

Implementation Changes to Recreational Water Quality Standard

Introduction:

Combined sewer overflow (“CSO”) discharges are a unique challenge under the Clean Water Act (“CWA”) that require a unique solution. By their very nature, untreated CSOs can *never* meet numeric effluent limitations for bacteria based upon criteria and implementation procedures that fail to account for the episodic nature of the discharges and the actual uses that typically, safely, or legally occur during peak flow periods.

The unique approach to this issue developed by the Environmental Protection Agency (“EPA”) and made legally binding on CSO dischargers and regulators under the CWA is referred to as the “CSO Policy.” Neither EPA nor Congress mandated the elimination of CSOs when they considered this issue and engaged in rulemaking and legislative negotiations. Both Congress and EPA recognized the economic, technological, practicable, and logistical impediments that most CSO communities would face if elimination of CSOs was made a legal requirement.

As a result, EPA developed a novel approach to the unique problem presented by CSOs. The framework for the CSO Policy includes:

- (1) Requiring CSO communities to implement nine minimum controls;
- (2) Mandating the development of Long Term Control Plans (“LTCPs”) by each CSO community that must be approved by authorized States to establish a level of control for CSO discharges that will meet the requirements of the CWA; and
- (3) Calling on States to revise water quality standards (WQS) to ensure that full implementation of approved LTCPs will result in CSO discharges that comply with the revised WQS.

The CSO Policy recognizes that CSO discharges cannot comply with traditional State recreational water quality standards (“RWQS”). **Ten times** the CSO Policy calls on States to revise their WQS to accommodate the recognition that wet weather, episodic discharges cannot realistically be held to meet dry weather, low flow standards. Moreover, the CSO Policy recognizes that the high costs of capturing and treating or eliminating CSO discharges may not be commensurate with the benefits. Thus, costs are considered in developing LTCPs, which is another deviation from typical water quality based effluent limitations. Toward that end, CSO discharges often contribute just a fraction of the pollutants that may impair water bodies, and the expenditure of large levels of citizen funding may do little, if anything, to achieve typical water quality standards. Finally, recreation in and on the water during wet weather events, especially in riverine systems, is generally undesirable, unsafe, or illegal, so the “use” to be protected by implementing stringent controls is often nonexistent. Revisions to State WQS to recognize these factors is strongly encouraged in the CSO Policy and the CWA. Otherwise, implementation of the LTCP will not meet WQS and CSO communities are destined to fail. Changes in State WQS must be made so that the level of control provided for in a community’s LTCP will reasonably be expected to satisfy the revised State WQS.

Indiana law reflects this requirement of the CSO Policy by expressly stating that fully implemented LTCPs “**fulfill[] the water quality goals of the state** with respect to wet weather discharges that

are a result of overflows from the combined sewer system addressed by the plan[s].”¹ Despite this clear policy statement, however, CSO communities that reach full implementation of their LTCPs and meet the performance requirements of the CSO Policy find that their residual CSO discharges still cannot comply with Indiana’s RWQS and may be deemed “prohibited discharges.”

The following proposal allows IDEM to realign with Indiana law, the federal CSO Policy, and the CWA by changing implementation of the RWQS so that residual CSO discharges can satisfy State WQS after full implementation of approved LTCPs.

Summary: IDEM improves implementation of its current RWQS for CSO discharges during the recreational season to calculate the geometric mean and single sample maximum based on the number of hours of CSO discharges that occur for a community using a 30-day assessment period.

Implementation Details:

- Indiana’s current numeric standards of 125 cfu or MPN as a geometric mean and single sample maximum of 235 cfu or MPN during the recreational season do not change.
- IDEM implements the current RWQS in a manner that is achievable for residual CSO discharges from communities that have fully implemented their approved LTCPs.
- The following method of implementing the RWQS could be set forth in NPDES permits or a non-rule policy document (NPD):
 - For CSO discharges, the geometric mean and single sample maximum are calculated based on either a typical year model simulation or actual discharge data using a 30-day assessment period.
 - Each hour of the 30-day period is considered a “sample.” “[A] larger dataset will more accurately characterize the water quality in a waterbody, which may result in more meaningful attainment determinations.”²
 - The geometric mean may not exceed 125 cfu or MPN per 100 mL. For the geometric mean calculation, hours of CSO discharge are assigned an event mean concentration (EMC) of 500,000 cfu, and hours without CSO discharge are assigned an EMC of 1 cfu. A CSO community that has no more than 264 hours of CSO discharge in a 30-day period in either a typical year model simulation or actual discharge data would comply with this standard.
 - “For data points reported below detectable limits, the GM calculation should be based on the assumption that those observations were present at the detection limit.”³
 - The single sample maximum is 235 cfu or MPN per 100 mL, except up to 10% of samples may exceed this value. A CSO community that has no more than 72 hours of CSO discharge in a 30-day period in either a typical year model simulation or actual discharge data would comply with this standard.

¹ Indiana Code 13-18-3-2.3(a) (emphasis added).

² EPA, 2012 Recreational Water Quality Criteria Fact Sheet, EPA-820-F-12-061, Sec. 3.6.5 (Dec. 2012).

³ *Id.* at Sec. 3.6.2 fn. 7.

- End-of-pipe or in-stream monitoring of CSOs during wet weather events is not required with the exception of monitoring treated CSO discharges.
- Design storm communities will determine the number of hours of overflow based on actual discharge data. Design storm communities reasonably can satisfy the standard when implemented as proposed, absent an extreme wet weather event that would warrant enforcement discretion.
- For communities that based their LTCP on the number of overflows in a typical year:
 - After implementing LTCP controls, the communities perform post-construction compliance monitoring, calibrate their collection system models, and verify that the model is predicting the level of overflow control specified in the LTCP.
 - The model is then used to determine the number of hours of CSO discharge a community has in a typical year.
- It is anticipated that LTCP Post Construction Compliance Monitoring (PCCM) Plans will need to be modified to reflect the proposed changes and/or a NPD will need to be prepared for consistent PCCM demonstrations.
- Design storm communities and events/year communities that cannot comply with the RWQS have the option of pursuing a Use Attainability Analysis.
- The implementation changes will not impact Indiana’s use of the recreational season, as set forth in 327 IAC 2-1.5-8(e)(1) and 327 IAC 2-1-6(d)(1).
- The implementation changes would be effective only for communities that have fully implemented their approved LTCPs and post-construction monitoring. Communities with LTCPs that have a level of control that exceeds the level of control that would achieve compliance with the RWQS implemented as set forth herein would not be allowed to amend the LTCPs based solely on implementation of the RWQS.
 - Suggested language: 327 IAC 2-1.5-8(e)(3) and 327 IAC 2-1-6(d)(3) may not be used as grounds to amend a Long Term Control Plan (LTCP) that has an approved level of control that is expected to exceed the level of control specified in clauses (A) and (B) of those Sections, unless the amendment is allowed under IC 13-18-3-2.4 or the CSO community can demonstrate to the satisfaction of the Commissioner that the approved level of control in the LTCP at full implementation is not feasible.
 - The above provision could be adopted into Indiana statute or regulation, giving IDEM an express prohibition on revising LTCPs based on RWQS implementation.
 - A variation of the language provided above also could be incorporated in the NPD that sets forth the method of implementing the RWQS for communities that are post-LTCP implementation.
- IDEM modifies 327 IAC 2-1.5-8(e) and 327 IAC 2-1-6 as proposed below to adopt a 30-day assessment period and be consistent with the above implementation change.
- **Proposed revisions to 327 IAC 2-1.5-8(e) and 327 IAC 2-1-6:**
 - (1) The recreational season is defined as the months of April through October, inclusive.

* * *

(3) For full body contact recreational uses, E. coli bacteria shall not exceed the following:

(A) One hundred twenty-five (125) per one hundred (100) milliliters as a geometric mean based on not less than five (5) samples equally spaced over a thirty (30)-day period. If a geometric mean cannot be calculated because five (5) equally spaced samples are not available, then the criterion stated in clause (B) must be met.

