

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Date: January 26, 2009
Time: 12:00 – 3:00 P.M.
Location: IDEM's Shadeland Avenue Offices, Conference Room C

Present at the meeting:

Brett Barber (Greeley and Hansen), Dave Bates (City of Goshen), Patrick Bennett (Indiana Manufacturers Association), Doug Bley (Arcelor Mittal USA), Brian Brown (Amec/City of Indianapolis), Kari Evans (Barnes & Thornburg), Lori Gates (Christopher Burke Engineering), Jeff Hyman (Conservation Law Center representing the Alliance for the Great Lakes), Kay Nelson (Northwest Indiana Forum), Dan Olson (Michigan City Sanitary District), Neil Parke (Eli Lilly), Dan Plath (Nisource), Gary Powdrill (WPCB), Bowden Quinn (Sierra Club), Charlotte Read* (Save the Dunes), Rae Schnapp (Hoosier Environmental Council), Stephanie Snell (Conservation Law Center), Dave Wagner (WPCB), Craig Williams (City of Angola).

*called in via teleconference phone

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

Introductions

An introduction by each person in attendance was made. The summary of the January 6, 2009, subgroup meeting has not been distributed; therefore, comments on it will be held until a future meeting. Antidegradation meeting materials can be found 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: Antidegradation related to Outstanding State Resource Waters (OSRWs) and their tributaries

To facilitate today's discussion about antidegradation's relationship to OSRWs and their tributaries, Martha suggested the following questions be used as a guide to the discussion:

- When is a water quality improvement project required?
- What is meant by "overall improvement"?
- What is the timing requirement for a water quality improvement project?

Should the project be:

identified by the applicant or IDEM;

underway; or

completed;

before permit issuance?

- How should the fee be calculated?

Discussion

When is a water quality improvement project (project) required?

Everyone understood that a project is required for activities causing significant lowering of water quality in an OSRW and an Exceptional Use Water (EUW). The idea that a project may be required for water quality lowering in a tributary of an OSRW is not explicitly stated in statute and not agreed upon by everyone. Dan Olson stated his preference to keep the definition of a tributary that is in the current antideg rules for Lake Michigan at 327 IAC 5-2-11.7. The definition included at 327 IAC 5-2-11.7(2)(D) reads as follows:

ANTIDegradation Stakeholders' Subgroup
Meeting Summary

(D) As used in this subdivision, "tributary of an OSRW" includes the upstream segments of a receiving waterbody when some or all of the downstream segments of the receiving waterbody are designated as an OSRW.

What is included in overall water quality improvement and how closely should a project be tied to the increased discharge?

Overall improvement

Doug Bley said he thinks a project should be acceptable if, for example, an increased discharge of ammonia is offset by a decrease in phenol in the water column.

Charlotte Read responded that trade offs may not be acceptable.

Bowden Quinn indicated trade offs may possibly be acceptable if a more toxic pollutant can be reduced when a less toxic pollutant is increased. However, his caveat was that in order to allow such trading, there would need to be a rating/ranking system of toxicities affecting aquatic organisms. This would be very difficult to establish since organisms have differing susceptibilities to various pollutants.

Jeff Hyman offered that any toxicity ranking system would have to consider the amount of the increased pollutant and its chemical behavior in the waterbody. He also was focused on determining whether a project will actually work to produce overall water quality improvement.

Connection between increased discharge and project or fee

In consideration of whether a project must be tied to the fee (not to exceed \$500,000), the subgroup discussion showed a division.

Industry and municipalities rely strictly on the statute not saying the discharger has to propose a project. They believe the statutory meaning is that the fee, if paid by a discharger, doesn't have to pay entirely for a project that IDEM may choose in the absence of the discharger proposing a project.

The environmental representatives say the statute means that the Water Pollution Control Board (WPCB) can only allow an increased discharge of a pollutant if there is an overall improvement to water quality in the watershed of the discharge, and, if there is no way for the fee paid by the discharger to accomplish overall improvement, then the discharger's proposed lowering of water quality to the OSRW cannot be approved. The environmental representatives say tying the fee to the project cannot be avoided because the project is intended to bring the waterbody's water quality back to pre-increased discharge quality.

