

MEMORANDUM OF UNDERSTANDING
AMONG THE FEDERAL HIGHWAY ADMINISTRATION,
THE U.S. ENVIRONMENTAL PROTECTION AGENCY (REGION 5),
AND THE INDIANA DEPARTMENT OF TRANSPORTATION
REGARDING
SOLE SOURCE AQUIFERS IN THE STATE OF INDIANA

I. INTRODUCTION

The purpose of this memorandum is to develop and document an understanding among the U.S. Environmental Protection Agency (EPA) Region 5, the Federal Highway Administration (FHWA), and the Indiana Department of Transportation (INDOT), collectively referred to as the "PARTIES" and individually referred to as "PARTY," concerning the review of proposed Federal-aid highway projects, in order to protect the EPA-designated Sole Source Aquifer (SSA) located in the State of Indiana, as shown in Attachment A, including any SSAs that EPA may designate in the future. EPA's authority for the SSA Protection Program is authorized under Section 1424(e) of the Safe Drinking Water Act of 1974, 42 U.S.C. § 300h-3(e), (the Act) and states, in part, that "no commitment for Federal financial assistance (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for Federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer."

All commitments made by EPA in this MOU are subject to the availability of appropriated funds. Nothing in this MOU, in and of itself, obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with Agency budget priorities. FHWA and INDOT agree not to submit a claim for compensation for services rendered to EPA in connection with activities it carries out in furtherance of this MOU. This MOU does not exempt FHWA and INDOT from EPA policies governing competition for assistance agreements. Any transaction involving reimbursement or competition of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

This Memorandum of Understanding (MOU) outlines the criteria used to evaluate proposed federal-aid highway projects within the State of Indiana that may contaminate the SSA and the procedures to be followed by the PARTIES in evaluating and reviewing such projects. This MOU also outlines the categories of proposed projects that do not need to be submitted to EPA for review. To the extent any criteria or procedures in this MOU differ from or are in addition to the ones in the April 1989 Memorandum of Understanding between Federal Highway Administration, Region 5 and the U.S. Environmental Protection Agency, Region V, this MOU shall reflect the current understanding between the Parties regarding federal-aid highway projects within the State of Indiana.

This MOU is a voluntary agreement that expresses the good-faith intentions of the parties, is not intended to be legally binding, and is not enforceable by any party.

This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity,

by persons who are not party to this MOU, or against the PARTIES, their officers or employees, subrecipients, or any other person. This MOU does not apply to any person outside of the PARTIES.

II. APPLICABILITY

This MOU applies to the review of all proposed federal-aid highway projects within all current and future SSA project review areas in the State of Indiana. When an aquifer in the State of Indiana is designated as an SSA, EPA plans to notify FHWA and INDOT, and Attachment A will be updated as necessary.

III. GOAL

The goal of this MOU is to ensure that each project receiving federal-aid highway funding is planned, designed, and constructed to prevent the introduction of contaminants into the SSA in quantities that may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health as defined in Attachment B, and to establish formal coordination procedures for the review of such projects among EPA, FHWA, and INDOT.

IV. GUIDING PRINCIPLES FOR PROJECT REVIEW

For the purposes of this MOU, in determining whether the act of constructing a proposed project would create a significant hazard to public health, the parties agree to consider the following factors, at a minimum:

1. The toxicity and migration/transformation potential of the contaminants involved;
2. The volume of contaminants that may enter the SSA; and
3. Characteristics of the SSA in the area affected by the project (i.e., geochemical, hydrological, geological, etc.), and attenuation capability of the SSA.

Attachment B contains additional definitions for terms used in this MOU.

V. CRITERIA AND PROCEDURES

A. The current procedure for submission and review of projects is as follows:

1. The INDOT agrees to notify all applicants for and subrecipients of FHWA federal-aid highway projects within its oversight authority of the location of designated SSA project review areas and identify applicable permits and recommended Best Management Practices (BMPs) necessary to minimize impact to the SSA. A searchable interactive map of designated SSA project review areas is available at <https://www.epa.gov/dwssa>.
2. The INDOT agrees to review proposed projects to determine if they require EPA SSA review. INDOT agrees to consider each step in the most current Indiana Department of Transportation Categorical Exclusion Manual (<https://www.in.gov/indot/2523.htm>).
3. The INDOT (or its designee such as the applicant for FHWA federal-aid highway projects) agrees to submit a brief written narrative to EPA describing the proposed project highlighting any risks that could create a significant hazard to public health. If

there are any risks due to the project that could create a significant hazard to public health, INDOT agrees to identify the proposed mitigation measures in the narrative provided to the EPA SSA Coordinator.