(B) Two hundred thirty-five (235) per one hundred (100) milliliters in any one (1) sample in a thirty (30) day period, except that in cases where there are at least ten (10) samples at a given site, up to ten percent (10%) of the samples may exceed two hundred thirty-five (235) cfu or MPN per one hundred (100) milliliters where:

~~(i) the E. coli exceedances are incidental and attributable solely to E. coli resulting from the discharge of treated wastewater from a wastewater treatment plant as defined at IC 13-11-2-258; and~~

(ii) the criterion in clause (A) is met.

However, a single sample shall be used for making beach notification and closure decisions.

(4) For demonstrating compliance with wastewater treatment requirements, sanitary wastewater dischargers shall ensure the following:

(A) The concentration of E. coli in the undiluted discharge does not exceed one hundred twenty-five (125) cfu or MPN per one hundred (100) milliliters as a geometric mean of the ~~effluent~~ samples ~~taken~~ in a calendar month.

(B) Not more than ten percent (10%) of all samples when there are not less than ten (10) samples ~~are taken and analyzed for E. coli~~ in a calendar month exceed two hundred thirty-five (235) cfu or MPN per one hundred (100) milliliters as a ~~daily~~ single sample maximum. Under this clause, the calculation of ten percent (10%) of the samples ~~taken~~ shall be limited to the lowest whole number result.

(5) Effluent limits to implement the criteria in subdivision (3) during the recreational season shall be established in NPDES permits by incorporating the following that are to be applied to the undiluted discharge:

(A) The concentration of E. coli in the undiluted discharge shall not exceed one hundred twenty-five (125) cfu or MPN per one hundred (100) milliliters as a geometric mean of the effluent samples taken in a calendar month.

(B) Not more than ten percent (10%) of all samples in a calendar month exceed two hundred thirty-five (235) cfu or MPN per one hundred (100) milliliters as a single sample ~~daily~~ maximum. Under this clause, the calculation of ten percent (10%) of the samples ~~taken~~ shall be limited to the lowest whole number result.

Basis in Indiana Law and the CSO Policy

- This proposed revision to implementation of IDEM’s current RWQS for CSO discharges achieves the requirements of Indiana law and the federal CSO Policy by making the standard attainable for CSO communities that have residual overflows after implementation of their approved LTCPs.
- Under Indiana law, full implementation of an approved LTCP achieves the State’s water quality goals. WQS must be revised or implemented such that residual CSO discharges can comply.
 - “WQS are State adopted, or Federally promulgated, rules which **serve as the goals for the water body** and the legal basis for the water quality-based NPDES permit requirements under the CWA.”⁴
 - “Upon implementation of the approved long term control plan, the plan **fulfills the water quality goals of the state** with respect to wet weather discharges that are a result of overflows from the combined sewer system addressed by the plan.”⁵
 - The State of Indiana has a “longstanding, codified policy decision that, once a CSO community has successfully implemented an approved Long Term Control Plan (LTCP) to achieve a high level of CSO control, water quality standards should be revised to allow for remaining residual CSOs.”⁶
 - “The CSO Policy recognizes that states have flexibility with respect to addressing residual CSOs that remain after successful implementation of LTCPs that are causing or contributing to exceedances of water quality standards.”⁷
 - Long ago, Indiana chose to “**allow residual CSOs after implementation of an approved LTCP to be authorized rather than requiring additional CSO control.**”⁸
- The CSO Policy requires that the level of control provided for in a community’s LTCP be sufficient to satisfy State WQS. As set forth in the below excerpts, the CSO Policy calls 10 times for States to revise their WQS so that when LTCPs are fully implemented communities are in compliance with the standards.
 - “State water quality standards authorities will be involved in the long-term CSO control planning effort as well. The water quality standards authorities will help

⁴ CSO Policy, 59 Fed. Reg. 18688, at *18695 (emphasis added).

⁵ Indiana Code 13-18-3-2.3(a) (emphasis added).

⁶ *EPA Review of Revisions to Indiana’s Water Quality Standards*, July 29, 2020, p. 2.

⁷ *Id.* at p. 7.