Dave Wagner thought it could be possible that one discharger's project may not be fully implemented by the amount of fee assessed to that discharger, but that the OSRW improvement fund could grow over time and the project completed with the built-up funds. Jeff and Bowden were skeptical that the fund would ever have unused funds built up over time because the amount of fee assessed is unlikely to be more than what a project would cost since the discharger, in that case, would do the project rather than pay the fee. More likely, projects will cost more than the maximum fee of \$500,000 and will remain uncompleted while the discharger pays the fee but the OSRW water quality is lowered.

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Dan Olson, speaking on behalf of municipalities, said small communities are without financial or technical resources and unable to shoulder the cost of projects or fee payment yet they need to expand wastewater treatment in response to growing population and providing treatment to existing unsewered areas. Other subgroup members thought the municipal situation described by Dan would be covered as an exception under the antideg draft rules.

Martha concluded this part of the discussion by saying she does not think IDEM can approve a project if it is known that the project won't provide the overall improvement required by statute.

Fee calculation

Gary Powdrill asked who does the determination of what the amount of the fee should be.

Martha expressed IDEM's inability to asses a fee that won't pay for a project to provide overall improvement.

Steve Roush thought the fee should be based on the cost necessary to offset the lowered water quality back to the de minimis level of the pollutant or pollutants. That is what the draft rule requires.

Dave Wagner was interested in knowing the number of potential dischargers into OSRWs or EUWs. His thinking is that there are few dischargers; therefore, there will be few required projects and the projects could be paid from funds accumulated in the fund.

Discussion was attempted, but did not go far, on the possibility of asking potential dischargers to contribute to the fund in advance of any permit actions just to build up money in the fund.

Discussion was also held on a project bank, an established list of improvement projects, from which IDEM could select a project when a discharger pays the fee but does not propose a project.

Doug Bley was not impressed with a project bank because, as he said, an industry cannot do a CSO removal project. Martha countered that at least a project would be identified.

Identified fee calculation options

The subgroup identified the following options for calculation of a fee for lowering of water quality in an OSRW or EUW:

- Tie the fee to the project (fee payment pays to complete the project)
- Fee payment in an amount equal to treating to the de minimis level

Kari disliked the idea of a fee equal to treating to de minimis because she said that would default all payments of fee to the maximum allowable of \$500,000, which she finds inappropriate. She gave as example the pollutants for which the only treatment possibility is reverse osmosis and where the environmental impact is minimal compared to the extraordinary cost of treatment.

Steve referred to the earlier suggestion of ranking the relative toxicities of pollutants and said it would be impossible to devise such a ranking system and a monetary value to compare copper,

ANTIDegradation Stakeholders' Subgroup
Meeting Summary

zinc, chloride, etc. He advocated for the fee that would provide for treatment to the de minimis, for which he agreed the fee would likely always be the maximum \$500,000.

Kari argued that would place a disproportionate burden on small entities.

With many caveats, Rae Schnapp thought there could be room to consider projects that create overall improvement but do not address the same impairment as the discharge for which the project is needed. Jeff cautioned against establishing an offset program for the projects. He said the "gold standard" would be a pollutant for pollutant overall improvement for each project. A step below his "gold standard" but still acceptable would be a project to decrease a more toxic pollutant than the one being increased in the discharge. His concern is that pollutant trading would be taken too far without addressing the problem of the significant lowering of water quality.

John Nixon reminded the subgroup that the statute only uses the term "overall improvement" but not "offset" or "mitigation".

Kinds of projects

Earlier in the meeting, a project bank was mentioned as a repository of ideas of potential projects that IDEM or the discharger could draw from to propose an overall improvement project.

Rae suggested projects that would tie to approved Total Maximum Discharge Limit (TMDL) plans or Watershed Management Plans (WMP).

Kari noted the problem of TMDLs and WMPs not being up to date in all instances, but, where they are, they could be ready projects. She also noted that the discharger's fee payment may not fund an entire TMDL but could move the TMDL work along.

Kay Nelson spoke up for remediation plan projects in Northwest Indiana though she admitted they are not all water quality projects.

