

**EPA’s Review of Revisions to Indiana’s Water Quality Standards:  
CSO Wet Weather Limited Use Designation for St. Mary’s River, Natural Drain #4,  
St. Joseph River, Spy Run Creek, Baldwin Ditch, Harvester Drain and Maumee River  
(327 IAC 2-1.1-3) and Revisions to CSO Wet Weather Limited Use (327 IAC 2-1-3.1,  
327 IAC 2-1-11.5, 327 IAC 2-1.1-1 and 327 IAC 2-1.1-2)  
Under Section 303(c) of the Clean Water Act  
WQSTS # IN2019-1935**

**Date: October 18, 2023**

**I. Executive Summary**

On May 11, 2022, the Indiana Department of Environmental Management (IDEM) submitted on behalf of the State of Indiana changes to Indiana’s water quality standards (WQS) to the U.S. Environmental Protection Agency for review and approval or disapproval under Section 303(c) of the Clean Water Act (CWA).<sup>1</sup> The changes to 327 IAC 2-1.1-3 remove Indiana’s federally-approved full body contact recreation use designation that applies to portions of seven water bodies near the City of Fort Wayne and replace the use designations for those seven water bodies with Indiana’s combined sewer overflow (CSO) wet weather limited use designation. The criteria associated with the CSO wet weather limited use designation reflect the level of CSO control that is supposed to be achieved in each water body after Fort Wayne implements its December 2007 approved Long Term Control Plan (LTCP) as updated by the modified Consent Decree, Case No. 2:07\_cv\_00445, entered by the United States District Court for the Northern District of Indiana. Specifically, the criteria to protect the CSO wet weather limited use designation consist of (a) Indiana’s *E. coli* criteria that protect full body contact recreation, which apply at all times during the recreation season<sup>2</sup> except the *E. coli* criteria do not apply during and for up to four days after CSOs occur that are consistent with the performance criteria set forth in Fort Wayne’s LTCP; and (b) requirements that CSO discharges that occur be consistent with the performance criteria in Fort Wayne’s LTCP, which means that CSO discharges should occur infrequently.<sup>3</sup> Neither Indiana’s regulation establishing the CSO wet weather limited use nor its regulation applying that use designation to the seven Fort Wayne waters allow the discharge of non-CSO sources of bacteria that would exceed Indiana’s statewide *E. coli* criteria or otherwise change the applicable WQS regarding non-CSO sources of bacteria. The seven water bodies impacted by Indiana’s WQS changes are portions of St. Mary’s River, Natural Drain #4, St. Joseph River, Spy Run Creek, Baldwin Ditch, Harvester Drain, and Maumee River.

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<sup>1</sup> 33 U.S.C. 1313(c)

<sup>2</sup> Indiana’s WQS at 327 IAC 2-1-6(d)(1) define the recreation season as April through October.

<sup>3</sup> The performance criteria in Fort Wayne’s LTCP are four overflow events in six of the seven waterbodies and one overflow in the St. Joseph River during a typical year. A “typical year” is a modeling concept used for designing CSO control measures in the LTCP and is based on a complete rainfall record for the geographic area using sound statistical procedures and best available data (59 Fed. Reg. 18691.II.C.1.a). Years with less or more precipitation may have less or more CSO events and still be consistent with the typical year performance criteria, however, as long-term average precipitation patterns may change, Fort Wayne may need to consider measures to maintain the achieved performance criteria of the LTCP.

Indiana also made several non-substantive revisions to other portions of its WQS pertaining to Indiana's CSO wet weather limited use regulation at 327 IAC 2-1-3.1, 327 IAC 2-1-11.5, 327 IAC 2-1.1-1 and 327 IAC 2-1.1-2 that do not pertain directly to the recreation use designations for the seven water bodies near Fort Wayne. These non-substantive revisions consist of (a) moving the location within Indiana's Administrative Code where the use designations for seven water bodies near Indianapolis are identified to a new section of the Indiana Administrative Code (without changing those use designations); and (b) adding accurate cross-references within Indiana's Administrative Code to reflect this revised location.

On August 1, 2022, IDEM sent an email to EPA indicating that "IDEM withdraws the City of Fort Wayne CSO Wet Weather Limited Use Subcategory Rule from your review and requests to schedule regular meetings with EPA to discuss the prospect of UAA process and rulemakings in general." EPA held meetings with IDEM and the City of Fort Wayne in 2022 and 2023. Additionally, Fort Wayne sent a letter to EPA on February 15, 2023, providing more information about the non-CSO water quality activities in which the City is engaging. Although IDEM's email stated that the State was withdrawing the WQS revisions from EPA review, IDEM has not taken action to withdraw or otherwise render that rule ineffective as a matter of state law. Consequently, Indiana's revisions continue to be legally binding under state law and, thus, constitute new and revised WQS that EPA has the authority to act on under Section 303(c) of the CWA, notwithstanding IDEM's August 1, 2022, email. *See Florida Public Interest Research Group Citizen Lobby, Inc., et al. v. EPA*, 386 F.3d 1070, 1089 (11<sup>th</sup> Cir. 2004); *see also* "What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions?" Office of Water, U.S. Environmental Protection Agency, EPA No. 820-F-12-017 (October 2012).<sup>4</sup>

As discussed in Section II of this document, EPA determines that these revisions are consistent with the relevant requirements of the CWA and federal regulations at 40 CFR Part 131 and therefore approves the WQS revisions. Consistent with the requirements of the Endangered Species Act, EPA evaluated the potential impacts of its approval on federally protected species and designated critical habitat. As discussed in Section III of this document, because the action pertains to WQS revisions of a human health-related designated use and is unrelated to protections for aquatic life or wildlife, EPA has no discretionary authority to take protection of listed species into consideration in its review. Therefore, consultation with the U.S. Fish and Wildlife Service (FWS) is not required. Additionally, consistent with the "EPA Policy on Consultation and Coordination with Indian Tribes," EPA evaluated whether approval of the WQS revisions may affect the interests of federally recognized tribes. As discussed in Section IV of this document, EPA concludes that approval will not impact tribal interests and that, therefore, tribal consultation is unnecessary.

## **II. EPA Review of IDEM's Submittal**

WQS requirements of CWA sections 101(a)(2) and 303(c)(2) are implemented through federal regulations contained in 40 CFR Part 131. Consistent with 40 CFR § 131.21, new or revised WQS do not become effective for CWA purposes until they are approved by EPA. The factors

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<sup>4</sup> The Frequently Asked Questions document is available at <https://www.epa.gov/sites/default/files/2014-11/documents/cwa303faq.pdf>.

governing EPA's review of state-adopted WQS are identified in 40 CFR § 131.5(a)(1) through 40 CFR § 131.5(a)(8). Each of these factors that are relevant to EPA's review of Indiana's WQS revisions are discussed below. Because the revisions do not affect Indiana's existing antidegradation policy or its implementation, grant any WQS variances, or affect Indiana's compliance schedule authorizing provisions, the WQS requirements in 40 CFR §§ 131.5(a)(3), (4) and (5) are not relevant in considering whether to approve Indiana's WQS revisions.

