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Mike Frey
Douglas Bley
Lisa McKinney Goldner
Tonya Galbraith
Melanie Darke
Dr. Thomas Simon
Miriam Dant
Bill Hayden
Tim Method
Ed Tinkle II

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Craig Mortell, Attorney for the Council
Bernadette Bartlett, Fiscal Analyst for the Council

Authority: ***P.L. 248-1996 (SEA 138); EQSC Minutes, June 29, 1999***

LAND AND WATER SUBCOMMITTEE OF THE ENVIRONMENTAL QUALITY SERVICE COUNCIL

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MEETING MINUTES[1]

Meeting Date: November 19, 1999
Meeting Time: 10:00 A.M.
Meeting Place: State House, 200 W. Washington St., Room 233
Meeting City: Indianapolis, Indiana
Meeting Number: 4

Members Present: Sen. Beverly Gard, Chairperson; Sen. Kent Adams; David Benshoof; Randy Edgemon; Regina Mahoney; Clifford E. Duggan, Jr.; Larry Kane; David Bottorf; Mark Palmer; John Kyle; Rae Schnapp; Maggie McShane; Scott Schutte; Glenn Pratt; Mike Frey; Douglas Bley; Lisa McKinney Goldner; Tonya Galbraith; Melanie Darke; Miriam Dant; Bill Hayden; Tim Method; Ed Tinkle II.

Members Absent: Sen. Glenn Howard; Rep. Mark Kruzan; Michael Carnahan; Kerry Michael Manders; Alice Schloss; Lynn Waters; Betsy DuSold; Dr. Thomas Simon.

The Chairperson, Senator Gard, called the meeting to order at approximately 10:10 a.m. She explained that the Subcommittee, at this meeting, would consider the recommendations that had been submitted as to the issues assigned to the Land and Water Subcommittee:

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[1] Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center (LIC) in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of $0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is http://www.ai.org/legislative/. No fee is charged for viewing, downloading, or printing minutes from the Internet.

(1) Continue to look at related water issues. [SB 343]

(2) Review the Hazardous Waste Manifest Program. [HEA 1578]

(3) Study whether IDEM should allow a transition period associated with the RISC guidance document. [HEA 1919]

I. WATER-RELATED ISSUES

Senator Gard immediately initiated the discussion of the recommendations that had been submitted in response to her invitation, which were printed in the "Recommendations from Members"[2] document that was distributed by staff at the meeting. Beginning with the water-related issues, Senator Gard asked Bill Beranek, Ph.D. of the Indiana Environmental Institute to present the water-related recommendations he had submitted. Dr. Beranek presented the following proposed Subcommittee findings and recommendations (recommendations appear in **bold type**):

1. Regarding the designation of Outstanding State Resource Waters

The Subcommittee heard that the current Indiana Outstanding State Resource Water (OSRW) regulation assigning “no degradation” to a group of already developed water bodies means a severe impediment on development and economic growth in areas such as the Lake Michigan basin. The environmental advocates prefer the regulation to remain as it has been since 1990 by a regulation of the Indiana Water Pollution Control Board. The business community prefers the regulation to be changed eliminating this special category because the implications were not understood by the Water Board at the time. The two sides have been polarized in rulemaking deadlock for four years since U.S. EPA has insisted the State implement its regulation, at least for the Great Lakes Basin.

The Subcommittee heard that the IDEM Commissioner’s Water Quality Advisory Group, formed in August, was aggressively working to craft a solution to the OSRW issue acceptable to most in business and environmental communities. The solution being considered would allow increases in parameters within the limits of ordinary water quality permit conditions but in these special waters would require that the discharger cause a project to be done that would result in net improvement in the quality in the watershed. *Selection of the project would have public involvement.* The advisory group hopes to have a specific *regulatory or* legislative recommendation by December which is supported by most of environmental advocate community and most of regulated community.