Steve stated that the overall improvement requirement of the projects would need to pass the public's "laugh test", a reference to the questionable overall water quality improvement provided by a non water quality project.

Jeff agreed with Steve and further argued against trade off pollutant improvement schemes that would allow the pollutant causing the lowered water quality to harm aquatic life, mussels in his example.

Kari reminded the subgroup that the permit process under antideg review would not allow a discharge level that would kill mussels.

Rae countered that there is no water quality standard for sediment and sediment kills mussels. Kari's response was that the problem is not with antideg's process but, with the water quality standards failing to be protective.

Bowden reminded the subgroup that we are discussing OSRWs where the antideg goal is to maintain the water quality better than standard. He said OSRWs are special waters originally designated as areas where no degradation is to be allowed, but, in order to accommodate growth,

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

some type of degradation was deemed to be allowable if it could be compensated by a project to improve the overall water quality of the OSRW.

Jeff furthered Bowden's thoughts by saying consideration of a project's overall improvement needs to include who or what is impacted by the discharger's lowered water quality, and the project needs to provide improvement to that which is impacted by the discharge.

Habitat and biology

Martha posed the question about whether the water quality improvement project could be expanded to include habitat and biology.

Rae was strict in statute interpretation; it says "water quality" not "habitat". Jeff was in accord with Rae with his assessment that the project needs to provide improvement for the organism that is impacted in-stream by the discharger's lowering of water quality.

Kari seemed to indicate some habitat improvement projects may be acceptable. She said a discharger paying DNR to stock more fish in a waterbody would be an unacceptable project for a discharge of more copper, but a project to improve in-stream habitat for fish like adding trees along the bank to provide in-stream shading would be an acceptable project

Jeff reacted to Kari's habitat improvement example by saying a habitat project might be acceptable if it makes the waterbody inhabitable by the fish that might have left or been killed off by the increased discharge. He said habitat projects would need to be considered on a case by case basis, but he is not saying they are universally acceptable.

Kari agreed to case by case consideration as long as habitat projects can be considered.

Charlotte Read stated that there is a place for inclusion of habitat projects since Indiana's regulations on nonpoint source pollution are not strong.

Lori Gates added that some storm water projects could be benefited by the water quality improvement projects.

Monitoring of project results

Kari stated that there can be no objective measurement of improvement provided by a project. She predicted early projects will go after the "low hanging fruit" or easy to accomplish projects.

Dave Wagner disagreed and said there could be objective measurement of results. He referred to the stream reach standardization studies.

Kari furthered her position by saying that, before a project is completed, it would be only a best guess to say that, if correctly implemented, a project will result in improvement.

The environmental representatives said they cannot accept having no post project assessment of improvement provided to the water quality. Rae suggested a local advisory committee could be formed to assess if the project improved the water quality locally. Bowden thought it is the WPCB's role to fill that function as the ultimate decider of water quality.

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Steve thought the project proposal should include ways to monitor for water quality improvement after the project's completion.

Timing requirement for a water quality improvement project

Martha asked if a project should be approved, started, or completed before the permit is issued that allows a lowering of water quality in OSRWs.

John Nixon pointed out the language of IC 13-18-3-2(m)(2)(A) that requires implementation of a project "...that will result in... overall improvement...". That language was compared to the language of IC 13-18-3-14)b(1) that says "...projects that will lead to overall improvement...". John said the statutory language is unclear about how far into implementation a project must be before a permit is issued.

Kari argued it would be impossible to require a project be completed in advance of permit issuance.

Bowden made a correlation to wetland mitigation banks and suggested an assessment of possible projects should be done now before any antidegradation lowering of water quality is allowed.

Kay, speaking for economic development, said dischargers need permit certainty in order to decide to move to or expand operations in Indiana.

Charlotte wanted to know if or how a project would be included in the issued permit.

Kari and Doug agreed that the project should be included in the permit.

Bruno tried to summarize the discussion so far by saying he sees agreement that project implementation before permit issuance would be unworkable. He suggested creating a library of possible projects as a reference that industry could choose from as an approvable project in order to move the permit process along.