**A. Whether the State has adopted designated water uses that are consistent with the requirements of the CWA. (40 CFR § 131.5(a)(1))**

Section 101(a)(2) of the CWA states:

it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.

Section 303(c)(2)(A) of the CWA requires states to establish WQS for their waters, taking into consideration the use of waters for "recreation in and on the water" among other uses. 40 CFR § 131.10 governs designation and revision of uses for surface waters. States must adopt uses consistent with those specified in Section 101(a)(2) of the CWA or demonstrate why attaining these uses is not feasible through a use attainability analysis (UAA). As specified at 40 CFR §§ 131.10(g) and (h)(1), states may not remove a designated use if it is an existing use.

**1. Background**

In evaluating Indiana's revisions to its WQS, it is useful to understand the following points:

- A. The historical context of CSOs in the United States, EPA's "Combined Sewer Overflow (CSO) Control Policy," published in the Federal Register on April 19, 1994 (59 Fed. Reg. 18,688, hereafter referred to as "CSO Policy" or "Policy"), and the Wet Weather Water Quality Act of 2000.
- B. The State of Indiana's longstanding, codified policy decision is that, once a CSO community has successfully implemented an approved LTCP to achieve a specified level of CSO control, WQS should be revised to reflect the performance criteria of the LTCP.
- C. The City of Fort Wayne has been implementing an approved LTCP within the agreed upon schedule and Fort Wayne's federal consent decree with the United States and the State of Indiana, that will achieve an annual average of four or fewer CSOs for Fort Wayne's typical precipitation year, over a five-year period, as defined in Fort Wayne's LTCP. Following implementation of its LTCP, Fort Wayne will be required to perform post-construction compliance monitoring of its CSOs in accordance with the consent decree and its NPDES permit.
- D. Under Indiana's revised WQS, Indiana's primary contact *E. coli* recreation criteria always apply during the recreational season unless several conditions are met, including that Fort Wayne has successfully implemented its approved LTCP and achieved the level of CSO control required by the approved LTCP.

- E. The State's submittal demonstrated that, following implementation of its LTCP, pollution sources other than CSOs will continue to cause Fort Wayne's waterways to frequently exceed Indiana's primary contact *E. coli* recreation criteria during periods when CSOs are not occurring, thus still inhibiting safe primary contact recreation with respect to water quality.
- F. The State's submittal demonstrated that more recreation is expected in the CSO-impacted waterways during low flow conditions than during CSO producing storms where waters and the flow conditions are unfavorable (dramatically increased velocities, flow rates and depths).
- G. The State's submittal demonstrated that Fort Wayne has implemented and anticipates that it will continue implementing measures other than CSO controls to reduce bacterial contamination from other sources and to otherwise increase the opportunities for safe recreational use of Fort Wayne's waterways.

Each of these points is addressed more fully below.

#### **a. CSOs, EPA's 1994 CSO Policy and the Wet Weather Water Quality Act of 2000**

Combined sewer systems are designed to transport stormwater and sanitary sewage away from the communities' population centers. During rain events, these sewer systems are designed to overflow into lakes, rivers and streams. These overflows, called CSOs, consist of raw sewage and stormwater. Because of the public health risks and adverse water quality impacts caused by CSOs, EPA published its CSO Policy on April 19, 1994, 59 Fed. Reg. 18,688. The Wet Weather Water Quality Act of 2000 amended the CWA by adding Section 402(q) to provide that each permit, order, or decree issued after December 15, 2000, for a discharge from a municipal combined storm and sanitary sewer must conform to the 1994 Combined Sewer Overflow Control Policy (33 U.S.C. § 1342(q)(1)).

The CSO Policy specifies, among other things, that CSO communities should go through an extensive, multi-step engineering, modelling and public outreach process to develop an LTCP to determine the long-term remedial measures that the community would implement to reduce and/or treat CSOs. 59 Fed. Reg. 18,691-93.

As is described in EPA's 1995 guidance document entitled *Combined Sewer Overflows – Guidance for Long-Term Control Plan*, the LTCP development phase is typically a multi-year process involving (1) extensive hydraulic monitoring of flows throughout a community's sewer system and from its CSO outfalls; (2) utilizing the flow monitoring to develop a sophisticated computerized hydraulic model of the sewer system; (3) utilizing the hydraulic model so that design engineers can determine the sizes, types, costs and effectiveness of a range of alternatives (such as larger sewers, underground or above-ground storage basins and/or tunnels, remote treatment facilities to treat CSOs, expansion of existing treatment facilities, measures to keep stormwater out of combined sewer systems) that could be implemented to reduce and/or treat CSOs down to various levels of control; (4) water quality monitoring of CSO-impacted receiving streams and development of a water quality model to be used for evaluating the environmental impacts of the range of alternatives being evaluated; (5) soliciting and obtaining public input on

selecting projects for the LTCP based on an evaluation of the alternatives; and (6) interacting with, and obtaining approval from, state and federal regulatory authorities.

The CSO Policy also specifies that, “[o]nce the permittee has completed development of the long-term CSO control plan and the selection of the controls necessary to meet CWA requirements has been coordinated with the permitting and water quality standard authorities, the permitting authority should include, in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan as soon as practicable,” 59 Fed. Reg. 18,696. The enforceable mechanism could be a permit, administrative order or judicial order, 59 Fed. Reg. 18,697.

The CSO Policy identifies options for states with respect to addressing CSOs that remain after successful implementation of LTCPs that are causing or contributing to exceedances of WQS. One option that states can pursue is to “require[ ] the CSO community to develop, submit and implement as soon as practicable, a revised CSO control plan which contains additional controls to meet WQS and designated uses.” 59 Fed. Reg. 18,696. Another option that states have discretion to pursue is to “adapt their WQS, and implementation procedures to reflect site-specific conditions including those related to CSOs.” 59 Fed. Reg. 18,694. For example, states may “adopt partial uses by defining when primary contact recreation such as swimming does not exist, such as during certain seasons of the year in northern climates or during a particular type of storm event.” 59 Fed. Reg. 18,695.

**b. The State of Indiana’s longstanding, codified policy decision is that, once a CSO community has successfully implemented an approved LTCP to achieve a specified level of CSO control, WQS should be revised to reflect the achieved and sustained performance criteria from the LTCP**

All of Indiana’s water bodies are designated for full body contact recreation use unless otherwise designated with a CSO wet weather limited use designation. *See* 327 IAC 2-1-3(a)(1) and 327 IAC 2-1-6(d). As noted above, Indiana’s full body contact recreation use is consistent with the recreation uses specified in Section 101(a)(2) of the CWA. One of the applicable water quality criteria that the State has adopted to protect the full body contact recreation use designation is that during the recreational season (April through October), “*E. coli* bacteria must not exceed . . . Two hundred thirty-five (235) [colony-forming units (cfu)] or [most probable number] per one hundred (100) milliliters in any one (1) sample in a thirty (30) day period.” 327 IAC 2-1-6(d)(3)(b). Due to the “must not exceed” nature of the criterion, any untreated CSO discharge (containing thousands of cfu of *E. coli* per 100 milliliters) that occurs during Indiana’s recreation season would likely violate National Pollutant Discharge Elimination System (NPDES) permit limits that derive from and comply with the applicable bacteria criterion to protect the full body contact recreation use.

