TITLE 327 WATER POLLUTION CONTROL BOARD

FIRST NOTICE OF COMMENT PERIOD
LSA Document #08-764

DEVELOPMENT OF NEW RULES AND AMENDMENTS TO RULES CONCERNING ANTIDEGRADATION STANDARDS AND IMPLEMENTATION PROCEDURES

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on new rules and amendments to rules concerning antidegradation standards and implementation procedures. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

CITATIONS AFFECTED: 327 IAC 2-1.3; 327 IAC 5-2-11.2; 327 IAC 5-2-11.3; 327 IAC 5-2-11.7.

AUTHORITY: IC 13-18-2-1; IC 13-18-3-1; IC 13-18-3-2; IC 13-18-3-11; IC 13-18-4.

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose and Background

The Clean Water Act (33 U.S.C. 1313(c)) under Section 303(c) specifies that a review of state water quality standards must be done at least every three years. Federal rules require states to develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation. Additional requirements affecting antidegradation rules come from the Indiana General Assembly's requirements found in IC 13-18-3 enacted in the 2000 legislative session under Public Law 140-2000 (also known as SEA 431).

Antidegradation has been considered in rules previously started by IDEM in 1997 (LSA Document #97-1) and 2003 (LSA Document #03-44). Those rules were stymied with controversy and each has been withdrawn. This First Notice of Comment Period will commence the rulemaking process anew and review and consider additions and modifications to Title 327 concerning antidegradation standards and implementation procedures while applying the provisions of IC 13-18-3.

Alternatives To Be Considered Within the Rulemaking

Alternative 1.

Earlier antidegradation rulemakings considered whether or not to extend antidegradation requirements to all surface waters of the state as opposed to maintaining the current antidegradation requirements only applicable to surface waters of Indiana's portion of the Great Lakes Basin. This rulemaking will propose to apply antidegradation requirements to all surface waters of the state.

Alternative 2.

The issue of de minimis has been a difficult subject throughout the history of Indiana's antidegradation rulemakings. This rulemaking will propose a definition of a de minimis discharge that will not be subject to further antidegradation review.

Alternative 3.

De minimis technology-based effluent limitations (DTBELs) are proposed in this rulemaking. The establishment of DTBELs, based on either the federal effluent guidelines or by IDEM's best professional judgment of the best available treatment for pollutants that are not included in the effluent guidelines, will allow antidegradation to be assessed for pollutants without water quality criteria, which cannot be assessed under the current rules that do not address these pollutants.

Alternative 4.

This rulemaking will propose to expand the social or economic justification to include the positive benefits to the area of the discharge as well as the negative impacts that have been considered under the existing rules.

Alternative 5.

This rulemaking will propose, based on IC 13-18-3-2, that any discharge resulting in a significant lowering of water quality in an outstanding state resource water (OSRW) or exceptional use water (EUW) is required to submit an antidegradation demonstration and support a project that results in an overall improvement of water quality in the watershed of the discharge. The discharger may implement a water quality project in the watershed that results in an overall improvement or pay a fee, not to exceed $500,000, based on the cost necessary to reduce the increased pollutant loading to the background concentration.

Alternative 6.

This rulemaking will review the existing conditions and consider simplifying the conditions that trigger an antidegradation evaluation.

Alternative 7.

This rulemaking will propose changes to the cap and applying a cumulative cap on using the unused loading capacity in a high quality water (HQW) and an OSRW.

Applicable Federal Law

The federal rules require states to have, at a minimum, three tiers of antidegradation. Tier 1 (40 CFR 131.12(a)(1)) protects existing uses by providing the absolute floor of water quality in all waters of the United States. Tier 2 (40 CFR 131.12(a)(2)) applies to waters whose quality exceeds that necessary to protect the Section 101(a)(2) goals of the Clean Water Act (criteria, 33 U.S.C. 1251(a)(2)). In this case, water quality may not be lowered to less than the level necessary to fully protect the "fishable/swimmable" uses and other existing uses. Water quality in Tier 2 waters may only be lowered after a determination is made that allowing lowered water quality is necessary and will accommodate important economic or social development in the area in which the waters are located. Any such lowering must still assure water quality adequate to protect existing uses fully. Tier 3 (40 CFR 131.12(a)(3)) applies to ONRWs where the ordinary use classifications and supporting criteria may not be sufficient or appropriate. States may allow some limited activities that result in temporary and short-term changes in water quality in the ONRW, but such changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW. Currently, Indiana has no ONRWs.

Potential Fiscal Impact

The proposed alternatives are provisions required by or developed with regard to the requirements of IC 13-18-3 (SEA 431); therefore, as rule requirements, they provide no additional fiscal impact beyond that which is required under statute. As a concept, antidegradation only applies to a subset of wastewater dischargers, those who intend to create a new or increased discharge and cannot meet a de minimis increase. Anticipating which or how many dischargers, if any, will be affected by antidegradation is entirely speculative. It may be that no existing or new dischargers will be affected by antidegradation because a discharger can make choices to prevent triggering an antidegradation review.