Project workability

Rae was accepting of the idea of concurrent permitting with project implementation, but she cautioned against the potential for abuse and gave as example the wetland mitigation projects that were never done or those that were done but never worked to provide mitigation. She wants a mechanism to provide accountability and suggested payment up front even if a discharger does its own project. She also suggested a re-opener clause in the permit to be able to address projects and payments if a project doesn't work.

Kay asked about a situation when the discharger pays the fee and how that connects to a workable project since she finds the statute says nothing about the project being proven workable.

Bowden and Jeff stated that if there isn't an identified project at the time when the discharger pays the fee then the discharger cannot go forward with the water quality lowering discharge.

Further, Jeff asked what if the fund never has enough money to pay for the identified project.

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Kari stated that the statute about matching money for federal 319 funds is written so that the entity can pay the money and walk away.

Bowden countered that the antideg statute doesn't require IDEM to approve every antideg lowering of water quality. He said the statute requires that degradation cannot be allowed without an overall improvement occurring in the watershed.

Bruno acknowledged that there is a definite disagreement on this issue which makes him think that a library of potential projects would be a very useful bridge to get to overall improvement.

Martha stated that even if the subgroup gets to agreement on overall improvement IDEM still doesn't know how to calculate the fee.

Jeff reiterated the environmental concern by saying a fair reading of the statute means that IDEM doesn't have to approve a permit without overall improvement being accomplished. He said someone has to identify an improvement project and that doesn't seem settled yet to him.

Martha said that simply receiving a check from a discharger does not allow IDEM to say overall improvement in water quality has been achieved.

Jeff said he thinks the amount of the fee is less of a problem than making sure projects occur that provide overall improvement of water quality. Dave Wagner seemed to agree that establishing the cost of a project isn't so difficult.

Rae wanted the focus to be on the cost to control the increased discharge that lowers the water quality.

Doug pointed out that, at the time of discussing projects and fees, the discharger already would have done the antidegradation demonstration showing a social or economic need for the water quality lowering activity so he determines that means the cost to treat the increased discharge must be great.

Martha and Rae both questioned what solution there is if the proposed library of potential projects does not contain a potential project that could be done in the watershed where the discharger proposes the water quality lowering activity. Martha stated she believes the discharger needs to participate in the process of identifying the overall water quality improvement project.

Kari said IDEM needs to develop criteria for:

- using the funds in the water quality improvement fund; and
- determining what project can be done if a discharger wants to do water quality lowering activity in a waterbody where there is no corresponding improvement project in the library.

Kari did not object to Martha's belief that a discharger needs to participate in identification of the improvement project as long as the entire burden of the identification isn't on the discharger.

Dave Wagner referred back to discussion on the public participation process and suggested using that process to solicit ideas from the public for water quality improvement projects.

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Recap

Kay tried to summarize her understanding of the discussion. She asked if IDEM can issue the permit once the discharger says it will pay the fee. She acknowledged the environmental community wants the project identified before the permit is issued because to do otherwise would mean IDEM and the WPCB would be approving degradation without overall improvement.

Doug favored basing the fee on the amount of unused loading capacity used by the increased lowering of water quality multiplied by some factor based on the increased pollutant.

Steve pointed out the difficulty of establishing a pollutant fee system using the relative toxicity of the pollutants.

Tributaries

As a starting point of the tributary discussion, it was stated that antidegradation applies to a tributary if a discharge to a tributary causes impact to the OSRW.

Doug immediately disagreed with the starting point. He believes tributaries are HQWs.

Dan Olson stated his preference to keep the definition of a tributary that is in the current antideg rules for Lake Michigan at 327 IAC 5-2-11.7. The definition included at 327 IAC 5-2-11.7(2)(D) reads as follows:

(D) As used in this subdivision, "tributary of an OSRW" includes the upstream segments of a receiving waterbody when some or all of the downstream segments of the receiving waterbody are designated as an OSRW.

Kari stated the entire tributary cannot be treated as an OSRW unless the WPCB goes through the process to designate the tributary as an OSRW.

