
OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2013-3

January 9, 2013

OFFICIAL OPINION 2013-3

Mr. Robert Carter
Director
Department of Natural Resources
402 W. Washington St.
Indianapolis, IN 46204

RE: Authority to prevent and control non-point source pollution

Dear Director Carter:

The Department of Natural Resources ("DNR") requested an opinion from our office regarding whether the Indiana Department of Environmental Management ("IDEM") has authority under applicable statutes and rules to prevent and control non-point source pollution within Indiana. We understand that such an opinion is necessary for joint approval of the state's non-point pollution control program by the National Oceanic and Atmospheric Administration and the U.S. Environmental Protection Agency pursuant to Section 6217 of the Federal Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. §1455, Pub. L. 101-508.

BRIEF ANSWER

In response to DNR's request we can provide the following opinion confirming that IDEM has the relevant authority in this regard based on permitting laws and related authority to require adequate control of resource management measures.

ANALYSIS

IDEM is the agency within the State of Indiana designated to implement both the Clean Water Act and the Safe Drinking Water Act. As such, IDEM has been granted broad general authority to secure the benefits of these federal Acts and secure compliance therewith. Additionally, a number of state statutes provide IDEM with broad regulatory authority over pollution control and abatement.

Ind. Code § 13-18-3-1 requires the Water Pollution Control Board ("WPCB")¹ to adopt rules for the control and prevention of pollution to Indiana's waters. Additionally, Ind. Code § 13-18-3-11 provides that all water pollution control laws shall be liberally construed to effectuate the purposes of those laws. For instance, Ind. Code § 13-18-4-5 states that "a person may not throw, run, drain, or otherwise dispose; or cause, permit, or suffer to be thrown, run, drained, allowed to seep, or otherwise disposed; into any of the streams or waters of Indiana any organic or inorganic matter that causes or contributes to a polluted condition of any of the streams or waters of Indiana. . ." Therefore, this Act protects waters of the state from pollution irrespective of the specific activity from which the pollution is generated.

Ind. Code § 13-18-3-1 provides that the WPCB shall establish requirements for the issuance of permits to control water pollution. The rules may include appropriate management measures to prevent or abate water pollution as necessary. Furthermore, IDEM may issue administrative orders to cease a violation and to abate the condition of pollution. Ind. Code § 13-18-4-6. Such orders would, among other things, require that the "alleged violator take specific action to correct the violation." Ind. Code § 13-30-3-4(2)(B)(i). Additionally, IDEM may obtain court orders for injunctive relief pursuant to Ind. Code § 13-30-4-1(b)(2) or Ind. Code § 4-21.5-6-6(1). The remedy request for action could include management measures such as those suggested in the Section 6217(g) guidance. Furthermore, while the majority of the water programs in Indiana are permit-related, IDEM has the authority to control and prevent non-point source pollution in the absence of a permit as well and require implementation of the Section 6217(g) measures, as necessary, including those for agriculture, urban development, roads, highways and bridges, hydromodification, and wetlands and riparian areas.

IDEM is not required to wait for a nonpoint source violation to occur before taking action. Pursuant to Ind. Code § 13-18-4-6, IDEM may issue administrative orders against a person who "is violating or is about to violate" the rules provided under the WPCA. Additionally, IDEM may take "appropriate steps to prevent any pollution that is

determined to be unreasonable and against public interests in view of the condition in any stream or other waters of Indiana." Ind. Code § 13-18-4-4. Therefore, IDEM has specific statutory authority to proactively prevent non-point source pollution from occurring. Any person violating the above provisions is subject to civil penalties. Ind. Code §13-30-4-1.

IDEM has promulgated water quality standards that also apply to non-point sources of pollution. The WPCB has specific authority to establish rules to determine what qualities and properties of water indicate a polluted condition of the water in any of the streams or waters of Indiana. Ind. Code § 13-18-4-1. The minimum surface water quality standards (MSWQS) specify minimum conditions for waters within the Great Lakes system. Pursuant to [327 IAC 2-1.5-8](#) "All surface waters at all times and all places. . .shall meet the minimum conditions of being free from substances, materials, floating debris, oil, or scum attributable to municipal, industrial, agricultural, and other land use practices. . ." A person violating these standards is subject to an administrative order requiring the person to cease the violation and abate the condition of pollution, as well court orders for injunctive relief. Ind. Code §§ 13-18-4-6, 13-40-4-1(b)(2), 4-21.5-6-6(1). The remedy request for action could include the implementation of management measures such as those suggested in the Section 6217(g) guidance.

Finally, if the controls available to IDEM at present are not sufficient to address non-point source pollution, the WPCB has ample authority to craft additional regulations as necessary. The Board is given broad authority to "adopt rules for the control and prevention of pollution in waters of Indiana with any substance that is deleterious to the public health. . .or by which any fish life or any beneficial animal or vegetable life may be destroyed; or the growth or propagation of fish life or beneficial animal or vegetable life is prevented for injuriously affected." Ind. Code § 13-18-3-1. Additionally, the Board may adopt rules restricting the polluting context of any waste material and polluting substances discharged or sought to be discharged into any of the streams or waters of Indiana. Ind. Code § 13-18-4-3.

CONCLUSION

All of these general authorities, which taken together with the regulations promulgated by the Water Pollution Control Board provide IDEM with the authority to prevent and control non-point source pollution within Indiana and require implementation of the Section 6217(g) management measures, as necessary, including those for agriculture, urban development, roads, highways and bridges, hydromodification, and wetlands and riparian areas.

Sincerely,

Gregory F. Zoeller
Attorney General

Matthew J. Light
Chief Counsel

¹ Pursuant to House Enrolled Act No. 1002-2012 (Pub. L. 133-2012), the WPCB will be abolished effective January 1, 2013 and replaced by the Environmental Rules Board. The new board will have essentially the same powers and duties as those outlined in this opinion, and the legislative change will not affect IDEM's ability to prevent and control nonpoint source pollution.

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