As described above in Section II.A.1.a, the CSO Policy recognizes that states have different options available with respect to addressing CSOs that remain after successful implementation of approved LTCPs. For example, some states may choose as a matter of policy to require their CSO communities to continue to make progress toward eliminating all CSO discharges, and so could choose to require their CSO communities to continue to evaluate and implement

alternatives for reducing and or treating CSOs that remain after implementation of an approved LTCP.

Indiana chose to pursue tailored revisions to WQS to allow CSOs after implementation of an approved LTCP to be authorized, rather than requiring additional CSO control. Specifically, in 2005, Indiana's legislature enacted legislation stating that "[u]pon implementation of the approved long term control plan, the plan fulfills the water quality goals of the state with respect to wet weather discharges that are a result of overflows from the combined sewer system addressed by the plan." Indiana Code (IC) § 13-18-3-2.3(a). The legislation also established:

A CSO wet weather limited use subcategory ... for waters affected by receiving combined sewer overflows, as specified in an approved long term control plan. The CSO wet weather limited use subcategory applies to a specific water body after implementation of an approved long term control plan for the combined sewer system whose overflow discharges affect those waters is implemented and [certain conditions] are satisfied.

IC § 13-18-3-2.5(a).

Indiana subsequently established a regulatory structure at 327 IAC 2-1-3.1 in accordance with the legislation to allow for removal of the federally approved full body contact recreational designated uses in specific CSO-impacted waters and replacement with a CSO wet weather limited use designation. This use and the associated criteria provide for recreation in and on the water at all times during the recreation season except when CSOs that are consistent with the performance criteria in an approved LTCP occur (*i.e.*, the CSO wet weather limited use designation would be a subcategory of the recreational use specified in section 101(a)(2) of the CWA). For waters that have been designated with a CSO wet weather limited use designation, the *E. coli* criteria that apply to the full body contact recreational designated use would not apply during and for periods of not more than four days after certain CSO discharges occur. *See* IC § 13-18-3-2.5(a)(2). This could mean that CSO discharges remaining after implementation of an LTCP might comply with NPDES permit limits that derive from and comply with the less stringent criteria associated with the sub-category. 327 IAC 2-1-3.1 does not specify how any particular CSO-related designated use subcategory should be expressed except to state:

The water quality-based requirements for the CSO wet weather limited use designation must:

- (1) be determined by the approved LTCP for the combined sewer system;
- (2) be consistent with the Clean Water Act; and
- (3) remain in effect during the time and to the physical extent that the recreational use designation that applied to the waters immediately before the application to

the waters of the CSO wet weather limited use subcategory is not attained but for not more than four (4) days after the date the overflow discharge ends.

327 IAC 2-1-3.1(h).

On June 9, 2008, EPA approved 327 IAC 2-1-3.1 as a new WQS.

**c. Fort Wayne has been implementing its approved LTCP, and its federal consent decree with the United States and the State of Indiana to significantly reduce the number of CSOs**

The following excerpt from pages 7-9 of the *City of Fort Wayne, IN Use Attainability Analysis – 2020 Update* (hereafter referred to as “the UAA”) submitted by the State summarizes the City’s development of its LTCP and the City’s LTCP itself.

The City has been working to reduce its combined sewer overflows since the late 1990s. A LTCP to address the water quality impacts of the City’s CSOs was submitted to IDEM and was approved by the agency in December 2007. The key elements of the approved LTCP have been made obligations of the Consent Decree which was approved by order of the U.S. District Court for the Northern District of Indiana entered in Case No. 2:07-cv-00445-PPS-APR on or about April 1, 2008.

In the years prior to the start of its formal LTCP implementation in 2008, the City constructed over \$46M in early action sewer separation projects. As other early action projects, the City completed construction of a new Wastewater Treatment Plant (“WWTP”) Headworks facility and had construction underway on a new, expanded primary treatment facility for its WWTP. Those two projects represented a combined investment of approximately \$63M and were foundational to the City’s ability to increase its WWTP capacity as part of its LTCP.

As originally approved, the City’s LTCP provided for CSO Control Measures that will achieve a high level of control for the remaining CSOs in the City’s combined sewer system at a capital cost of over \$305 Million and the expenditure of many more millions of dollars in additional annual operations and maintenance expenses and debt service costs. ...

When fully implemented, the LTCP will reduce the number of overflow events for the City’s CSO outfalls from as high as 20 to 71 annual events in the “typical year” to a maximum of 4 annual overflow events for which it will not be feasible to treat excess CSO flows to meet currently applicable water quality criteria for full body contact recreation. Moreover, CSO discharges to the St. Joseph River, the City’s highest quality waterway, will be markedly reduced under the LTCP such that only a single annual overflow event in the “typical year” will occur for which it will not be feasible to treat excess CSO flows to meet water quality criteria for full body contact recreation. This represents an exemplary level of control for previously uncontrolled wet weather discharges of combined sewage to the City’s CSO-Impacted Waters.

Since the initial approval of the Consent Decree, Fort Wayne has received approval for two modifications to the Consent Decree that provide improved performance and/or accelerated completion dates for LTCP control measures.

- Modification #1 was approved on January 26, 2015 in U.S. District Court for the Northern District of Indiana. This modification eliminated the original LTCP concept of satellite disinfection and storage for the St. Joseph River CSOs and revised the LTCP scope to provide for conveying those flows to the WWTP for full treatment.
- Modification #2 was approved on May 23, 2019 in U.S. District Court for the Northern District of Indiana. This modification allows for the elimination of all remaining satellite disinfection facilities from the LTCP and their replacement by relief sewers or storage facilities. More significantly, this modification also provides for the replacement of the original Wayne Street and St. Marys parallel interceptor projects with a deep rock tunnel and relief sewer.

...

To achieve the LTCP progress identified in Table 1, the City has invested significantly in its infrastructure. In the years 2008–2018, the City has already made capital investments of over \$187 million in LTCP projects and is currently projecting a total capital investment of approximately \$340 million to complete the LTCP. (Footnotes omitted).

To date, the LTCP represents the largest construction and public investment project ever in the City of Fort Wayne. <http://www.cityoffortwayne.org/latest-news/3770-mayor-henry-leads-groundbreaking-for-largest-infrastructure-project-in-fort-wayne-history.html>. The total cost to the City’s ratepayers to implement the LTCP is expected to be \$340 million (in 2005 dollars). UAA at 9.

As noted above, the LTCP, including the LTCP’s performance criteria reflecting the LTCP’s specified level of CSO control of four CSOs per typical year for most waterways and one CSO per typical year for St. Joseph River, was originally approved upon entry of the consent decree in December 2007. Fort Wayne has met all the consent decree construction deadlines and is scheduled to complete implementation of its LTCP and achieve the performance criteria by the originally agreed upon date of December 31, 2025. Following implementation of its LTCP, Fort Wayne will be required to perform post-construction compliance monitoring of its CSOs in accordance with the consent decree and its NPDES permit.

