. She is interested in creating more informed participation by members of the public. Her interests in this regard have been influenced by the BP, Whiting, expansion project and the

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resulting public outcry. Lee wants the public to understand the policy of how the antideg rule works before people try to apply their knowledge to a specific permit application.

Dan Olson asked whether IDEM could simply put language on the IDEM Web site stating that a permit application has been received.

Commissioner Easterly ran through the various different mechanisms that the Offices of Air, Land, and Water use in providing information to the public about applications received:

OAQ posts on the Web site the application when received then does public notification (PN).

OLQ, in the RCRA program, waits until a complete application is received; there is no draft permit yet when PN is given.

OWQ does PN on a draft permit with fact sheet.

The commissioner said he is unclear why the programs have different PN procedures though he suspects it is historical carry over.

Lee stated that a lot of people hold the assumption that IDEM has made its decision before the public is notified of an action and that causes a perception problem for IDEM in the eyes of the public.

Brad agreed the perception problem is real. He said there is a lot of work to be done regarding antidegradation before it gets to the draft permit stage so the public needs to be involved early—early enough to participate in the selection of the alternative. Brad referred to the municipal facility planning stage, which is long before the NPDES permit application is submitted to IDEM. He thinks there may not be a need to change the formal PN process as long as the informal PN activities of public involvement occur early in the planning process. Comparison was made by several subgroup members to the public meetings required in the LTCP development process.

Kay Nelson raised the issue of how to identify interested public stakeholders. She explained the situation for her organization in sending out a large number of notices based on a controversial project that brought out that many commenters who thereafter are never interested in another project. Doug Bley asked what becomes of the list of interested parties that is submitted by the applicant as required by the application submission. (IDEM uses the list to send notices of permit issuance.)

Regarding the information IDEM should or could post on the Web site, Dan Olson thought it could be as simple as indicating whether or not a permit will require a changed decision by IDEM. Bowden raised the example of the CAFO program posting a spread sheet listing what permits have a pending application or have been issued within the past 30 days. Dan Olson referred to the Wet Weather program that keeps a list on the Web site of LTCPs from the start to completion of each community's plan.

Bruno reminded everyone that there are approximately 1500 NPDES permittees as compared to 106 CSO communities. Martha put a wrap on this part of the discussion by saying everyone agrees to have more of the informal type, early notification to the public. IDEM will need to talk to its IT staff about the extent and type of Web postings we can accommodate.

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Basic Permit Process Step 1

John Nixon suggested removing Basic Step 1 from the process because it isn't a requirement that an applicant must give IDEM notice of intent to apply for permit coverage. John's suggestion was overridden with the overwhelming interest in encouraging potential applicants to start interaction with IDEM as early as possible.

Basic Permit Process Step 2

At this step, IDEM has actually received something from the applicant that needs IDEM evaluation and decision. Bowden's position is that if IDEM is making a decision, then an interested parties list should be part of the process, receiving either notification of:

- eligibility for a general permit; or
- the applicant's justification for antideg exemption.

John Nixon, IDEM attorney, reminded everyone that each formal IDEM decision triggers the possibility of judicial review, though the ability to appeal may be limited if the rule contains a standard for determination such as what is eligible for a general permit or exemption.

Basic Permit Process Steps 3-7 (applicant into antideg demonstration requirements)

Commissioner Easterly commented that the issues argued in the BP, Whiting, case were not just the discharge limits in the permit but also whether IDEM followed the correct decision making process in getting to the limits. The Commissioner's position is that IDEM's best interest is served by not having all problems surface at the end of the process, which is another argument in favor of early public involvement and IDEM's decisions open to public comment singly as they occur. Lee Botts concurred and stated her opinion that the permitting process is lengthened if public involvement doesn't occur early in the antideg process with provisions for the public to be informed with broad communication.

Doug Bley and John Humes objected to having separate IDEM decisions (on the antideg demonstration followed later by the draft permit decision) open to formal public comment. Doug wants all steps in the antideg process to be covered by informal public notification mechanisms and only public comment with possible hearing and appeal occurring at the end of the process when the final permit is issued. John Humes agreed, calling it a parallel process. He and Doug believe the separate decision making process each with its own formal public notification will lengthen the time it takes an applicant to get a permit.

The sides formed up regarding separated steps each having formal public notification vs. the parallel process of decision making with a single opportunity for formal public notification at the time of permit issuance. (See below for final summary.)

WRAP UP

The original list of topics to be discussed through the subgroup process did not include a separate meeting for general permits, but, subsequently, the subgroup has determined that an additional meeting dedicated to the general permit topic is necessary. Martha said IDEM has not forgotten about a subgroup meeting on general permits but indicated more internal IDEM work is needed to consider if the general permits satisfy de minimis.

Dan Olson asked about IDEM's intent for communicating with the larger stakeholder group about the decisions made through the subgroup process before moving onto the next formal

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rulemaking step (posting of draft rule with second notice of comment period in the Indiana Register).

The issue of the rulemaking schedule was raised since the original schedule was to complete the rulemaking by December 31, 2008. Dave Wagner asked for a revised schedule at the October 30, 2008, subgroup meeting. A revised schedule has been prepared and is ready for presentation to the next WPCB meeting, which is scheduled for February 11, 2008. Gary Powdrill, WPCB Chairman, said he doesn't want undue delay in the rulemaking, but he sees progress being made through the subgroup process and he understands not meeting the December 31, 2008, timeline.

NEXT STEPS

The next subgroup meeting is scheduled for Monday, January 26, 2009, starting at 10 am, at IDEM's Shadeland Avenue office, Conference Room C. The meeting topic is the environmental improvement project or payment of fee for watershed improvement for discharges approved in an OSRW. Dan Olson reminded the subgroup that the discussion also needs to include how tributaries to OSRWs are going to be treated.

Summary of Subgroup Discussions from this Meeting

Other than a loose acknowledgement that early, informal public involvement is a good idea, no agreement came out of the meeting regarding at what phase(s) and with what type of public involvement (formal or informal) should occur. Two options were discussed:

1. Have the discharger/applicant hold public meetings locally, providing a comment period and responding to comments. Then the applicant would submit the antideg demonstration to IDEM with materials evidencing the public involvement activities already conducted. IDEM would then provide public notification with a 30 day comment period on the demonstration with the possibility of holding a hearing if requested by the public. After which, IDEM makes a decision on the demonstration, a final determination which is appealable. Next, the draft permit would be public noticed with its comment period and possible hearing. Final step is IDEM's permit issuance which is an appealable decision.

OR

2. Have the discharger/applicant hold public meetings locally, providing a comment period and responding to comments. Then the applicant would submit the antideg demonstration to IDEM with materials evidencing the public involvement activities already conducted. The demonstration and draft permit would be public noticed with its comment period and possible hearing. Final step is IDEM's permit issuance which is an appealable decision.

Pros raised on Option 1:

Once the comment and appeal period on the demonstration was completed, it couldn't be used later by the public to question the agency's permit decision. One issue dealt with at a time.

Cons raised on Option 1:

More than one appeal period would allow opponents of a discharge "two bites at the same apple", that is two chances to appeal the same action. Requiring separate appeal periods will lengthen the time it takes for them to get a permit.

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Cons raised on Option 2:

It could be unwise to proceed with drafting a permit based on an antideg demonstration that hasn't passed all its hurdles. The permit could be written based on an alternative that is then challenged through appeal and later thrown out thereby necessitating a permit rewrite.

Martha said EPA's only stated requirement, to date, is that whatever procedure for PN is put in place must be entirely transparent to the public.

ACCEPTED