

Kari A. Evans
317-231-6458
kari.evans@btlaw.com

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Sent via electronic mail

MaryAnn Stevens
Mail Code 65-40
Rules Section
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, Indiana 46204-2251

Dear Ms. Stevens,

The Indiana Water Quality Coalition and the Indiana Manufacturers Association appreciate the opportunity to provide the following comments on the April 6, 2009 draft antidegradation rulemaking. As requested by Commissioner Easterly during the April 22, 2009 antidegradation workgroup meeting, these comments focus on our key concerns with the draft rule, and should not be construed as a complete and detailed accounting of all of the concerns that we would raise during an official public comment period.

When IDEM publishes the second notice comment period on the draft rule, we encourage the agency to afford a longer comment period than the minimum 30 days. We understand and share IDEM's desire to move the antidegradation rulemaking forward to conclusion. However, as was discussed by several participants during the April 22, 2009 workgroup meeting – including the Water Pollution Control Board member observers – this rulemaking is complex and will establish significant new policy for dischargers throughout the state. Therefore, it is essential that IDEM provide sufficient time for stakeholders to review and develop comments on this rulemaking. We would support a comment period of at least 45 days.

Our comments are organized in three categories: key concerns with the revisions reflected in the April 6, 2009 draft rule; additional revisions that are needed following enactment of HEA 1162; and additional issues that need to be addressed in the rulemaking.

Key Concerns with Revisions Reflected in April 6, 2009 Draft Rule

327 IAC 2-1.3-1 – Applicability: It is unclear why subsection (a) begins with the clause, “Notwithstanding the requirements on 327 IAC 2-1.5-4.” This reference to the Great Lakes antidegradation standards does not seem necessary or appropriate in this draft rule, which is intended to replace the existing antidegradation rules.

We also recommend that subsection (b) be revised as follows:

Except as provided under section 4 of this rule, the antidegradation implementation procedures established by this rule apply to **an intentional change in land use or facility manufacturing processes, or other deliberate activities that cause** a proposed new or increased loading of a pollutant of concern to a surface water of the state.

This addition makes it clear that an intentional act to modify an existing land use or manufacturing process is required. This language specifically excludes acts of God and other unintentional activities (*e.g.*, bypasses, upsets) from antidegradation consideration.

327 IAC 2-1.3-2(3) – “Best available demonstrated control technology” or “BADCT”: We appreciated IDEM’s decision to replace the “de minimis technology-based effluent limitations” or “DTBELs” with this revised concept of BADCTs, which are defined in reference to currently achievable control technology. However, as it concerns the industrial direct and indirect discharger provisions in subdivisions (3)(C) and (3)(D), we believe that the language is problematic in that it requires that the design standard for the facility must be the most stringent of the technology standards. As currently drafted, the rule language would require that existing facilities meet new source performance standards, which we do not believe is IDEM’s intent. The following recommended revisions make it clear that the design standard for the facility must only meet the applicable federal effluent guideline standard:

(C) For an industrial direct **or indirect** discharge subject to federal effluent guidelines, the facility shall be designed to meet the **applicable categorical standards in 40 C.F.R. 400 through 40 C.F.R. 471.** ~~most stringent of the:~~

- ~~(i) new source performance standards;~~
- ~~(ii) best conventional control technology;~~
- ~~(iii) best available technology economically achievable; and~~
- ~~(iv) best practicable control technology currently available;~~

~~for the appropriate categorical guidelines of 40 C.F.R. 400 through 40 C.F.R. 471.~~

~~(D) For a categorical industrial indirect discharger, the facility shall be designed to meet the following:~~

- ~~(i) Categorical pretreatment standards for existing sources.~~
- ~~(ii) Categorical pretreatment standards for new sources.~~

We also are concerned with the requirement in subdivision (3)(F), which provides that all remediation sites contaminated by volatile organic compounds meet a 5 ug/L limit. This provision contains no definition of “volatile organic compound.” While a 5 ug/L limit may be technologically achievable for some VOCs, the physical characteristics of others may not permit treatment to such a low level, which in many cases is orders of magnitude lower than the applicable water quality standard.