**d. Indiana’s primary contact *E. coli* recreation criteria apply at all times during the recreational season unless a number of conditions are met, including that Fort Wayne has successfully implemented its approved LTCP and achieved the level of CSO control required by the approved LTCP.**

IDEM’s regulations provide that specific CSO-impacted waters can be placed into the CSO wet weather limited use subcategory prior to a CSO community’s completion of implementation of the approved LTCP. *See* 327 IAC 2-1-3.1. Indiana’s statutory provisions (IC § 13-18-3-2.5)



creating the CSO wet weather limited use subcategory make clear that, once IDEM places specific CSO-impacted waters into the subcategory and that action is approved by EPA under 40 CFR Part 131 and becomes effective for CWA purposes for the specific waters, Indiana's primary contact *E. coli* recreation criteria apply at all times unless a number of conditions specific to the CSO-impacted waters are met, including that the approved LTCP has been implemented. IDEM has clarified that the phrase "after implementation of the [LTCP]" in IC § 13-18-3-2.5 includes both that the measures in the LTCP have been constructed and that the LTCP's performance criteria have been achieved. When the specified conditions are met, the *E. coli* criteria do not apply during and for periods of not more than four days after CSO discharges occur that are consistent with the performance criteria contained in the City's approved LTCP.

**e. The State's submittal demonstrated that, following implementation of Fort Wayne's LTCP, pollution sources other than CSOs will continue to cause Fort Wayne's waterways to frequently exceed Indiana's primary contact *E. coli* recreation criteria during periods when CSOs are not occurring.**

The supporting documentation submitted by the State demonstrated that Fort Wayne's CSO-impacted waterways currently frequently exceed Indiana's single sample maximum *E. coli* criterion to protect Indiana's primary contact recreation use criterion of 235 cfu per 100/mL due to CSOs and several non-CSO sources including stormwater, septic systems, agricultural areas, livestock, domesticated animals, and wildlife. LTCP at 2-15 and UAA at 35-36 and 51. The State's supporting documents also demonstrated that its CSOs currently were responsible for substantially increasing the magnitude of the exceedances of Indiana's single sample maximum *E. coli* criterion. Specifically, the documents demonstrated that prior to Fort Wayne's implementation of the LTCP, CSOs occurred on average 71 times per year contributing to in-stream *E. coli* concentrations in the tens to hundreds of thousands of cfu per 100/mL. LTCP at 2-23 and 2-38. Monitoring data from the affected waterways indicates that within the CSO-affected area, samples exceed Indiana's single sample maximum *E. coli* criterion 52% of the time on the St. Mary's River and 40% of the time on the St. Joseph River. UAA at 29. Once the LTCP is implemented, CSOs are projected to occur four times per year on average for the St. Mary's and Maumee rivers and one time per year for the St. Joseph River. LTCP at 4-4. Thus, implementation of the LTCP will reduce public health risks by reducing the number of days when in-stream *E. coli* concentrations exceed 235 cfu per 100 mL and by drastically reducing the number of days that in-stream *E. coli* concentrations are above 10,000. However, the UAA summarized the available monitoring data from 2016-2018 both within and upstream of the CSO-affected areas of the Fort Wayne-area waterways. The monitoring data indicated that sites located upstream of the CSO-affected areas exceed Indiana's single sample maximum *E. coli* criterion 43% of the time on the St. Mary's River and 35% of the time on the St. Joseph River. UAA at 29. Because the upstream monitoring sites do not receive any CSO discharges, the UAA concluded that the exceedances were caused by non-CSO sources of bacteria. Therefore, notwithstanding the important benefits that will result from implementation of the LTCP, even when CSOs are not discharging, non-CSO sources will continue to regularly cause Fort Wayne-area waterways to exceed Indiana's single sample maximum *E. coli* criterion of 235 cfu per 100/mL to protect Indiana's primary contact recreation use.

**f. The State’s submittal has demonstrated that more recreation is expected in the CSO-impacted waterways during low flow conditions than during large storms, when waters exhibit increased velocities, flow rates and depths.**

The supporting documentation provided by the State provided extensive evidence that more people are expected to recreate in Fort Wayne’s CSO-impacted waterways during low flow conditions than during the large storm events that will be necessary to cause CSOs to occur after the City has implemented its LTCP.

The City performed an “existing use” evaluation of whether and when recreational activities occur in the CSO-impacted waterways. Based on weekly inspections along the waterways, public stream use surveys and surveys of organizations with known high interest in the rivers, that evaluation demonstrated that significantly more people wade, swim, kayak or partake in other primary contact recreation activities during low flow conditions than during the types of large storm events that would result in CSOs following implementation of the City’s LTCP. UAA at 17-20.

One of the primary reasons identified by the City for why more people recreate in Fort Wayne’s CSO-impacted waterways during low flow conditions than during the storm events that would result in CSOs following implementation of the LTCP is that high flow conditions during and after those storm events make primary contact recreation activities unsafe. Specifically, the City demonstrated that:

- All the water bodies proposed to be designated with revised recreation uses are relatively shallow, wadable rivers, streams and creeks that United States Geological Survey (USGS) personnel typically monitor via wading, unless such personnel determine that flow conditions render wading unsafe. Where USGS personnel determine that wading is unsafe, they monitor the water bodies using a non-wading method, typically from a bridge. USGS personnel note in their field sheets which monitoring method (wading or non-wading) was used and the flow conditions that led them to decide not to wade.
- The City obtained the USGS monitoring field sheets and compared the peak flows, velocities and depths that were present when USGS personnel determined that it would be unsafe to wade in each specific water body to the peak flows, velocities and depths that would occur during the very large storm events that will result in CSOs following the City’s implementation of the LTCP. Those comparisons demonstrated that the peak flows during CSO events will be 2-22 times higher than the flows that USGS personnel deem to be unsafe for wading, the peak velocities will be 1-3 times higher, and the peak depths will be 1.3-10 times higher. UAA at 47.
- The City considered data from USGS monitoring sites located both within the CSO-affected area and upstream of the CSO-affected area. At monitoring sites upstream of the CSO-affected area, the City demonstrated that peak flows, velocities, and depths that are expected during the large storm events that will result in CSOs following the City’s implementation of the LTCP will be higher than the flows that USGS personnel deem to be unsafe for wading. Therefore, even if CSO volumes are removed from the total flows in those streams, the high flow conditions in those streams would still be

several times higher than the flows, velocities and depths that USGS personnel deem to be unsafe for wading.

- Water quality and hydrologic modeling conducted by the City indicate that the high flow conditions render recreation unsafe in these waters both during and after the CSOs. As described in Table 7.2-1 of the UAA, Fort Wayne determined that the high flow conditions during which the City's remaining CSOs will occur are expected to persist for 48 hours on Natural Drain #4, Spy Run Creek, Baldwin Ditch and Harvester Drain and 96 hours on all other CSO-impacted waterways.
- The City has a public notification and education program in place to warn the public to not enter the CSO-impacted waterways following CSO events. This education and notification program could also be used to warn the public to not enter the waterways during unsafe flow conditions. UAA at 73.