⁸ *Id.* at p. 8-9 (emphasis added).

ensure that **development of the CSO permittees' long-term CSO control plans are coordinated with the review and possible revision of water quality standards on CSO-impacted waters.**"⁹

- "Four key principles of the Policy ensure that CSO controls are **cost-effective** and meet the objectives of the CWA. The key principles are: . . . 4. **Review and revision, as appropriate, of water quality standards and their implementation procedures when developing CSO control plans to reflect the site-specific wet weather impacts of CSOs.**"¹⁰
- "[NPDES authorities] are responsible for **coordinating the review of the long-term CSO control plan and the development of the permit with the WQS authority to determine if revisions to the WQS are appropriate.**" *Id.* at *18690.
- "[T]he entire process surrounding CSO controls, community planning, **WQS and permit development/revision**, enforcement/compliance actions and public participation must be coordinated to control CSOs effectively. Permittees and **permitting authorities are encouraged to consider innovative and alternative approaches** and technologies that achieve the objectives of this Policy and the CWA."¹¹
- "Development of the long-term control plan should be coordinated with the review and appropriate revision of WQS and implementation procedures on CSO-impacted waters **to ensure that the long-term controls will be sufficient to meet water quality standards.**"¹²
- "Agreements should be reached on the monitoring protocols and models that will be used to evaluate the water quality impacts of the overflows, to **analyze the attainability of the WQS** and to determine the water quality-based requirements for the permit. Many opportunities exist for permittees and States to share information as control programs are developed and as WQS are reviewed. Such information should assist States in determining the **need for revisions to WQS and implementation procedures to better reflect the site-specific wet weather impacts of CSOs.**"¹³
- "EPA encourages States and permittees jointly to sponsor workshops for the affected public in the development of the long-term CSO control plan and during the development of appropriate revisions to WQS for CSO-impacted waters."*Id.*
- "**EPA regulations and guidance provide States with the flexibility to adapt their WQS, and implementation procedures to reflect site-specific conditions including those related to CSOs.**"¹⁴
- "In reviewing the attainability of their WQS and the applicability of their implementation procedures to CSO-impacted waters, States are encouraged to define more explicitly their recreational and aquatic life uses and then, if appropriate, **modify the criteria accordingly** to protect the designated uses."¹⁵

⁹ 59 Fed. Reg. 18688, at *18688.

¹⁰ *Id.* at *18689.

¹¹ *Id.*

¹² *Id.* at *18695.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

- “During the permittee's development of the long-term CSO control plan, the permit writer should **promote coordination between the permittee and State WQS authority in connection with possible WQS revisions.**”¹⁶
- By law, Indiana must have a RWQS that is attainable for CSO communities upon full implementation of their LTCPs. The elevated levels of E. coli in a CSO discharge make it impossible for any CSO discharge to comply with Indiana’s RWQS as currently implemented. This proposed implementation change to Indiana’s current RWQS achieves this legal requirement.
 - “Under the CSO Control Policy, communities with combined sewer systems are expected to develop LTCPs to provide for the attainment of water quality standards and compliance with other CWA requirements. By law, discharges that remain after implementation of the CSO controls must not interfere with the attainment of water quality standards.”¹⁷
 - “It is well accepted that any discharge from a CSO will likely contribute to violations of the water quality standard for E. coli.”¹⁸
 - “Water quality standards reviews are an important step in integrating the development and implementation of affordable, well-designed and operated CSO control programs with the requirements of the Clean Water Act (CWA).”¹⁹
 - “EPA’s goal is for CSO communities to develop and implement **cost-effective** LTCPs that achieve compliance with applicable water quality standards and with other CWA requirements, and for states to review and revise water quality standards as appropriate to ensure they are attainable.”²⁰
 - “Where available information demonstrates that water quality standards revisions are appropriate, EPA expects that States will make appropriate revisions to water quality standards to enable communities to implement LTCPs that comply with NPDES permit requirements and provide for attainment of water quality standards.”²¹
- The proposed changes are **implementation revisions** that EPA does not have authority to review under CWA Section 303(c)(3).
 - The CWA authorizes EPA to approve or disapprove a new or revised WQS. “[A] provision that simply implements a WQS without revising it would not constitute a new or revised standard.”²²
 - EPA has four requirements that must be met before they consider a specific provision as a new or revised WQS:
 - 1. Legally Binding;

¹⁶ *Id.*

¹⁷ EPA Office of Water, *Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews*, EPA-833-R-01-002, p. 9 (July 31, 2001).