The Subcommittee supports the general direction of the Water Quality Advisory Group to develop a resolution of this OSRW dilemma *and, because this is key public policy issue, favors legislative action supporting such a concept.*

2. Regarding Wet Weather

[2]The "Recommendations from Members" document is available from LIC as Attachment A to these minutes.

The Subcommittee heard testimony from municipalities dissatisfied about the IDEM efforts to match what needs to be done to address the combined sewer overflow (CSO) challenge with the current wording of the Indiana water quality standard for full-body contact in all waters. It determined that the state and the municipalities were both agreed to strategies whereby as much as reasonably affordable would be the expected controls over the next decades to solve the bulk of the problem. The dilemma is that the U.S. EPA is demanding the CSO NPDES permit to include language that it be a violation of the permit if the current Indiana water quality standard for this is not always met. That would be a practical impossibility for most communities. Unless IDEM can find permit language to avoid this and be satisfactory to U.S. EPA, the choice is to change the Indiana standard either by statute or by regulation.

The Subcommittee heard that the Water Quality Advisory Committee, itself advised by a newly created IDEM-organized Wet Weather Technical Advisory Committee of external technical experts, may have a regulatory or legislative solution to recommend in December to solve the wet weather water quality standard/permit Indiana conundrum that 106 Indiana CSO communities find themselves caught in. The solution includes creating by regulation or statute a means for the Indiana full body contact designated use to be temporarily suspended after a storm event at a CSO specifically determined by NPDES permit. It includes encouraging IDEM to issue permits for municipal sewage treatment plants to have adjustable conditions for wet weather.

The Subcommittee heard that the State should do much more to develop solutions to the serious funding dilemma faced by cities and towns as they must cope with expensive new studies about use attainability and engineering projects.

The Subcommittee supports the general direction of the Water Quality Advisory Group to develop a resolution of this dilemma which is supported by the regulated community, the environmental advocate community and the technical community *and, because this is a key public policy issue, favors legislative action supporting such a concept.*

3. Regarding Antidegradation of nonBCCs[3]; sediment quality as a water quality standard and biological integrity as a water quality standard

The Subcommittee recommends the same policy on antidegradation, sediment quality and biological integrity it did from the 1998 EQSC surface water policy deliberation. This is because IDEM continues to include these three concepts in the on-going triennial rulemaking before the Water Pollution Control Board, despite the caution raised by the EQSC last year and in S.B. 343. Each of these issues has federal rulemaking underway to determine the federal government policy. The Subcommittee understands that the Commissioner's Water Quality Advisory Committee is planning to consider these issues in the coming months.

(a) antidegradation procedures for nonBCCs

[3]There is a current Indiana antidegradation policy applying to bioaccumulative chemicals of concern (BCC) that are discharged into waters draining into the Great Lakes. The proposed antidegradation policy referred to here would presumably affect discharges that are not covered by the antidegradation policy applying to BCCs discharged into Great Lakes waters.

For the antidegradation procedures, there is currently in Indiana statute and regulation authority to include in an NPDES permit any condition required by the proposed rules. Having the new regulation, however, would lock in a certain interpretation of the antidegradation policy before federal policy is complete, like the Water Pollution Control Board did at IDEM's request for OSRW in 1989 and for a BCC policy in the early 1990's. This would reduce Indiana flexibility to attain water quality goals compared to other states. U.S. EPA should clarify the very questions it posed in the preamble to its rulemaking begun in 1998 about the nature of antidegradation before Indiana commits in rules to procedures it may not prefer later.

Pending deliberations and advice of the Water Quality Advisory Group, the Subcommittee recommends that IDEM not proceed with rulemaking on antidegradation procedures for nonBCCs.

(b) sediment quality as Indiana water quality standard

IDEM wishes, at EPA Region V request, to include general text declaring sediment quality to be an inherent Indiana water quality standard. Currently in Indiana, there is adequate authority to include in an NPDES permit any conditions that would protect the quality of sediment considered to be at risk. The proposed language adds neither clarity nor power to that authority. It does, however, allow U.S. EPA to consider a harm to the sediment by to-be-determined criteria to be a violation of the Indiana water quality standard.