EPA has previously determined that for relatively shallow, wadable waters, historic data on USGS staff decisions as to whether it is safe to wade in the waters can be a useful proxy for evaluating whether it is safe to engage in primary contact recreation activities (e.g., see *EPA's Review of Revisions to Indiana's Water Quality Standards: CSO Wet Weather Limited Use Designation for White River, Fall Creek, Little Eagle Creek, Pogues Run, Pleasant Run and Bean Creek (327 IAC 2-1-11.5) and Revisions to CSO Wet Weather Limited Use (327 IAC 2-1-3.1) Under Section 303(c) of the Clean Water Act*, dated July 29, 2020, and Case Study on "Suspension of Recreational Beneficial Uses in Engineered Channels during Unsafe Wet Weather Conditions" in *UAAs and Other Tools for Managing Designated Uses*, EPA 821-R-07-001 (March 2006)).

**g. The State submittal demonstrated that Fort Wayne has implemented and anticipates that it will continue implementing measures other than CSO control to reduce bacterial contamination from other sources of pollution and to otherwise increase the opportunities for safe recreational use of Fort Wayne's waterways.**

Fort Wayne identified several ongoing and potential future efforts to reduce the non-CSO sources of pollution identified above that contribute to exceedances of Indiana's single sample maximum *E. coli* criterion in the CSO-impacted waterways. These non-CSO sources thus also affect the ability of the public to safely recreate in these waters. Specifically, in the LTCP and UAA, the City identified the ongoing activities listed below to address stormwater and failing septic systems. As discussed above, control of these non-CSO sources would be necessary to achieve attainment of Indiana's *E. coli* criterion to protect primary contact recreation in these specific waters regardless of the reduction of CSO events.

- Through its NPDES municipal separate storm sewer system (MS4) program, the City expects implementation of stormwater controls to result in pollutant loading reductions. Fort Wayne described plans to revise the City's Stormwater Quality Management Plan and stormwater ordinances to require new development and significant redevelopment projects to meet post-construction stormwater runoff control requirements through the use of best management practices (BMPs) that promote infiltration of stormwater and reduce pollutants in stormwater. As discussed in Section II.A.1.e above, the City's UAA identified stormwater as one of the non-CSO sources of pollutants contributing to

exceedances of Indiana's single sample maximum *E. coli* criterion to protect its primary contact recreation use. Therefore, the City expects implementation of stormwater controls to result in pollutant loading reductions to these waters and potential reductions in exceedances of Indiana's single sample maximum *E. coli* criterion.

- The City implements a watershed-based strategy for restoring stream banks to improve water quality. As discussed in the LTCP, the streambank restoration program is intended to reduce nonpoint source pollution, which may include pathogens. Additionally, the City expects streambank restoration activities to improve dissolved oxygen levels in the waterways.

The City's February 15, 2023 letter describes several other programs that Fort Wayne implements or contributes to in order to reduce non-CSO sources of bacteria that would be necessary to achieve attainment of Indiana's *E. coli* criterion to protect primary contact recreation.

- The City implements a Septic System Removal program to eliminate septic systems that contribute bacteria to rivers and streams. Between 2009 and 2022, the City removed more than 2,074 septic systems.
- The City implements a program to maintain and expand urban trees to help mitigate storm runoff.
- The City participates and provides financial and technical support to several local watershed groups. These groups implement programs to improve water quality in Fort Wayne-area waterways, including promoting good farming practices to improve manure management and reduce agricultural runoff.
- The City participates in the Western Lake Erie Basin and Great Lakes Nutrients Annex (Annex 4) and Domestic Action Plans, which are intended to reduce nutrient loading to area waters. The Domestic Action Plans detail the work planned within the basin to reduce nutrients, and tangentially, *E. coli*, which include implementing regulatory and non-regulatory measures to reduce phosphorous loadings from agricultural, rural non-farm, urban, and industrial point and nonpoint sources; ensuring farms comply with the State's limits for manure application; ensuring confined feeding operations comply with design, construction, and capacity requirements for confinement buildings, manure storage structures, and other waste management structures; and ensuring manure application is conducted consistent with land application requirements including setbacks, application at agronomic rates, and avoiding weather conditions that could lead to contaminated runoff, such as restrictions on application to frozen and snow-covered ground.
- The City operates a rain garden program to promote the installation of rain gardens to reduce urban stormwater runoff.

## **2. Whether attaining the primary contact recreation designated use is not feasible because of one of the factors specified in 40 CFR § 131.10(g).**

Where states adopt a new or revised designated use based on one of the six factors at 40 CFR § 131.10(g), the new or revised designated use must reflect the highest attainable use, as defined at 40 CFR § 131.3(m) (*See* Section II.A.3).

EPA provided more specificity at 80 Fed. Reg. 51,025:

When conducting a UAA and soliciting input from the public, states and authorized tribes need to consider not only what is currently attained, but also what is attainable in the future after achievable gains in water quality are realized. EPA recommends that such a prospective analysis involve the following:

- Identifying the current and expected condition for a waterbody;
- Evaluating the effectiveness of best management practices (BMPs) and associated water quality improvements;
- Examining the efficacy of treatment technology from engineering studies; and
- Using water quality models, loading calculations, and other predictive tools.

EPA's regulation at 40 CFR § 131.5 further specifies how EPA evaluates any submission of new or revised WQS from a state and the accompanying supporting documentation. Specifically, 40 CFR § 131.5 provides that in determining whether to approve or disapprove a WQS submission, EPA's review includes determining whether the state has adopted designated uses consistent with the CWA (40 CFR § 131.5(a)(1)), and whether any WQS that do not support the uses specified in CWA Section 101(a)(2) "are based upon appropriate technical and scientific data and analyses" (40 CFR § 131.5(a)(7)).

One of the six factors in 40 CFR § 131.10(g) (40 CFR § 131.10(g)(3)) is that "[h]uman caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place." In 40 CFR § 131.10(g)(3), the phrase "would cause more environmental damage to correct than to leave in place," could refer to a scenario where dredging a waterbody to remove contaminated sediment may stir up the pollutant and increase pollutant availability in the water column, thus causing more environmental damage to the waterbody compared to leaving the contaminated sediment in place.

EPA also believes it is reasonable to interpret the phrase to include environmental benefits that would be forgone if the state, authorized tribe, and/or discharger(s) were to "correct" the human caused condition or source of pollution rather than implement an alternative pollutant reduction option<sup>5</sup> that could achieve a greater environmental benefit. This interpretation involves comparing the environmental benefit that would be gained from implementing a pollutant reduction option that would "correct" the human-caused condition or source of pollution with the environmental benefit that would be gained from implementing an alternative pollutant reduction option(s). If the alternative pollutant reduction option(s) would result in a greater environmental benefit, then correcting the human-caused condition or source of pollution may "cause more environmental damage" to correct the human-caused condition or source of pollution if it precluded pursuing the more environmentally beneficial alternative option(s). Such alternatives could include controls on point and nonpoint sources because WQS express the desired condition

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<sup>5</sup> Pollutant reduction options could include pollutant reduction technologies and/or pollution prevention and source reduction measures.

and level of protection for a waterbody, including consideration of the contributions of pollutants from point and nonpoint sources.<sup>6</sup>

Either interpretation may be an appropriate application of the “environmental damage” portion of 40 CFR § 131.10(g)(3), depending on the case-specific situation.