Indiana's current antidegradation requirements were developed under the Great Lakes Initiative of the 1990s and apply only to dischargers to the Great Lakes System. This rulemaking proposes to implement antidegradation rules across the entire state. Dischargers outside of the Great Lakes System have not previously been required to comply with antidegradation rules and could experience a new cost associated with a new or increased discharge with regard to meeting antidegradation requirements. The fiscal impact to any discharger that triggers an antidegradation review will depend on the type of discharge, the receiving waterbody, and other variable characteristics. Accordingly, the extent of fiscal impact to a discharger could vary widely from another discharger. The General Assembly may have envisioned the fiscal impact per discharger to be limited to $500,000.

The following requirements established by IC 13-18-3-2 for certain anitdegradation requirements for OSRWs apply to a discharger that has proposed a new or increased discharge to an OSRW and completed an anitdegradation demonstration:

(1) implement a water quality project in the watershed of the OSRW that will result in overall improvement of the water quality of the OSRW; or

(2) pay a fee, not to exceed $500,000, to fund a water quality project that will result in overall improvement of the water quality of the OSRW.

Due to the very site-specific nature of any potential water quality project, any estimate of the fiscal impact of that project is highly speculative. Variables that affect the fiscal impact of a project include the type and quantity of pollutants in the proposed discharge and the characteristics of the receiving water. It is anticipated that there will not be a large number of proposed new or increased discharges to current OSRWs. It is also anticipated that there will not be a large number of newly designated OSRWs.

IDEM anticipates that, if a discharger finds that the implementation of a water quality project will result in costs to the discharger in excess of $500,000, it seems likely the discharger will instead take advantage of the option to pay a fee.

If the discharger agrees to accept the effluent limits based on the de minimis lowering of water quality, the discharger will not be required to implement or fund a water quality project. The effluent limits based on the de minimis lowering of water quality are achievable using the best available treatment technology that is readily available. Therefore, requesting effluent limits that exceed the de minimis lowering of water quality is a voluntary action taken by the discharger knowing in advance that it will be required to submit an antidegradation demonstration and implement or pay for a water quality improvement project for a new or increased discharge to an OSRW or EUW.

Small Business Assistance Information

IDEM established a compliance and technical assistance (CTAP) program under IC 13-28-3. The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with IC 13-28-3 and IC 13-28-5, there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at:

www.in.gov/idem/ctap

Small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Alison Surface, Senior Environmental Manager
IDEM Compliance and Technical Assistance Program
OPPTA - MC60-04
100 North Senate Avenue
W041
Indianapolis, IN 46204-2251
(317) 232-8172 or (800) 988-7901
ctap@idem.in.gov

The Small Business Assistance Program Ombudsman is:

Megan Tretter
IDEM Small Business Assistance Program Ombudsman
MC 50-01– IGCN 1301
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 234-3386
mtretter@idem.in.gov

Public Participation and Workgroup Information

An external workgroup has been established to discuss issues involved in this rulemaking. The workgroup is made up of IDEM staff and a cross-section of stakeholders. If you are interested in participating in this workgroup, please contact MaryAnn Stevens in the Office of Water Quality at (317) 232-8635 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted.

If you wish to provide comments to the workgroup on the rulemaking, attend meetings, or have suggestions related to the workgroup process, please contact MaryAnn Stevens in the Office of Water Quality at (317) 232-8635 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the workgroup who represent their particular interests in the rulemaking.

STATUTORY AND REGULATORY REQUIREMENTS

IC 13-14-8-4 requires the board to consider the following factors in promulgating rules:

(1) All existing physical conditions and the character of the area affected.
(2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
(3) Zoning classifications.
(4) The nature of the existing air quality or existing water quality, as the case may be.
(5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
(6) Economic reasonableness of measuring or reducing any particular type of pollution.
(7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

(1) The submission of alternative ways to achieve the purpose of the rule.
(2) The submission of suggestions for the development of draft rule language.

Mailed comments should be addressed to:

#08-764 (Antidegradation)
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

Hand delivered comments will be accepted by the receptionist on duty at the twelfth floor reception desk, Office of Water Quality, Indiana Government Center North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana. Comments also may be submitted by facsimile to (317) 232-8406. Please confirm the timely receipt of faxed comments by calling the Office of Water Quality, Rules Section at (317) 233-8903. Please note it is not necessary to follow a faxed comment letter with a copy of the letter submitted through the postal system.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by November 14, 2008.

Additional information regarding antidegradation and water quality standards may be obtained from Steve Roush, Permit Technical Specialist, Permits Branch, Office of Water Quality, (317) 233-5747 or (800) 451-6027. Additional information regarding this rulemaking action may be obtained from MaryAnn Stevens, Rules Section, Office of Water Quality, (317) 232-8635 or (800) 451-6027 (in Indiana).

Bruno Pigott
Assistant Commissioner
Office of Water Quality

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