¹⁸ IDEM NPD Water-003-NRD, Combined Sewer Overflow (CSO) Long-Term Control Plan Use Attainability Analysis Guidance (Dec. 14, 2001).

¹⁹ *Id.* at Foreword.

²⁰ *Id.* at p. 2.

²¹ *Id.* at p. 7.

²² EPA, *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*, Oct. 2012, p. 3.

- 2. Addresses Designated Uses, Water Quality Criteria, or Antidegradation;
- 3. Establishes the Criteria for Waters of the U.S. Immediately or Mandates How it will be Expressed/Established in the future; and
- 4. Establishes a New WQS or Revises an Existing WQS
 - “In contrast, a provision that **simply implements a WQS without revising it would not constitute a new or revised standard.**”
 - Specific water quality criteria provisions constitute new or revised WQS if they are “legally binding provisions that define, change, or establish **magnitude, duration or frequency** of water quality criteria.”²³
 - Indiana’s RWQC consists of a:
 - **Magnitude** of E. coli described by both a geometric mean of 125 cfu/100 mL and a single sample maximum of 235 cfu/100 mL;
 - **Duration** of 30 days; and
 - **Frequency** allowing a ten percent excursion of the single sample maximum in the 30-day period.²⁴
- The proposed changes to the standard do not affect the magnitude, duration, or frequency of the current RWQS. Accordingly, they are implementation provisions that do not constitute a new or revised standard.
 - While EPA retains authority to review and approve policies generally affecting WQS application and implementation, those policies themselves must “constitute new or revised WQS based on the four considerations above.”²⁵
 - Moreover, provisions guiding implementation of State NPDES programs do not meet the four considerations above and are not subject to EPA review under CWA Section 303(c)(3).²⁶
- Specifically, the proposal to calculate the geometric mean and single sample maximum using each hour as a sample is not subject to EPA review.
 - “The number of samples, to be collected by a state in determining if WQS have been exceeded, is not an approvable element of a WQS package (Florida Public Interest Research Group vs. EPA, 2007). Therefore states

²³ *Id.* p. 2 (emphasis added); see also *Florida Public Interest Research Group Citizen Lobby, Inc. v. United States Environmental Protection Agency*, 4:02CV408-WS, 2007 WL 9735053, at *6 (N.D. Fla. Feb. 15, 2007)(“EPA interprets the CWA and its implementing regulations to include as ‘water quality standards’ . . . those provisions . . . that define, change, or establish the magnitude (concentration), duration, or frequency that the State would use to determine when a waterbody is attaining any applicable water quality standards. Defined magnitude, duration, and frequency is also referred to herein as the established “ambient condition” or ‘level of protection.’ ”).

²⁴ See EPA, 2012 Recreational Water Quality Criteria Fact Sheet, EPA-820-F-12-061 (Dec. 2012)(describing the 2012 RWQC as having a magnitude expressed as GM and STV, a duration of 30 days, and a frequency allowing a 10% excursion of the STV).

²⁵ *Id.* at p. 3.

²⁶ *Id.* at p. 4.

should not include a minimum sample size as part of their criteria submission.”²⁷