The Subcommittee prefers U.S. EPA to promulgate its own rule (in process), or at least get its ideas about sediment harm more clearly in focus, before Indiana promulgates wording making sediment quality per se an Indiana water quality standard.

Pending deliberations and advice of the Water Quality Advisory Group, the Subcommittee recommends the Water Board not promulgate sediment quality as a water quality standard at this time but that it encourage IDEM to incorporate both into permits and into IDEM water monitoring greater studies of sediment quality. Upon finding impaired sediments, IDEM should then determine cause and prevent further contamination.

(c) biological integrity as Indiana water quality standard

IDEM wishes, at EPA Region V request, to include general text declaring biological integrity itself to be an inherent Indiana water quality criteria. Biological integrity means closeness to the "proper" ratios and numbers of species and individuals of the complete suite of appropriate species for a particular reach of a water body. The issues are identical to the sediment quality as a water quality. To the extent IDEM has identified in advance what that correct ratio is and how it is to be measured accounting for natural and other physical, biological and chemical changes in a given stream segment, then discharge conditions IDEM considers appropriately protective can be placed in a permit. But declaring the ratio and number of species themselves to be the responsibility of the discharger is inappropriate. It is especially inappropriate because the discharger is not informed of the "correct" integrity characteristics, those being determined by EPA or IDEM later. Then it becomes a violation of an Indiana water quality standard and discussions are about enforcement.

On the other hand, expanded use by IDEM of biological integrity measures as a tool to explore the impact of specific discharges, such as effluent waters disinfected with chlorine, is strongly

encouraged.

The Subcommittee supports and encourages the use of biological integrity as a tool for IDEM to monitor the quality of Indiana waters and, when justified, to include requirements for studies in permits. *Pending deliberations and advice of the Water Quality Advisory Group,* the Subcommittee opposes the inclusion of biological integrity itself as an Indiana water quality standard until U.S. EPA has clarified what is meant in a manner that permits all parties to understand the quality expectation in the same way.

4. Regarding Indiana Surface Water Quality Data Collection

The foundation of issuing sound NPDES permits and of identifying, prioritizing and addressing impaired waters is data collection. Indiana historically has had and presently has inadequate data either to set proper numeric criteria and designated uses, to identify impaired water bodies and to identity nonpoint sources contributions to the impairment.

The Subcommittee heard testimony about the uncertain guidelines of data collection for assigning streams to the impaired body list (303(d)). It heard of inadequacy of written IDEM guidance about data for prioritizing streams for attention by the TMDL initiative. It heard of inadequacy of the data in the nonpoint source initiatives, *including inadequate attention to tributaries of rivers with identified exceedences*.

The Subcommittee recommends that the Governor appoint a Water Quality Data Task Force to assess the physical, chemical and biological data water resource at IDEM, the quality assurance protocols, the needs for improved data quality and the options for obtaining and maintaining an adequate data base for standard-setting (e.g. site-specific metal toxicity, site-specific BAF and site-specific use attainability) and for addressing impairment. The task force shall include representatives from academia (including biological, chemical and hydrological), IDEM, IDNR, USGS, private chemical laboratory, business, agriculture, environmental advocate, municipality, general citizen, Water Board member and four legislators.

Subcommittee members discussed these proposed recommendations. They also discussed the progress being made by IDEM's Water Quality Advisory Group (WQAG), which is discussing many of the issues addressed in Dr. Beranek's proposed recommendations.

Maggie McShane asked whether the WQAG seems to be leaning toward a legislative solution to these water issues. Senator Gard (a member of the WQAG) replied that it is her impression that IDEM would prefer to receive recommendations from the WQAG and move ahead with rulemaking instead of seeking the enactment of legislation. Senator Gard commented that she would prefer to have the broad public policy issues pertaining to water resolved through legislation. At least, she said, the General Assembly should have a role to play, like putting the broad concepts into statute. The Subcommittee was informed that the WQAG intends to issue written recommendations right after Thanksgiving.