327 IAC 2-1.3-2(32) – “Limit of Detection” or “LOD”: We recommend that this definition specify that values less than the limit of quantitation (LOQ), not the limit of detection, are considered compliant with the de minimus provisions of sections 327 IAC 2-1.3-4(b)(1)(A) and (B). The LOQ is the value at which the level of a pollutant can be definitively determined. In

contrast, the LOD does not reflect an accurate measurement. Thus, the LOQ is the appropriate point of reference for the de minimis provisions. Also, a definition of “Limit of Quantitation” or “LOQ” should be added.

327 IAC 2-1.3-2(45) – “Pollutant of Concern”: We greatly appreciate IDEM’s decision to revise this definition to encompass a finite and reasonable set of pollutants so that dischargers are provided fair notice at the beginning of the process about which pollutants will be subject to review.

327 IAC 2-1.3-3(c) – Tier 2.9 antidegradation standards for OSRWs: We remain concerned about the draft rule’s treatment of tributaries to OSRWs. The August 4, 2008 draft rule stated that the entire tributary to an OSRW is subject to the same standard as the OSRW – which would include the overall improvement requirement. In this April 6, 2008 draft, it appears that IDEM intends to revise how tributaries are treated, because it has inserted qualifying language making it clear that the “portions of waters upstream ... that impact the water quality of the OSRW” are subject to the OSRW standard. We appreciate IDEM’s efforts to limit the boundaries of tributaries subject to treatment as OSRWs, but we remain very concerned that by placing language concerning treatment of tributaries in the standard itself, IDEM is inappropriately and illegally “designating” many additional waters as OSRWs. We recommend that IDEM place this language in a section of the rule dealing with implementation of the standard, and revise the statement to more clearly express the necessary impact that must be addressed as it concerns lowering of water quality in the downstream OSRW. As we have stated previously, we agree with the method used in 327 IAC 5-2-11.7(a)(2), which appropriately treats tributaries as high quality waters, and applies an impact-based test to determine whether a discharge to a tributary will cause a significant lowering to the OSRW.

At the very least, we recommend that subsections (c)(1), (2), (3) and (4) each be revised as follows:

... as well as the portions of waters upstream of an OSRW ~~or EUW that impact,~~
provided there is a significant lowering of the water quality of the OSRW ~~or~~
EUW, these waters shall be maintained and protected in their present high quality

...

The suggested change helps clarify that an increased discharge to a tributary of an OSRW is evaluated to determine if there is an impact on the OSRW.

327 IAC 2-1.3-4(b)(1)(A)(i)(DD) and (EE) – high water quality de minimis benchmark used loading capacity (cumulative cap): We recommend that the language of these provisions be clarified as follows:

(DD) ~~The~~ **A** benchmark unused loading capacity is **established and is set** equal to seventy-five percent (75%) 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.

(EE) ~~For every request after the time of the permit issuance for the initial increase in the loading of a pollutant of concern, the~~ **The** unused loading capacity

remaining after the net increase in the loading of a pollutant of concern must be greater than or equal to the benchmark unused loading capacity.

327 IAC 2-1.3-4(b)(1)(B) – De minimis provisions for OSRWs: The April 6, 2009 draft rule establishes new de minimis provisions for OSRWs, which are extraordinarily stringent. IDEM's justification regarding the OSRW de minimis is based upon certain provisions regarding non-significant lowering of air quality under the Clean Air Act Prevention of Significant Deterioration (PSD) program. IDEM's decision to establish de minimis allowances for OSRWs that are 1 percent (Tier I criteria), 2 percent (Tier II values), and 2.5 percent (cumulative cap) are based upon the ratio of the acceptable increases (annual arithmetic mean) for sulfur dioxide and nitrogen dioxide in a Class II air area as compared to a Class I air area. We find several problems with IDEM's logic in applying these air program provisions to the antidegradation program for water:

- IDEM has provided no explanation of the purpose of this particular component of PSD program to which it is attempting to equate to the antidegradation program. In fact, there is no rational relationship or analogy that can be drawn between the two programs. Each has been independently developed over decades, and the purposes, calculations, assumptions and other mechanisms have nothing in common with each other. Therefore, there is no basis for applying a ratio based upon a subset of the PSD program implementation to establish de minimis allowances for OSRWs.
- IDEM has used only a subset of the PSD program to establish the 10:1 ratio. It is focused only on the annual arithmetic means, and only sulfur dioxide and nitrogen dioxide. However, these non-significant lowering thresholds were developed based upon extensive modeling and monitoring efforts for these particular pollutants; it is not technically defensible to apply this specific process to a more general application in a water program. Furthermore, the annual arithmetic mean in air is very different than the calculation processes for water quality standards and NPDES permit limits in the water program. The water program is based upon short-term, worst case scenario assumptions, not upon long term averages.
- IDEM states that Class I air areas are very similar to OSRWs. However, this is not the case. The types of areas protected as Class I air areas – international and national parks and wilderness areas – are much more akin to Outstanding National Resources Waters (ONRWs), which are “waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance.” (See 40 CFR 131.12(a)(3) and IC 13-11-2-149.5.) Furthermore, the historical process of designating OSRWs and EUWs (which will become OSRWs pursuant to HEA 1162) was not as rigorous as the current designation process. The current OSRWs and EUWs were designated based upon subjective evaluation processes with little or no scientific or other technical data to support the designation.

As we have stated in past comments, we do not believe the de minimis/cumulative cap provisions for OSRWs should be more stringent than the corresponding provisions for high quality waters. More stringent provisions do not comply with the requirements of SEA 431, which provide that OSRWs are subject to the same antidegradation requirements as high quality

waters, plus an additional overall improvement requirement. IC 13-18-3-2(l) provides in relevant part:

For a water body designated as an outstanding state resource water, the board shall provide by rule procedures that will ...

(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 2-1.5-4(b) are met.

The 327 IAC sections referenced in this provision are the antidegradation requirements for all waters (Tier 1) and high quality waters (Tier 2). Application of this provision clearly requires that the OSRW antidegradation requirements, including specification of de minimis/cumulative cap provisions, should be the same as those for high quality waters. Therefore, the draft rule should be revised so that the de minimis/cumulative cap provisions for OSRWs are the same as those for high quality waters.

327 IAC 2-1.3-4(b)(3)(F) – New or increased loading of approved non-BCC water treatment additives: This exemption should be moved to subdivision (2) and should not require the “submission of information that sufficiently demonstrates that the proposed discharge satisfies the exemption description” for the following reasons:

- The treatment chemical has already been approved by IDEM for its use within the specified optimum dosages.
- Facilities must notify IDEM under their NPDES permit general requirements about which water treatment chemicals they are using.
- Wastewater treatment chemical dosages can routinely fluctuate due to pollutant load at the wastewater treatment plant to insure compliance with permit limits and water quality standards.

327 IAC 2-1.3-7(b)(3) – Requirement for applicant to hold a public meeting: We strongly object to this new requirement in the section of the rule addressing IDEM’s obligations in making a determination on an antidegradation demonstration, and request that it be deleted. The draft rule already contains many opportunities for public participation, including many special procedures beyond those afforded in the standard NPDES permitting process. These procedures appropriately assign responsibility to IDEM, the regulatory agency that must evaluate the antidegradation demonstration. Therefore, it is not clear what purpose or additional benefit is intended by also requiring the applicant to hold a public meeting. Furthermore, the draft rule does not specify any requirements for the public meeting, so it is entirely unclear when and how such a meeting would be publicized and held.

