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Sent via electronic mail to M. Stevens

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Dear Ms. Stevens, Mr. Easterly, Mr. Pigott, and Ms. Mettler:

At the January 26, 2009 subgroup meeting, some members raised questions regarding the impact of Ind. Code §§ 13-11-2-50.5 and 13-18-3-2 on the selection of a *de minimis* threshold for Outstanding State Resource Waters (“OSRWs”) (also referred to as Tier 2.9 protected waters).¹ In particular, a few subgroup members suggested that these statutes prohibit IDEM from setting a *de minimis* threshold for OSRWs that is different from the threshold set for non-OSRW high quality waters. At the close of the meeting,

¹ Although we refer only to OSRWs in this letter, the same arguments apply to Exceptional Use Waters (“EUWs”).

the environmental representatives stated that the environmental coalition would respond in writing to this interpretation of the statutes. This letter constitutes the promised response. The environmental coalition may provide further comments and views on this issue in the future.

Summary

Indiana Code §§ 13-11-2-50.5 and 13-18-3-2 do not require, suggest, or imply that the antidegradation *de minimis* threshold should be the same for OSRWs and non-OSRW high quality waters. Although sections 13-11-2-50.5 and 13-18-3-2 provide extra protection to OSRWs (through water quality improvement projects), this extra protection is not triggered unless the addition of a pollutant is deemed “significant.” *De minimis* additions of pollutants are deemed non-significant. In these statutes the Indiana legislature does not speak to the issue of what constitutes a non-significant lowering of water quality in an OSRW; in fact, the legislature expressly left that definition to be established by IDEM in rulemaking. The legislature speaks only to the issue of what is required once a chosen significance threshold is crossed. Setting the tension on the trigger for an antidegradation review (*i.e.*, setting the significance threshold) provides a different type of protection than does providing for water quality improvement once that trigger is pulled, and one type of protection does not preclude the other. The agency may and should set the threshold of “significance” for OSRWs at a conservative level to ensure these waters receive adequate antidegradation review.

I. According to Ind. Code § 13-11-2-50.5(2), which defines “Degradation” for OSRWs, a Non-Significant Lowering of Water Quality is Not Degradation.

Indiana Code § 13-11-2-50.5 (“Degradation”) states as follows (emphasis added):

“Degradation”, for purposes of IC 13-18-3, means, with respect to a National Pollutant Discharge Elimination System permit, the following:

- (1) With respect to an outstanding national resource water, any new or increased discharge of a pollutant or a pollutant parameter, except for a short term, temporary increase.
- (2) With respect to an outstanding state resource water or an exceptional use water, any new or increased discharge of a pollutant or pollutant parameter that results in a *significant lowering of water quality* for that pollutant or pollutant parameter, *unless*:
 - (A) the activity causing the increased discharge:
 - (i) results in an overall improvement in water quality in the outstanding state resource water or exceptional use water; and
 - (ii) meets the applicable requirements of 327 IAC 2-1-2(1) and (2) and 327 IAC 2-1.5-4(a) and (b); or
 - (B) the person proposing the increased discharge undertakes or funds a water quality improvement project in accordance with IC 13-18-3-2(1) in the watershed of the outstanding state resource water or exceptional use water that:
 - (i) results in an overall improvement in water quality in the outstanding state resource water or exceptional use water; and
 - (ii) meets the applicable requirements of 327 IAC 2-1-2(1) and (2) and 327 IAC 2-1.5-4(a) and (b).

Subsection (1) of Ind. Code § 13-11-2-50.5 provides one way that a new or increased discharge to an Outstanding National Resource Water (*i.e.*, Tier 3 “ONRW”) can avoid the category of “Degradation”: namely, if the discharge is short-term and temporary.

Subsection (2) of Ind. Code § 13-11-2-50.5, which applies to OSRWs, provides two ways for a new or increased discharge to an OSRW to avoid the category of “Degradation”:

- (1) if the discharge does not result in a “significant lowering of water quality”; or
- (2) if the discharge results in a “significant lowering of water quality” but the conditions in (A)(i) and (ii) or in (B)(i) and (ii) are satisfied.

By definition, if a new or increased discharge is not “significant” then it entirely escapes the category of “Degradation,” irrespective of the conditions in 50.5(2)(A) and (B).

II. A *De Minimis* Quantity of Additional Pollutant Load is a Non-Significant Lowering of Water Quality, and thus is Not Degradation.

The possibility that a new or increased discharge may be labeled as “nonsignificant” is provided in Ind. Code § 13-18-3-2(m)(1) as follows:

- (m) The procedures provided by rule under subsection (l) must include the following:
 - (1) A definition of significant lowering of water quality that includes a *de minimis* quantity of additional pollutant load . . .

