INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
We Protect Hoosiers and Our Environment.

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MEMORANDUM

TO: Water Pollution Control Board

FROM: John Nixon
Attorney
Office of Legal Counsel

SUBJECT: Recall and Readoption of LSA Document #06-156 (Pretreatment Streamlining)

DATE: January 14, 2009

Factual Background

The Water Pollution Control Board final adopted the Pretreatment Streamlining rule at its September 10, 2008 meeting. At the suggestion of the Office of the Attorney General during its review of the Pretreatment Streamlining promulgation packet, IDEM has recalled the rule to correct some technical errors in the rule language. On February 11, 2009 IDEM will present its proposed amendments to the rule for the Board's consideration and vote.

Under IC 4-22-2-40, a rule may be recalled at any time before the rule is accepted for filing by the Publisher. Under this same statute, a board may reconsider its adoption action and adopt either an identical rule or a revised rule. IC 4-22-2-40(c). The board need not wait until the recall notice is published before taking action on a recalled rule. IC 4-22-2-40(b).

Reasons for Recall

The Attorney General expressed concern that the final adopted rule language left it unclear which version of the Code of Federal Regulations (CFR) the new rule language meant to incorporate by reference.

327 IAC 5-16-1(d), which is part of the Pretreatment Rule, but was not amended during the rulemaking, provides that "Unless otherwise indicated, any reference to a provision of the Code of Federal Regulations in the pretreatment rules refers to the July 1, 1999, revision." IDEM's intention during the recent rulemaking was to update the Pretreatment Rules and bring them into accord with the latest version of the CFR. However, IDEM failed to provide as part of the new rule language that any incorporation by reference of the CFR incorporated the latest version, not the July 1, 1999 version. In the terms of 327 IAC 5-16-1(d), the language failed to indicate otherwise. Therefore, the sections of the Pretreatment Rule final adopted by the Board in September do not incorporate by reference the correct version of the CFR.

IDEM will present to the Board its suggested changes to the recalled, final adopted rule language that will incorporate by reference the correct version of the Code of Federal Regulations applicable to Indiana's pretreatment program.

Board Action

Under IC 4-22-2-40, the board may readopt a rule after an agency recalls it. The board may adopt either the identical rule or a revised rule. IC 4-22-2-40(c). The rule will then be resubmitted to the AG for approval, submitted to the Governor's office for signature, submitted to the Publisher upon signature, and published as a final rule in the *Indiana Register*.

The agency requests that the board adopt amendments to the rule as it was final adopted and readopt the rule as amended. Any questions you may have regarding the rule or the process of readoption can be answered at the February 11 board meeting.