327 IAC 2-1.3-8 – Water quality improvement project: Subdivision (2)(A) should be revised as follows:

...The department shall determine the fee based on the:

- ~~(i) estimated initial capital cost; and~~
- ~~(ii) costs of operation and maintenance;~~

~~for the treatment system or other alternative that would be necessary to offset the~~
percentage of the unused loading capacity that the proposed significant
lowering of water quality **attributable to** ~~caused by~~ the increased pollutant
loadings to the OSRW ~~or EUW or their tributaries.~~

If an antidegradation demonstration is needed, the capital cost of the wastewater treatment system would be significant and, most likely, would force all payments into the fund to be at the maximum. The suggested language ties the fee payment into an easily measurable value to provide certainty to IDEM, the public and the permittee.

Repealer: The final section of the draft rule (SECTION 3) states that 327 IAC 5-2-11.2 (Great Lakes antidegradation implementation procedures for high quality waters) and 327 IAC 5-2-11.7 (Great Lakes antidegradation implementation procedures for OSRWs) are repealed. It is unclear why this section also does not repeal the current antidegradation standards in 327 IAC 2-1-2 (non-Great Lakes) and 327 IAC 2-1.5-4 (Great Lakes). This draft rule establishes new antidegradation standards for all waters in 327 IAC 2-1.3-3, which are intended to replace the existing antidegradation standards.

Necessary Revisions Due to Enactment of HEA 1162

General permits: SECTION 15 of HEA 1162 (IC 13-18-3-2(p)) provides that IDEM must conduct an antidegradation review of each of the general permits, and that the Water Pollution Control Board may modify the existing general permit to comply with antidegradation requirements. The draft rule should reflect the requirements of the Act by clearly stating that after IDEM has completed an antidegradation review of a general permit, activities covered by the general permit are not required to undergo additional antidegradation review. This statement could be placed in 327 IAC 2-1.3-1 (Applicability), or in a new rule section.

Treatment of exceptional use waters (EUWs): SECTION 15 of HEA 1162 (IC 13-18-3-2(u) and (v)) converts the existing 11 EUWs to OSRWs, and eliminates the EUW designation category. The draft rule should be revised to remove all provisions that refer to EUWs.

Antidegradation demonstration: 327 IAC 2-1.3-6 specifies the information a discharger must provide when submitting an antidegradation demonstration; and 327 IAC 2-1.3-7 states the procedures that IDEM must follow in reviewing and making a determination on the demonstration. These sections of the rule should be reviewed and updated for consistency with SECTION 15 of HEA 1162, particularly concerning the antidegradation review requirements (IC 13-18-3-2(q) and (r)) and the factors and procedures for determining whether a proposed discharge is necessary to accommodate important economic or social development in the area (IC 13-18-3-2(s) and (t)).

Timing of antidegradation determination: SECTION 16 of HEA 1162 (IC 13-18-3-2.1) generally provides that IDEM must make an antidegradation determination within the same

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timeframes as provided for issuance of NPDES permits (see IC 13-15-4-1); however, that timeframe may be extended for cause by no more than 90 days. The draft rule should incorporate these requirements, so that stakeholders are apprised of the timelines associated with antidegradation review.

Key Issues that Still Need to be Addressed in Rulemaking

Water quality certifications: The implementation procedures in this rulemaking are designed for and should only apply to activities subject to the NPDES permitting program. The rulemaking should specify that the implementation procedures do not apply to Clean Water Act Section 401 water quality certifications.

Variations: Discharges that have been granted variances should not also be required to submit an antidegradation demonstration because the application and review process for obtaining a variance is substantially the same as the antidegradation demonstration and review process. We believe IDEM meant to include such a provision because 327 IAC 2-1.3-2(67) contains a definition of variance, a term that is not otherwise used in this proposed new rule.

We appreciate IDEM's consideration of these comments, and hope that they lead to revisions of the draft rule prior to publication of the second notice comment period. If you have any questions regarding these comments, please contact me.

Sincerely,

Kari A. Evans

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cc: Indiana Water Quality Coalition
Patrick Bennett, Indiana Manufacturers Association