A *de minimis* quantity of additional loading will not, by definition, result in a “significant lowering of water quality,” and thus is not “Degradation” under Ind. Code § 13-11-2-50.5(2). The conditions in Ind. Code § 13-11-2-50.5(2)(A) and (B) do not apply to *de minimis* additions of pollutant.

III. Under the Definition of “Degradation” in Ind. Code § 13-11-2-50.5(2)(B), a “Significant Lowering of Water Quality” in an OSRW Must be Accompanied by a Project Resulting in an “Overall Improvement in Water Quality in the [OSRW]” and Must Meet the Applicable Requirements of 327 IAC 2-1-2(1) and (2) and 327 IAC 2-1.5-4(a) and (b).

We focus on Ind. Code § 13-11-2-50.5(2)(B), which pertains to the requirement of a water quality improvement project, but the same principles apply to (2)(A). Section 13-11-2-50.5(2)(B) sets forth two requirements to avoid the label of “Degradation.” First, (2)(B)(i) requires that a “significant lowering of water quality” in an OSRW be accompanied by a water quality improvement project. This requirement is presented also in Ind. Code § 13-18-3-2(m)(2) as follows (emphasis added):

- (m) The procedures provided by rule under subsection (1) must include the following: . . .
 - (2) Provisions allowing the permittee to choose application of one (1) of the following *for each activity undertaken by the permittee that will result in a significant lowering of water quality* in the outstanding state resource water or exceptional use water:
 - (A) Implementation of a water quality project in the watershed of the outstanding state resource water or the exceptional use water that will result in an overall improvement of the water quality of the outstanding state resource water or the exceptional use water.
 - (B) Payment of a fee, not to exceed five hundred thousand dollars (\$500,000) based on the type and quantity of increased pollutant loadings, to the department for deposit in the outstanding state resource water improvement fund established under section 14 of this chapter.

Second, (2)(B)(ii) requires that a “significant lowering of water quality” in an OSRW must meet the “applicable requirements” in 327 IAC 2-1-2(1) and (2) and 327 IAC 2-1.5-4(a) and (b).

327 IAC 2-1-2(1) and (2) state as follows:

327 IAC 2-1-2 Maintenance of surface water quality standards

The following policies of nondegradation are applicable to all surface waters of the state:

- (1) For all waters of the state, existing beneficial uses shall be maintained and protected. No degradation of water quality shall be permitted which would interfere with or become injurious to existing and potential uses.
- (2) All waters whose existing quality exceeds the standards established herein as of February 17, 1977, shall be maintained in their present high quality unless and until it is affirmatively demonstrated to the commissioner that limited degradation of such waters is justifiable on the basis of necessary economic or social factors and will not interfere with or become injurious to any beneficial uses made of, or presently possible, in such waters. In making a final determination under this subdivision, the commissioner shall give appropriate consideration to public participation and intergovernmental coordination.

327 IAC 2-1-2(1) and (2) provide that any new or increased discharge of a pollutant or pollutant parameter that results in a “significant lowering of water quality” in an OSRW, to avoid being labeled as “Degradation,” must be accompanied by (1) maintenance and protection of beneficial uses, and (2) an antidegradation demonstration showing that the lowering is necessary to accommodate important social or economic development. These requirements are essentially reiterations of the existing and well-established Tier 1 and Tier 2 antidegradation policy.² In other words, a permit applicant

² See antidegradation policy in 40 CFR 131.12(a)(1) and (2), which state: “(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.”

adding a “significant” load of pollutant into an OSRW must comply with the basic Tier 1 and Tier 2 requirements as well as the extra Tier 2.9 requirement of overall improvement in water quality.

327 IAC 2-1.5-4(a) and (b) also reiterate the Tier 1 and Tier 2 requirements, but for Great Lakes System waters specifically:

327 IAC 2-1.5-4 Antidegradation standard

- (a) For all surface waters of the state within the Great Lakes system, existing instream water uses and the level of water quality necessary to protect existing uses shall be maintained and protected. Where designated uses of the waterbody are impaired, there shall be no lowering of the water quality with respect to the pollutant or pollutants that are causing the impairment.
- (b) Any surface water of the state within the Great Lakes system whose existing quality for any parameter exceeds the criteria established within this rule shall be considered high quality for that parameter consistent with the definition of high quality water found in this rule; and that quality shall be maintained and protected unless the commissioner finds, after full satisfaction of intergovernmental coordination and public participation provisions under 327 IAC 5-2-11.3, that allowing lower water quality is necessary and accomodates [*sic.*] important economic or social development in the area in which the waters are located. In allowing such degradation, the commissioner shall assure water quality adequate to protect existing uses fully. Further, the commissioner shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control. The commissioner shall utilize the antidegradation implementation procedures under 327 IAC 5-2-11.3 in determining if a significant lowering of water quality will be allowed.