One example of a situation where “environmental damage” may refer to forgone environmental benefits is in the context of remaining CSOs from communities with combined sewer systems. In accordance with the CSO Policy, most CSO communities have developed LTCPs that identify the CSO control projects they will implement to meet applicable WQS requirements. Some communities may see monitoring data indicating that the level of control achieved after implementing CSO controls is not sufficient for the waterbody to attain WQS. In such cases, consistent with the CSO Policy and the CWA, many communities may need to consider implementing additional CSO controls and/or evaluating other available options, as provided in the CSO Policy. These options include revising WQS through adoption of a temporal designated use<sup>7</sup> or WQS variances. For example, a state or authorized tribe may be able to demonstrate that a community can achieve greater environmental benefits, in terms of increased opportunities for safe recreation, by controlling certain non-CSO sources of bacteria (*e.g.*, stormwater pollution) compared to controlling the remaining CSOs that occur during very large storms when the public is less likely to recreate due to safety considerations. Thus, prioritizing implementation of non-CSO stormwater control projects could achieve a greater environmental benefit than implementing the CSO controls.

EPA reviewed the supporting documentation specific to Fort Wayne submitted by Indiana and, as discussed below, concludes that the State demonstrated that Fort Wayne can achieve greater environmental benefits, in terms of increased opportunities for safe recreation, by controlling non-CSO sources of bacteria compared to controlling the remaining CSOs that occur during large storms when the public is less likely to recreate due to safety considerations.

The supporting documentation submitted by the State demonstrates that Fort Wayne has committed to implementing an LTCP consistent with the CSO Policy, its state and federally-approved LTCP through a federal consent decree with the United States and State of Indiana, and Indiana’s 1996 *Combined Sewer Overflow Strategy*, that requires the City to achieve the specified level of CSO control by December 31, 2025, as originally agreed upon. This work, which must be implemented before the less stringent *E. coli* requirements pertaining to post-LTCP CSOs established by the WQS revisions at issue here will be applicable under State law, will substantially reduce public health risks and improve the recreational potential of the area’s waterways by eliminating all but a small number of CSO discharges (four or fewer in a typical year) that occur during heavy rain events when recreation is less likely to occur due to high flow conditions in Fort Wayne’s otherwise wadeable waterways.

As also described in the supporting documentation submitted by the State and summarized above in the background section of this document (Section II.A.1), although implementation of the

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<sup>6</sup> 80 Fed. Reg. 51,021

<sup>7</sup> A temporal designated use, such as a temporal recreation use in this example, would reflect when the recreation use can be attained and when it cannot be attained during the span of the year.

LTCP will significantly decrease public health risks by eliminating CSO impacts to the waterways except for during and immediately after large storms, Fort Wayne has demonstrated that human-caused sources of pollution from both CSO and non-CSO sources will still cause *E. coli* levels to exceed Indiana's single sample maximum *E. coli* criterion of 235 cfu/100 mL. For a total of 30 hours per typical year, CSOs will still contribute to exceedances of Indiana's single sample maximum *E. coli* criterion. However, as discussed in Section II.A.1.f above, the supporting documentation submitted by the State demonstrated that recreation currently does not occur and is less likely to occur due to safety concerns during the high flow conditions that coincide with when its occasional, CSOs will occur after implementation of the City's LTCP (four or fewer in a typical year). Therefore, while CSO discharges will continue to cause *E. coli* levels to exceed Indiana's single sample maximum *E. coli* criterion, the UAA information showing that fewer people recreate during these large storm events in Fort Wayne's waters demonstrates that there would be little appreciable gain in opportunities for safe public recreation if the community were to implement additional controls to prevent CSO discharges that would occur after implementation of its LTCP. As discussed in Section II.A.1.e above, 35-43% of the time, the *E. coli* would be entirely the result of sources other than Fort Wayne's CSOs. Given that these exceedances occur during lower flow conditions when recreation is more likely to occur than the high flow conditions that will be present when CSOs are occurring, addressing these exceedances would greatly reduce the public health risks when exposure is potentially greater and improve the recreational potential of area waterways. Consequently, activities to reduce non-CSO sources of pathogens would provide a greater environmental benefit than activities to prevent CSO discharges beyond the level of control required by the City's LTCP.

Finally, in evaluating the feasibility of attaining the primary contact recreation use, it is important to keep in mind that municipalities and the public who provide the funds for municipalities have limited resources to address water quality problems that would involve funding sewer system improvements and other necessary services and infrastructure improvements. Focusing on further CSO control could limit Fort Wayne's ability to address its most serious water quality issues first. For the past few decades, CSO control has been a high priority for Fort Wayne, as is evident from the large amount of financial and other resources Fort Wayne has expended to implement its LTCP. Once that work is completed, it is reasonable to believe that further investments in CSO controls would no longer be addressing Fort Wayne's highest priority water quality issues. Specifically, Fort Wayne spent \$340 million to develop and implement its LTCP to reduce CSOs from 71 per typical year down to 4 or fewer per typical year (approximately \$5.1 million per CSO event reduced). As noted above in Section II.A.1.c, this is considered "the largest construction and public investment project in the City's history." If Fort Wayne continues investing its resources to reduce CSOs even further (at an estimated cost of \$28.5 million for each additional typical year CSO event eliminated, or nearly 5.5 times more per CSO event than the cost of its current LTCP), that would likely come at the expense of Fort Wayne funding other projects or services to improve water quality and provide increased opportunities for safe recreation to its public, such as the City's septic elimination program, stormwater management activities, and watershed manure management activities (all discussed above), which all contribute to reducing the number of exceedances of Indiana's single sample maximum *E. coli* criterion. As shown by the information that the public is not recreating during the large storm events that cause the residual CSO events, investing such a large amount of Fort Wayne's municipal resources to remove even just one more overflow would result in a minimal

increase in opportunities for safe recreation consistent with the designated use. However, as discussed above, prioritizing these resources to address non-CSO pollution/bacteria sources and other impediments to increased recreational use of Fort Wayne's waterways would have a greater environmental impact by providing more opportunities for safe recreational uses due to reductions in pollutant loading during lower flow conditions when the public is more likely to recreate.

40 CFR § 131.10(g)(3) provides that the infeasibility demonstration requirement in 40 CFR § 131.10(g) can be met by demonstrating that “[h]uman caused conditions or sources of pollution prevent attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.” Based on the supporting documentation provided by Indiana, EPA concludes both that “human caused conditions or sources of pollutants [*i.e.*, residual, post-LTCP CSOs] prevent attainment of the use” and that it “would cause more environmental damage to correct [the residual, post-LTCP CSOs] than to leave in place” and so 40 CFR § 131.10(g)(3) is satisfied based on all of the following:

- (a) the City of Fort Wayne will complete implementation of its state and federally-approved LTCP in accordance with the CSO Policy, its federal consent decree with the United States and the State, and achieve a level of control of four CSOs per typical year or better (one CSO for the St. Joseph River);
- (b) rather than requiring its CSO communities to invest additional resources to reduce CSOs beyond the level of control required by state-approved LTCPs, the State of Indiana has determined that “[u]pon implementation of the approved long term control plan, the plan fulfills the water quality goals of the state with respect to wet weather discharges that are a result of overflows from the combined sewer system addressed by the plan;” IC § 13-18-3-2.3(a);
- (c) because of Fort Wayne's level of CSO control, CSOs will only occur during very large storms, when data shows that primary contact recreation is not an existing use and fewer people are expected to recreate during these large storms because flow conditions (dramatically increased velocities, flow rates and depths) render the impacted waterways physically unsafe for primary contact recreation;
- (d) the high flow conditions that correspond to periods when residual CSOs will occur after implementation of the LTCP will persist both during and after the CSO discharges;
- (e) following implementation of its LTCP, impacted waterways are expected to exceed the state's primary contact recreation *E. coli* criteria due to sources of *E. coli* other than CSOs approximately 35-43% of the time, including during periods when CSOs are not occurring and when the public is more likely to recreate on or in these waters;
- (f) the community is prioritizing and anticipates it will continue to prioritize efforts and resources to increase the opportunities for safe recreation consistent with the designated use by implementing measures to address non-CSO sources of *E. coli* and other impediments to increased recreational use of area waterways; and



(g) prioritizing resources to address non-CSO pollution sources and other impediments in these specific waters of Fort Wayne would lead to increased safe recreational use of area waterways and thus a greater environmental benefit than implementing further CSO controls beyond the LTCP commitments.

Thus, human-caused sources of pollution (*i.e.*, CSO discharges that will occur after full implementation of the City's LTCP) will prevent attainment of the use (*i.e.*, primary contact recreation) and it "would cause more environmental damage to correct" the CSO sources of *E. coli* (*i.e.*, to require controls in addition to implementation of the approved LTCP to further reduce CSOs beyond four CSOs in the typical year) than to leave those sources (*i.e.*, CSOs remaining after implementation of the approved LTCP) in place. This is because requiring further CSO controls after Fort Wayne's implementation of the approved LTCP would inhibit the City of Fort Wayne's ability to prioritize its resources to implement activities that would have greater environmental benefit than further CSO controls. Specifically, the City could achieve greater environmental benefits in terms of increased opportunities for safe recreation through reducing *E. coli* contributions from non-CSO sources that prevent safe recreation during times the public is most likely to recreate in these specific waters. By contrast, further CSO control beyond the level of control specified in the originally approved LTCP would reduce *E. coli* during high flow conditions when the City of Fort Wayne has documented that fewer people recreate and that it is unsafe for the public to recreate. Consequently, EPA concludes that Indiana's revised WQS satisfy 40 CFR § 131.10(g) in that "[h]uman caused conditions or sources of pollution [*i.e.*, residual CSOs remaining after implementation of the LTCP] prevent attainment of the use and ... [it] would cause more environmental damage to correct than to leave [those CSOs] in place."

### **3. Whether the State adopted the highest attainable use for each of the waterways affected by the revised WQS.**

40 CFR § 131.10(g) requires that "[i]f a State adopts a new or revised water quality standard based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in §131.3(m)." 40 CFR § 131.3(m) defines the highest attainable use as

the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability.

As noted above, Indiana's existing statutory provisions (IC § 13-18-3-2.5) that created the CSO wet weather limited use subcategory provide that once IDEM places specific CSO-impacted waters into the subcategory and that decision is approved by EPA under 40 CFR Part 131 and becomes effective for CWA purposes for the specific waters, then:

(1) The water quality-based requirements associated with the CSO wet weather limited use subcategory that apply to waters affected by wet weather combined sewer overflows are determined by an approved long term control plan for the combined sewer system. The water quality-based requirements remain in effect during the time and to the physical

extent that the recreational use designation that applied to the waters immediately before the application to the waters of the CSO wet weather limited use subcategory is not attained, but for not more than four (4) days after the date the overflow discharge ends.

(2) At all times other than those described in subdivision (1), the water quality criteria associated with the appropriate recreational use designation that applied to the waters immediately before the application to the waters of the CSO wet weather limited use subcategory apply unless there is a change in the use designation as a result of a use attainability analysis.

327 IAC 2-1.1-3, which designates the seven Fort Wayne waters with the CSO wet weather limited use, includes the following water quality-based requirements for these waters:

(b) The water quality-based requirements for the CSO wet weather limited use subcategory:

(1) are determined by the December 2007 approved LTCP for the combined sewer system as updated by the modified Consent Decree, Case No. 2:07\_cv\_00445, entered by the United States District Court for the Northern District of Indiana; and

(2) require that CSO events that occur be consistent with the performance criteria contained in the approved LTCP, including its maximums of:

(A) one (1) annual, untreated CSO event per typical year to the St. Joseph River; and

(B) four (4) annual, untreated CSO events per typical year to waters other than the St. Joseph River.

Consistent with the determination in Section II.A.2 above that requiring additional CSO control beyond the level that will be achieved following implementation of the approved LTCP will cause more environmental damage than to leave in place, and so attaining primary contact recreation uses and criteria at all times in all places for these seven waters due to the CSO discharges remaining after implementing the approved LTCP is not feasible, Indiana's revised WQS at 327 IAC 2-1.1-3(b) establish the highest attainable use as one that only allows CSO discharges that are consistent with the City's approved LTCP. As provided at IC § 13-18-3-2.5(2), the State is adopting a CSO wet weather limited use that applies Indiana's *E. coli* criteria to protect primary contact recreation in these waters at all times except for during and for periods of not more than four days after CSO discharges occur that are consistent with the performance criteria contained in the City's approved LTCP. Specifically, for each CSO discharge allowed under the CSO wet weather limited use, Indiana's revised WQS at 327 IAC 2-1.1-3(b) limit the duration of this period to only the time during which the CSO discharge prevents attainment of Indiana's recreational criteria, and in no case more than four days after the CSO discharge ends. Additionally, neither Indiana's regulation establishing the CSO wet weather limited use nor its regulation applying that use designation to the seven Fort Wayne waters allow the discharge of non-CSO sources of bacteria that would exceed Indiana's

statewide *E. coli* criteria or otherwise change the applicable WQS regarding non-CSO sources of bacteria.

Because the water quality-based requirements for the CSO wet weather limited use designation for these waters provide for safe primary contact recreation at all times except for during and up to four days following CSO discharges after implementation of the City's approved LTCP, EPA concludes that the designation of the CSO wet weather limited use for the seven waters affected by these revisions is consistent with the requirement at 40 CFR § 131.10(g) for states to adopt the highest attainable use as defined in 40 CFR § 131.3(m).

**B. Whether the State has adopted criteria that protect the designated water uses based on sound scientific rationale consistent with § 131.11. (40 CFR § 131.5(a)(2))**

40 CFR § 131.11(a) provides that

States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.

Indiana's revised WQS at IC § 13-18-3-2.5(2) apply the State's EPA-approved *E. coli* criteria for protection of primary contact recreation at all times except for periods during and not more than four days after CSO discharge occurrences that are consistent with the performance criteria contained in the City's approved LTCP. Therefore, EPA concludes that Indiana's revised WQS for the seven waters are consistent with 40 CFR § 131.5(a)(2) and § 131.11(a).