Jeff took issue with Doug's "wanting to have his cake and eat it too" approach to his industry position that an activity to lower OSRW water quality can be approved in return for doing a water quality improvement project somewhere within the watershed, though not necessarily in the OSRW receiving the lowered water quality. Jeff gave an example: if the improvement project were done in the OSRW's tributary and the project's benefits trickled to the OSRW, Doug believes that is appropriate under statute. Simultaneously, Doug's industry position is that an activity done in a tributary to an OSRW creating water quality lowering in the tributary should not require a water quality improvement project because according to Doug's interpretation, the tributary is not the OSRW though it may receive negative impacts from the activity in the same manner it receives positive impacts from a water quality improvement project.

Steve talked about the addition of one additional molecule of a pollutant in the tributary being reason enough to require a water quality improvement project if that molecule will make its way to the OSRW. He said all molecules will not create equal impacts over a distance; metals will travel unchanged, but organic pollutants can be metabolized.

Kari gave the industry's position that the antideg standard and implementation for HQWs and OSRWs are the same except that OSRWs have the overall improvement project requirement.

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Therefore, she is not concerned about the addition of a molecule unless impact is caused to the OSRW.

Steve responded that the impact to be considered is whether the pollutant's background concentration is increased because the current rule sets de minimis as the background.

Kari countered that she believes background should not be de minimis. She provided her Tier I versus Tier II explanation for her position. She pointed out that the definition for degradation referenced in the statute to be used for OSRWs is for high quality waters. That suggests that OSRWs should be treated the same way as other high quality waters except that when there is a significant lowering of water quality in an OSRW, the discharger is required to either implement an overall improvement project or pay a fee to IDEM.

Dan said he felt compelled to stress the point that IDEM cannot limit the growth of cities in Northwest Indiana. Increased municipal growth will require increased wastewater treatment needs and discharges. He provided several tables of statistics with estimates on population changes for cities and towns in the Lake Michigan Basin, which are subject to antidegradation regulation. As Dan pointed out, the larger cities have shown population decrease, but surrounding satellite cities and towns have increased population. Since the satellite cities and towns often send their wastewater to the existing larger cities for treatment, there is no less issue with antidegradation for the existing larger cities despite their decreased populations.

General Permit Meeting

The idea to hold an additional subgroup meeting to discuss antidegradation in regard to general permits was established several meetings ago.

Martha asked the subgroup members what they wanted to accomplish in a meeting regarding general permits.

Kari said she wants an upfront determination by IDEM that a general permit doesn't exceed de minimis and, therefore, individual projects under a general permit do not need to go through an individual antideg review.

Martha said IDEM needs to prepare a package for EPA's review of our existing general permits. To prepare that package, IDEM will need to assess each existing general permit as to whether it exceeds de minimis. Martha acknowledged that a general permit cannot be used for a discharge to an OSRW.

Kari pointed out that the existing draft antideg rule does not address each individual Notice of Intent (NOI).

Martha responded that it is still part of IDEM's internal debate as to whether to include NOIs in the antideg rule.

Kari reminded the subgroup that the number one reason for state antideg rules that have been challenged in court being remanded back for rule change is the treatment of general permits under the antideg rules.

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

WRAP UP

Martha told the stakeholders to contact MaryAnn Stevens if they want to be included in the meeting on general permits. IDEM needs to do some homework before the meeting on general permits can be held to determine if the existing general permits allow for any discharges that would be greater than de minimis. Until de minimis is settled in our antideg rule, the existing general permits will be difficult to assess.

Martha reminded the subgroup that the August 4, 2008, draft antideg rule is the last version that IDEM has produced. She said IDEM will be working soon on producing a new draft and she wondered if the subgroup thinks the newly drafted rule will need to be taken to the larger group of antideg stakeholders before proceeding with second notice.

Jeff stated he plans to prepare a written response to Kari's Tier I/Tier II existing rule justification of why background should not be de minimis.

NEXT STEPS

A date for the next subgroup meeting was not selected pending IDEM's assessment of the existing general permits.

Summary of Subgroup Consensus from this Meeting

The date of a subgroup meeting to discuss general permits will be announced at a later date.