Although 327 IAC 5-2-11.3 is referenced in subsection (b) of 327 IAC 2-1.5-4 above, 327 IAC 5-2-11.3 is to be repealed by the new antidegradation rule. Again, the above requirements apply only to a “significant lowering of water quality” in an OSRW and not to a *de minimis* addition of a pollutant load, however *de minimis* is defined by IDEM.

IV. Ind. Code §§ 13-11-2-50.5 and 13-18-3-2 Do Not Require, Suggest, or Imply that the *De Minimis* Threshold be the Same for OSRWs and Non-OSRW High Quality Waters.

The critical point that leads directly from the plain language of the statutes quoted above is as follows: Indiana Code §§ 13-11-2-50.5 and 13-18-3-2 do not require, suggest, or imply any particular definition of “significant lowering of water quality” or “*de minimis* quantity of additional pollutant load” in OSRWs. Nor do they require, suggest, or imply that the definitions should be the same as for other high quality waters.

A person may argue from the statutory language in Ind. Code § 13-11-2-50.5(2)(B) that where a new or increased discharge will result in a “significant lowering of water quality” in an OSRW, IDEM may not impose on the permit applicant any requirements other than (1) the maintenance of existing uses, (2) a showing of necessity

and importance,³ and (3) implementation or funding of a water quality improvement project. (This argument would be based on the interpretation of the word “unless” in § 13-11-2-50.5(2) and whether the legislature intended the word to exclude other options.)

However, and this is the key point, there is no support in the statute for an argument that IDEM may not impose a different definition of “significant lowering of water quality” for different classes of waters. The legislature’s definition of “Degradation” in Ind. Code § 13-11-2-50.5 simply does not address the meaning of “significant lowering of water quality” in OSRWs. In fact, the legislature expressly left that definition to be established by IDEM in rulemaking. See Ind. Code § 13-18-3-2(m)(1) (“The procedures provided by rule under subsection (l) must include the following: (1) A definition of significant lowering of water quality . . .”).

V. Background (or Reference) Concentration is an Appropriate *De Minimis* for OSRWs, Particularly Lake Michigan.

The designation of OSRWs as Tier 2.9 refers to an extra level of antidegradation protection that is greater than Tier 2 protection but something less than Tier 3 protection.

The Indiana legislature in Ind. Code §§ 13-11-2-50.5 and 13-18-3-2 provided extra protection for OSRWs when a proposed additional loading of a pollutant is expected to cause a “significant lowering of water quality.” When this is the case, the Tier 2 antidegradation policy requires an antidegradation demonstration showing, among other things, that the loading is necessary to accommodate important economic or social development. If the applicant passes the necessary and importance test, the extra requirement of an overall improvement of water quality in the OSRW is imposed.

Additions of pollutant to the OSRW that are deemed non-significant – *i.e.*, *de minimis* additions and other exempted discharges – are not subject to either the antidegradation demonstration or the extra requirement of overall improvement in water quality. An important form of extra protection for OSRWs not captured by the statutes discussed above would ensure that most proposed additions of pollutants to OSRWs would be scrutinized under the necessary and importance test (testing whether the discharges are necessary to accommodate important economic or social development). The agency can provide this important extra layer of protection to OSRWs by setting the *de minimis* threshold at a more conservative level than for non-OSRWs. Without this up-front protection, too many proposed additions of pollutants to OSRWs may escape the protections provided in Ind. Code §§ 13-11-2-50.5 and 13-18-3-2.

Background (or reference) pollutant concentration is the most justifiable and practical *de minimis* threshold for OSRWs, particularly Lake Michigan. A *de minimis*

³ This antidegradation demonstration would include all of the requirements in 40 CFR 131.12(a)(2), including the requirement that “the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.”

threshold for discharges into Lake Michigan based on 5% or even 1% of unused assimilative capacity would still be a relatively large loading of pollutant. Background (or reference) is a valid *de minimis* under Ind. Code § 13-18-3-2, which requires that IDEM provide for a “*de minimis* quantity of additional pollutant load.” This *de minimis* would allow facilities to increase pollutant loadings by a relatively small amount yet stay below the threshold of significance.

Thank you for this opportunity to provide additional information for IDEM’s antidegradation rulemaking.

Sincerely,

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