Dr. Beranek said that the WQAG is considering the effect of wet weather conditions on municipalities with combined sewer overflows (CSOs). He expressed confidence that the WQAG will recommend the temporary suspension of the "fishability" and "swimmability" designated uses of Indiana waters when wet weather conditions make it certain that a city with CSOs will fail to meet the water quality standards.

Tonya Galbraith of the Indiana Association of Cities and Towns said that her association would support the establishment of this temporary suspension of the fishability/swimmability designated uses during wet weather. Glenn Pratt commented that IDEM could allow the suspension during wet weather through the adoption of administrative rules. Larry Kane expressed concern about the establishment of the temporary wet weather suspension through administrative rules instead of through legislation. Like Ms. Galbraith, Mr. Kane suggested that it would make sense to introduce legislation on this matter even though rulemaking may have begun. Scott Schutte also expressed a preference for legislative action.

Bill Hayden posed the question of whether IDEM could incorporate sediment quality or biological integrity into a permit if sediment quality and biological integrity are not standards. He said that it is common knowledge that chlorine is bad for biological criteria in bodies of water, yet IDEM issues permits allowing the discharge of chlorine. Mr. Hayden suggested that Indiana needs to move forward in the use of biological criteria.

IDEM Deputy Commissioner Tim Method commented that there should be more public policy discussion of issues relating to the use of sediment quality and biological integrity . Mr. Method said that he hopes the discussion of these issues will continue, and pointed out that these issues will be discussed by the WQAG.

Concerning the issue of water quality data collection, Dr. Beranek said that his proposed recommendation, like a recommendation made in 1998, would call for an examination of the adequacy of the quantity of IDEM's data concerning impaired waters to see whether IDEM needs more resources so as to be able to gather more data.

Bill Hayden criticized the "probabilistic" method of collecting data on water quality and expressed his wish that IDEM could expand its staff so as to compile data more quickly.

Senator Gard then directed the Subcommittee's attention to a proposed recommendation submitted by John Wilkins of Eli Lilly and Company. It read as follows:

> Policy Regarding Waterbody Special Designations
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> A policy that specifies the criteria for future designations of water bodies that ensures only those streams that are in relatively underdeveloped areas with excellent water quality will receive OSRW (outstanding state resource water) or ONRW (outstanding natural resource water) designation is essential. The use of water body designations as a tool to protect existing, high quality waters is appropriate. However, the process should not be used as a tool to clean up water bodies that are currently in highly populated, developed watersheds. In fact, using water body designations in this manner will result in slower progress in improving water quality in Indiana. By designating streams in developed watersheds as OSRW or ONRW, future economic investment will be curtailed. Existing industry and municipalities will have no economic incentive to invest in new pollution prevention or wastewater treatment technologies if they are told they will no longer be able to expand their cities or their plants. Billions of dollars in improved wastewater technologies have been invested in this state by municipalities and private entities over the past 20 years. It is vital that our state water quality policy encourages similar investment in the future. Therefore, the Land & Water Subcommittee should adopt the following recommendation:
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> **The Subcommittee recommends that before the Board adopts a rule designating a**

waterbody as an OSRW or ONRW that the waterbody should be considered of outstanding quality as determined using recognized biological scoring models and criteria. Furthermore, the economic impact of the designation and degree of existing urban and agricultural development must be considered.

Glenn Pratt suggested that this recommendation, if enacted, would tie the state's hands in a critical area. Bill Hayden suggested that a body of water should not be ineligible for designation as an OSRW or ORNW for not being of outstanding quality if there are other appropriate criteria that would qualify it for designation, such as containing an endangered species.

Scott Schutte agreed with Mr. Wilkins' idea that the economic impact of the designation of a body of water should be studied before the designation takes place. He also expressed the opinion that only the General Assembly should be able to decide on a designation of a body of water if the designation would result in the body of water being put in "no degradation" status.