**C. Other items that EPA is taking action on.**

In addition to the revisions discussed above, Indiana made several non-substantive revisions that (a) establish a new section in Indiana's Administrative Code (327 IAC 2-1.1) to contain the use designations and water quality-based requirements for waters designated with the State's CSO wet weather limited use (without changing the CSO wet weather limited use or establishing any new or revised requirements for that use), (b) move the use designations and water quality-based requirements for seven water bodies near Indianapolis from 327 IAC 2-1-11.5 to 327 IAC 2-1.1-2 (without changing those use designations and water quality-based requirements), (c) adding and updating cross-references in 327 IAC 2-1-3.1 to address these revisions, and (d) making grammatical edits to 327 IAC 2-1-3.1.

As discussed in EPA's 2012 document, titled "What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions," EPA considers non-substantive edits to existing WQS to constitute new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA Section 303(c)(3).

While such revisions do not substantively change the meaning or intent of the existing WQS, EPA believes that it is reasonable to treat such non-substantive changes in this manner to ensure public transparency as to which provisions are effective for purposes of the CWA. EPA notes that the scope of its review and action on non-substantive edits or editorial changes extends only

to the edits or changes themselves. EPA does not reopen or reconsider the underlying WQS that are the subject of the non-substantive edits or editorial changes.

EPA reviewed these non-substantive revisions and concludes that these revisions do not change the meaning or implementation of the State's existing federally-approved WQS. Therefore, EPA approves these revisions.

**D. Whether the State has followed applicable legal procedures for revising or adopting standards. (40 CFR § 131.5(a)(6))**

In a letter prepared for IDEM and submitted to EPA with the adopted WQS revisions, John D. Walls from the Indiana Office of the Attorney General certified that the regulations were duly adopted in accordance with Indiana state law.

In adopting the regulations, the State also provided opportunities for public input consistent with federal requirements at 40 CFR § 131.20(b) and 40 CFR Part 25. On July 7, 2021, Indiana published on its website and in the *Indiana Register* notice of a public hearing to be held on November 10, 2021. The notice was accompanied by a copy of the proposed regulation and links to all supporting documentation. As specified in the notice, the agency held a public hearing in Fort Wayne, Indiana on November 10, 2021. Indiana also published a notice requesting written comments on May 12, 2021 and accepted written comments on its proposal through June 11, 2021. IDEM did not receive any comments either in writing or at the public hearing.

As described above, the IDEM publicized the public hearing more than 45 days prior to the date of the hearing, recorded the hearing and met other requirements for public hearings specified at 40 CFR § 25.5. Consequently, EPA concludes that the State satisfied the public participation requirements of 40 CFR § 131.20(b).

**E. Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based on appropriate technical and scientific data and analyses. (40 CFR § 131.5(a)(7))**

Indiana's revised designated uses for the seven stream segments do not provide for the "recreation in and on the water" use specified in Section 101(a)(2) of the CWA. As discussed in Section II.A above, the designation of the CSO wet weather limited use for these stream segments is based on appropriate technical and scientific data and analysis.

As discussed in Section II.B above, IDEM's revised WQS apply criteria that are protective of the CSO wet weather limited use. Consequently, EPA concludes that the State based all use

designations which do not include the uses specified in Section 101(a)(2) on appropriate technical and scientific data and analyses.

**F. Whether the State submission meets the requirements included in §131.6 of this part and, for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR § 132.2) to conform to section 118 of the Act, the requirements of 40 CFR 132. (40 CFR § 131.5(a)(8))**

40 CFR § 131.6 identifies the minimum requirements of a WQS submission. As described below, IDEM's submittal meets all the relevant requirements of 40 CFR § 131.6.

**1. Minimum requirements for WQS submission (40 CFR § 131.6)**

**a. Use designations consistent with the provisions of section 101(a)(2) and 303(c)(2) of the Act (40 CFR § 131.6(a))**

As discussed in Section II.A above, all of the revised designated uses were supported with a UAA consistent with 40 CFR § 131.10(j).

**b. Methods used and analyses conducted to support WQS revisions (40 CFR § 131.6(b))**

The State's submittal on May 11, 2022 identified the analyses and documents it used to develop the WQS revisions, which included Fort Wayne's UAA.

**c. Water quality criteria sufficient to protect the designated uses (40 CFR § 131.6(c))**

As discussed in Section II.B above, the criteria that apply to protect the CSO wet weather limited use for these seven stream segments are consistent with 40 CFR § 131.11.

**d. An antidegradation policy consistent with 40 CFR 131.12 (40 CFR § 131.6(d))**

These revisions do not affect Indiana's existing, EPA-approved and effective antidegradation policy.

**e. Certification by the State Attorney General or other appropriate legal authority within the State that the WQS were duly adopted pursuant to State law (40 CFR § 131.6(e))**

Indiana's Office of the Attorney General certified the regulations in a letter signed by John D. Walls, Chief Counsel, Advisory Division.

**f. General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State**

**standards which may affect their application and implementation  
(40 CFR § 131.6(f))**

As discussed in Section II.A above, Indiana submitted documentation based on appropriate technical and scientific data and analyses for all use designations that do not include the uses specified in Section 101(a)(2) of the CWA. The data and analysis used to support the use designations are listed in Section II.F.1.b.

The revised WQS do not remove, affect or include any general policies applicable to Indiana's WQS that may affect their application and implementation.

**2. Requirements of 40 CFR Part 132**

The requirements of 40 CFR Part 132 are not applicable with respect to this action because the water bodies addressed by today's action are not in the Great Lakes System.

**III. Endangered Species Act Requirements**

Consistent with Section 7 of the Endangered Species Act and 50 CFR Part 402, EPA is required to consult with the U.S. Fish and Wildlife Service on any action taken by EPA that may affect federally-listed threatened or endangered species or their critical habitat. Actions are considered to have the potential to affect listed species if listed species are present in the action area.

As discussed in Section III of this document, Indiana's adopted use revisions pertain to a recreational designated use intended to protect human health and is unrelated to the protection of aquatic life or wildlife. Therefore, EPA concludes that it has no discretionary authority to take protection of listed species into consideration in its review of the adopted revisions and thus, consultation with the U.S. Fish and Wildlife Service (FWS) is not required. The rationale for this decision is articulated in the 2009 Memorandum from Benjamin Grumbles, Office of Water Assistant Administrator, which states that:

For [Endangered Species Act] section 7(a)(2) to apply, EPA must be taking an action in which it has sufficient discretionary involvement or control to protect listed species. State WQS actions where EPA has concluded that it lacks such discretion include... [a]pproval of water quality criterion to protect human health... [H]uman health water quality criteria are designed to protect humans, not plants and animals. EPA's discretion to act on a State submission is limited to determining whether the criteria ensure protection of designated uses upon which the criteria are based (*i.e.*, use by humans). Therefore, EPA has no discretion to revise an otherwise approvable human health criterion to benefit listed species.

Consequently, Endangered Species Act consultation requirements do not apply to this action.

#### **IV. Tribal Consultation**

On May 4, 2011, EPA issued the “EPA Policy on Consultation and Coordination with Indian Tribes” to address Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The EPA Tribal Consultation Policy states that “EPA’s policy is to consult on a government-to-government basis with federally recognized Tribes when EPA actions and decisions may affect tribal interests.” There are no tribal lands or ceded territory in the areas impacted by the WQS revisions at issue here and so approval of these use changes will not affect any tribal interests.