- Examples of implementation provisions upon which EPA has taken no action because it lacks authority to do so:
 - Florida²⁸: **EPA determined that Florida’s method of implementing its E. coli criteria is not a new or revised water quality standard.** Specifically, EPA took no action on Florida’s requirement that “[m]onthly geometric means shall be based on a minimum of 5 samples taken over a 30-day period.” EPA’s review of the following water quality standard uses **blue text** to indicate provisions that EPA does not consider new or revised water quality standards:
 - F.A.C. r. 62-302.530: “MPN or MF counts shall not exceed a monthly geometric mean of 126 nor exceed the Ten Percent Threshold Value (TPTV) of 410 in 10% or more of the samples during any 30-day period. **Monthly geometric means shall be based on a minimum of 5 samples taken over a 30-day period.**”
 - Florida added this E. coli standard in 2016, replacing a fecal coliform standard. Thus, EPA was reviewing this provision for the first time when it determined that the manner in which to calculate the monthly geometric mean is not a new or revised WQS.
 - Virginia²⁹: In December 2020, EPA did not approve or disapprove a provision that **specifies the manner in which chlorophyll-a data should be aggregated and provides calculation procedures to determine the median chlorophyll-a values** for a segment. This provision does “not constitute and [sic] change to WQS and therefore [is] not subject for review under the CWA:”
 - 9 VAC 25-260-310: “(2) For segments JMSOH, JMSMH, and JMSPH, the median of same-day samples collected one meter or less in a segment should be calculated to represent the chlorophyll a expression of a segment over that day, and the median of same-month chlorophyll a values should be calculated to represent the chlorophyll a expression of a segment over that month. The seasonal geometric mean shall be calculated from the monthly chlorophyll a values for a segment.”
 - Texas³⁰: In reviewing Texas’ water quality standards, EPA determined that provisions for assessing water quality monitoring data to determine if water quality

²⁷ EPA Office of Water, Recreational Water Quality Criteria, EPA-820-F-12-058 (2012) (citing *Florida Public Interest Research Group Citizen Lobby, Inc. v. U. S. EPA*, Accordingly, in considering the IWR upon referral to the Agency, EPA interprets the CWA and its implementing regulations to include as “water quality standards” (or the relevant component of “water quality standards,” which is “water quality criteria” as that term is defined in 40 C.F.R. § 131.3(b)), those provisions of the IWR that define, change, or establish the magnitude (concentration), duration, or frequency that the State would use to determine when a waterbody is attaining any applicable water quality standards. Defined magnitude, duration, and frequency is also referred to herein as the established “ambient condition” or “level of protection.”

Florida Public Interest Research Group Citizen Lobby, Inc. v. United States Environmental Protection Agency, 4:02CV408-WS, 2007 WL 9735053 (N.D. Fla. Feb. 15, 2007).

²⁸ https://www.epa.gov/sites/production/files/2014-12/documents/fl_section62-302.pdf

²⁹ <https://www.epa.gov/sites/production/files/2014-12/documents/vawqs.pdf>

³⁰ <https://www.epa.gov/sites/production/files/2014-12/documents/vawqs.pdf>

standards are attained in individual water bodies are implementation, assessment, or monitoring provisions rather than new or revised water quality standards. Among these provisions is a directive that “[s]ample results that are used to assess standards attainment must not include samples that are collected during extreme hydrologic conditions such as high-flows and flooding immediately after heavy rains.” Similarly, EPA did not review how water quality standards are applied to stormwater discharges in Texas. Excerpts of the standards are set forth more fully below:

- 30 TX ADC § 307.9(a) General standards attainment sampling and assessment procedures. **The procedures listed in this section are solely for the purposes of assessing water quality monitoring data to determine if water quality standards are attained in individual water bodies.** Unless otherwise stated in this chapter, additional details concerning sampling procedures for the measurement, collection, preservation and laboratory analysis of water quality samples are provided in the Texas Commission on Environmental Quality (TCEQ) Surface Water Quality Monitoring Procedures, Volume 1: Physical and Chemical Monitoring Methods (RG-415) as amended, the most recently published edition of the book entitled Standard Methods for the Examination of Water and Wastewater, 40 Code of Federal Regulations (CFR) Part 136, or other reliable sources acceptable to the commission. Laboratory accreditation requirements are specified in Chapter 25 of this title (relating to Environmental Testing Laboratory Accreditation and Certification). Unless otherwise stated in this chapter, **additional details concerning how sampling data are evaluated to assess standards compliance are provided in the TCEQ Guidance for Assessing and Reporting Surface Water Quality in Texas as amended.**
- 30 TX ADC § 307.9(b) Samples to determine standards attainment are collected at locations approved by the commission. Samples collected at non-approved locations may be accepted at the discretion of the commission. Samples to determine standards attainment in ambient water must be representative in terms of location, seasonal variations, and hydrologic conditions. Locations must be typical of significant areas of a water body. Temporal sampling must be sufficient to appropriately address seasonal variations of concern. **Sample results that are used to assess standards attainment must not include samples that are collected during extreme hydrologic conditions such as high-flows and flooding immediately after heavy rains.** Further guidance on representative sampling, both spatially, temporally, and hydrologically, can be found in the TCEQ Surface Water Quality Monitoring Procedures, Volume 1: Physical and Chemical Monitoring Methods (RG-415), Surface Water Quality Monitoring Procedures, Volume 2: Methods for Collecting and Analyzing Biological Assemblage and Habitat (RG416), and the TCEQ Guidance for Assessing and Reporting Surface Water Quality in Texas as amended.