Rae Schnapp suggested that the motivation for advancing the concept in Mr. Wilkins' recommendation has been removed by the "net improvement" concept being developed by the WQAG, under which a firm would be allowed to make additional discharges into a designated body of water if the firm also took additional actions which would result in an overall improvement in water quality. Tim Method agreed with Ms. Schnapp.

John Kyle proposed amending Mr. Wilkins' recommendation so it that would create a presumption that a body of water, to be eligible for designation, would have to be of outstanding quality, but would enable this presumption to be overcome under certain circumstances. With the amendment proposed by Mr. Kyle, the proposed recommendation read as follows:

> There is a presumption that the Water Pollution Control Board cannot adopt a rule designate a waterbody as an outstanding state resource water (OSRW) or an outstanding natural resource water (ONRW) unless it is demonstrated that the waterbody has outstanding water quality, as determined by recognized biological scoring models and criteria. To overcome this presumptive requirement of outstanding water quality, it must be demonstrated that the waterbody possesses truly unique or special features. In addition, before any waterbody can be designated OSRW or ONRW, the Board must also evaluate the economic impact of the designation and the degree of existing urban and agricultural development.

Senator Gard requested the consent of the Subcommittee to submit to the full EQSC, with the endorsement of the Subcommittee, Dr. Beranek's proposed recommendations and Mr. Wilkins' recommendation, with John Kyle's amendment. The Subcommittee, with no dissenting votes, consented to this request.

Senator Gard invited anyone having views contrary to these water-related recommendations to submit their views in writing so that they could be included in the Subcommittee's report to the EQSC.

II. THE HAZARDOUS WASTE MANIFEST PROGRAM.

To begin the discussion of the hazardous waste manifest program, Senator Gard informed the EQSC that Senator Simpson had recently discussed the program with a group of interested persons and that the discussions had led to a proposal. She called on IDEM Assistant Commissioner Bruce Palin, a member of the group, to explain the proposal.

Mr. Palin offered the following explanation: The hazardous waste manifest program, under which IDEM must be sent a copy of each manifest relating to the transportation of hazardous waste within Indiana, provides IDEM with information and with revenue from the fee associated with the sale of the manifest form. Under the proposal discussed by the group, the requirement to send a copy of each manifest to IDEM would be eliminated as of January 1, 2001. In place of this requirement, generators of hazardous waste and hazardous waste treatment, storage, and disposal facilities would be required to submit an annual report to IDEM. The annual report would utilize the same form as is used for biennial reports to the federal government and would provide the same information now provided to IDEM by manifest copies. The implementation of this change would be delayed until 2001 to provide time to find a source of funds to replace the approximate sum of $600,000 per year that IDEM would lose in manifest fee revenue.

Dave Benshoof said that he likes the idea of doing away with mandatory filing of manifest copies but has concerns about the proposed annual reporting requirement. For a small quantity generator of hazardous waste, he said, filling out a detailed annual report would be an onerous burden.

Tim Method pointed out that the elimination of the mandatory filing of manifest copies would reduce IDEM's income by approximately $600,000 per year.

Senator Gard asked whether the Subcommittee could recommend that work should continue on the idea of replacing the mandatory filing of manifest copies with an annual report. The Subcommittee, with no contrary expressions, gave its assent.

III. TRANSITION PERIOD ASSOCIATED WITH THE RISC GUIDANCE DOCUMENT.

Senator Gard then drew the Subcommittee's attention to the third issue assigned to the Subcommittee: whether IDEM should allow a transition period associated with the RISC (risk integrated system of closure) guidance document.

Referring to the "Recommendations from Members" paper, Senator Gard noted that Miriam Dant had submitted the following recommendations on this subject:

> Length of Transition Period. ... we would recommend a longer transition period than the six-month period that is proposed. We suggest that a one-year or two-year transition period should be used, as such a period would provide for these contingencies more adequately than a six-month period.
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> Consistent environmental standards should apply throughout an environmental project. IDEM's policy should clearly state that if "existing" guidance is chosen during the transition period, "existing" guidance will apply to that project during and after the transition period, and until the end of the project.
>
> Eligibility for "existing" guidance option. The option to choose "existing" guidance rather than RISC guidance during the transition period should be available if a party has (1) begun a project (including preparing a proposal for environmental investigation and/or remediation); and (2) has relied on "existing" guidance in doing so, to the point that applying new standards to the project would be unfair.
>
> The Transition Policy should avoid implying that the RISC Guidance will be imposed as law. ...

> We suggest that IDEM change this language in the transition policy in a way that more appropriately reflects the status of the RISC Guidance as a non-rule policy.

Senator Gard also noted the recommendations submitted by attorney Mark Shere on behalf of Doug Bley of Bethlehem Steel:

> First, the (RISC Transition) policy seems to indicate that an approved work plan, remediation plan, or other document should be implemented according to its terms. In other words, these approved documents do not need to be reopened during the transition period or thereafter just because some work remains to be finished. It would be very helpful to Bethlehem Steel if this point could be made more explicit.
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> Second, there seems to be a surface inconsistency in using terms such as "ONLY" and "must" in a non-binding guidance policy. Bethlehem believes that it understands IDEM's intent behind using these terms, and that the agency's objectives are entirely appropriate and reasonable. A short statement confirming the availability of non-default options (consistent with page 1-3 of the RISC technical resource guide) would help to clarify this intent and eliminate any inconsistency.

Ginny Mahoney commented that her employer, Indiana Energy, Inc., intends to submit up to an additional 15 sites to the Voluntary Remediation Program, and favors a longer transition period.

David Benshoof recommended that the transition period be extended from 6 months to one year. John Kyle concurred in this recommendation.

Tim Method pointed out that IDEM, in the preparation of its RISC transition policy, had already extended the proposed transition period three months beyond the initially proposed length.

Senator Gard proposed that the Land and Water Subcommittee should recommend that:

> **(1) the discussion among the interested parties and IDEM about the length of the transition period should continue; and**
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> **(2) a clear definition of the "triggering mechanism" should be produced.**

This was accepted by the Subcommittee without a dissenting expression.

At Senator Gard's request, Ginny Mahoney provided an update on the working subgroup she has been leading. Ms. Mahoney explained that her subgroup has met to discuss the brownfields and voluntary cleanup statutes of other states and has identified concepts in those statutes that may be helpful in any proposed revision of Indiana's statutes. For example, she said, the statutes of Pennsylvania and Michigan are seen as providing the most protection against future liability for land owners. Ms. Mahoney said that her subgroup's discussions have also concerned:

- the need for regulatory flexibility in the implementation of RISC requirements; and
- the effect of RISC on the Voluntary Remediation Program.

IDEM Assistant Commissioner Bruce Palin commented that the discussions on RISC that have taken place have been enlightening and have shown that the RISC and brownfields requirements "are not that far apart." IDEM, he said, wants to summarize those areas where clarification and more discussion is needed and to have more discussions.

Sen Gard said that she hopes IDEM will consider Ms. Mahoney's subgroup's final report when the subgroup produces it.

Erika Seydel Cheney, the Director of IDEM's Office of Legislative Relations, distributed (1) a rough draft of an amendment to IC 13-18-11, the Indiana statute concerning the certification of the operators of water treatment plants, wastewater treatment plants, and water distribution systems; and (2) the U.S. EPA's Final Guidelines for the Certification and Recertification of the Operators of Community and Nontransient Noncommunity Public Water Systems, as printed in *the Federal Register* on February 5, 1999.[4] Ms. Cheny said that Indiana has already met most of the requirements set forth in these Guidelines.

Senator Gard then expressed her appreciation for the efforts of all who participated in the work of the Land and Water Subcommittee. She adjourned the meeting at 12:05 p.m.

[4]These materials are available from the LIC as Attachment B to these minutes.