- (4) implement control alternatives determined to be cost effective and affordable.
- Cost effectiveness may be determined, at the option of the NPDES permit holder, by using a knee of the curve analysis in accordance with section 402(q) of the federal Clean Water Act (33 U.S.C. 1342(q)) and 59 FR 18688.”
- Indiana statute already distinguishes communities that have fully implemented LTCPs from those who have not. For example, the CSO wet weather limited use subcategory only applies after implementation of an approved LTCP.³³
 - **IC 13-18-3-2.5 CSO wet weather limited use subcategory**
 - “(a) A CSO wet weather limited use subcategory is established for waters affected by receiving combined sewer overflows, as specified in an approved long term control plan. **The CSO wet weather limited use subcategory applies to a specific water body after implementation of an approved long term control plan for the combined sewer system whose overflow discharges affect those waters is implemented and the conditions of subsection (b) are satisfied. . . .**
 - (b) The CSO wet weather limited use subcategory applies if:
 - (1) the department has approved a long term control plan for the NPDES permit holder for the combined sewer system;
 - (2) the approved long term control plan:
 - (A) is incorporated into:
 - (i) the NPDES permit holder's NPDES permit; or
 - (ii) an order of the commissioner under IC 13-14-2-6;
 - (B) satisfies the requirements of section 2.3 of this chapter; and
 - (C) specifies the water quality based requirements that apply to combined sewer overflows during and immediately following wet weather events, as provided in subsection (a)(1);
 - (3) the NPDES permit holder has implemented the approved long term control plan; and
 - (4) subject to subsection (c), 40 CFR 131.10, 40 CFR 131.20, and 40 CFR 131.21 are satisfied.”
- Indiana regulations provide limited circumstances under which an NPDES permit may be modified.³⁴ None of the reopener provisions in Indiana’s regulations would allow for a NPDES permit to be reopened based on implementation changes to

³³ Indiana Code 13-18-3-2.5.

³⁴ 327 IAC § 5-2-16.

RWQS that, by Indiana statute, regulation or NPD, apply only after the LTCP is fully implemented and post construction monitoring obligations are satisfied.³⁵

- Indiana NPDES Permits separately contain reopener clauses; however, we are not aware of any reopener clauses that would give a community the opportunity to reopen the NPDES Permit based on RWQS implementation changes. The changes – by Indiana statute, regulation, or NPD – apply only to CSO discharges from communities that have completed their LTCP and post-construction monitoring.
 - For example, in the City of Angola’s NPDES permit, “[s]ix (6) reopening clauses were incorporated . . . in Part I.C. . . . [A] third clause is to incorporate any applicable effluent limitation or standard issued or approved under section 301(b)(2)(C), (D) and (E), 304(b)(2), and 307(a)(2) of the Clean Water Act. . . .”³⁶ The implementation changes constitute changes to standards issued or approved under the Clean Water Act.
- Consent decrees incorporating a community’s LTCP may also contain provisions limiting the circumstances under which an LTCP may be modified.
- Nothing within the CSO Policy would prohibit Indiana from enacting, by statute, regulation or NPD, implementation changes to the RWQS that apply only after full implementation of a LTCP and post-construction monitoring.

³⁵ See 327 IAC § 5-2-16.

³⁶ Angola NPDES Permit Fact Sheet, 14 (2020).