4. The EPA intends to respond to SSA review requests within thirty (30) calendar days of receipt unless EPA deems additional review time as described below in 4a.-c. If supplemental documentation is needed to make a determination, EPA intends to notify the requestor within thirty (30) calendar days of receipt of the SSA review request; in such cases, the thirty (30) calendar review period for EPA's decision will start once all necessary documentation has been received by EPA.
 - a. If there are comments (with substantiating data such as project information, review of literature, independent field investigation, or a physically observable or obvious fact) received from the public, interested agencies, or tribes, indicating potential adverse impacts on the SSA, INDOT, through FHWA, shall immediately send these comments to EPA. EPA intends to notify FHWA and INDOT, within thirty (30) calendar days of receipt of the comments, regarding its decision. EPA reserves the right to extend this time period when it finds that additional information is needed, that additional administrative review is necessary, or that it will be in the public interest to hold a public meeting. Prior to publicly announcing a public meeting, EPA intends to inform INDOT of its intention to hold a public meeting and allow INDOT 10 days to resolve any remaining issues. EPA may request, in writing, additional time or information to complete its review.
 - b. If EPA receives a citizen's request at any time during the review or at any time before FHWA has approved the project's final environmental document, EPA intends to immediately notify FHWA and INDOT (in writing, if time permits or by telephone if the end of the comment period is near). The EPA may consult with FHWA and INDOT as necessary to reevaluate the project with respect to the concern(s) contained in the request, and EPA intends to notify FHWA and INDOT within thirty (30) calendar days of receiving such request of EPA's decision.
 - c. The EPA may request additional review time or information in writing. If EPA requests additional time or information, EPA intends to inform FHWA and INDOT within thirty (30) additional calendar days, or any other reasonable period of time needed to conduct the review, of the results of this evaluation.
5. The EPA review will result in one of the following determinations described below. EPA agrees to provide its determination in writing.
 - a. If EPA determines the proposed project as designed most likely will not result in contamination of the SSA so as to create a significant hazard to public health, EPA intends to inform the requestor (e.g., applicant for FHWA federal-aid highway project or its designee) that no further assessment or evaluation is required under the SSA program. Prior to federal financial assistance for projects within the SSA, INDOT and FHWA agree to review funding applications to confirm that either this determination has been documented by EPA or that the project is exempt from EPA SSA Review (see below).

- b. If EPA determines the project has the potential to result in contamination of the SSA so as to create a significant hazard to public health, EPA intends to inform the requestor (e.g., applicant for FHWA federal-aid highway project or its designee), as well as INDOT and FHWA, that a *Detailed Ground Water Impact Assessment* is required.
 - 1) If such a determination is made, EPA and FHWA plan to discuss measures that must be implemented to ensure that any contamination of the SSA will not create a significant hazard to the public health; and
 - 2) The FHWA and INDOT agree to inspect and monitor to ensure that such measures are implemented.
6. If no response is received from EPA, FHWA and INDOT may advance the project after notifying in writing the EPA Region 5 Sole Source Aquifer Coordinator that the official review period has concluded. FHWA and INDOT will consider to the maximum extent practicable those comments that are submitted after the official review period has concluded and will accept EPA's final determination (which EPA plans to announce after consultation with FHWA and INDOT).
7. When roadways and/or bridges need emergency repair as determined by FHWA, most of such repairs will meet the criteria in Section V.B. "Projects Exempt from EPA SSA Review". If emergency activities do not meet the Section V.B. criteria, EPA will strive to complete its review in such emergency situations within seven (7) calendar days of receipt of FHWA's notification. In the rare cases when the emergency circumstances require immediate attention to address threats to life or property, and the activities do not meet the exemption criteria, then emergency repairs will proceed and FHWA agrees to notify EPA as soon as practicable.

To the extent practicable for emergency situations, INDOT will ensure that emergency repairs are conducted in a manner that will not contaminate an SSA so as to create a significant hazard to public health.

8. The EPA agrees to maintain a project review file that includes copies of all SSA project review documents and correspondence for the preceding ten years consistent with EPA Records Retention Schedule 1035, Environmental Programs and Projects, item c (Routine environmental program and project records).
9. To carry out the joint activities described in the MOU, any assertion of business confidentiality (not including any attorney-client communications or attorney work product privileges) will not prevent INDOT from sharing these documents with EPA. Upon notification of the presence and location of confidential business information in received documents, EPA will protect the confidentiality of the confidential business information, including records, reports, or other financial information as set forth in EPA's regulations at 40 C.F.R. Part 2, subpart B.

B. Projects Exempt from EPA SSA Review

All proposed Federal-aid highway projects for which all associated construction elements are situated outside of designated SSA project review areas are exempt from EPA SSA review.

Federal-aid highway projects classified as Categorical Exclusions (CEs) under 23 C.F.R. § 771.117 are exempt from EPA SSA review, unless the project involves any of the elements below.

- Projects that involve substantial excavation depth (greater than 10 feet below ground surface (bgs)) except deeper finite, controlled excavation greater than 10 feet bgs. Projects requiring deeper finite, controlled excavation greater than 10 feet bgs, which follow all applicable state and federal laws and INDOT standard specifications, do not pose a substantial threat to groundwater quality, the SSA(s), or the human environment due to high confidence in engineering control measures and natural dispersion. Examples of deeper finite, controlled excavation include pile driving, structural foundations, septic tank removal, manholes, sanitary sewer, core drilling for traffic signal poles, etc.
- Projects that involve the use of chemicals listed in the National Primary Drinking Water Regulations (40 C.F.R. Part 141).
- Any other project or activity which the requestor, FHWA, or INDOT determines may contaminate a designated SSA through its recharge area so as to create a significant hazard to public health.

Implementation of BMPs, required in permits under the Clean Water Act (CWA) and construction industry standards, are expected to prevent the exceedance of drinking water standards in surface waters. Therefore, such CEs are not expected to pose a significant hazard to public health and are exempt from EPA SSA review.

The EPA understands that certain federal-aid highway projects, such as those listed below, may not be classified as CEs and therefore INDOT and FHWA intend to provide to EPA for SSA review if located within any SSA project review area.

- New, modified, or disturbed wells including where wells of any type (e.g., water, geothermal, oil/gas production) are within the anticipated construction area and are not clearly flagged to be protected.
- New, modified, or disturbed septic systems or other individual disposal systems, other than septic system removal following applicable state laws and standard specifications to prevent septage release.
- New, modified, or disturbed French drains or stormwater basins designed to promote infiltration.
- New, modified, or disturbed chemical storage (e.g., salt storage; relocation of petroleum/chemical storage tanks or pipelines, sanitary sewers, or waste storage facilities)
- Projects within or in close proximity to known soil or groundwater contamination (e.g., a site listed on the EPA National Priorities List (i.e., a Superfund site) or a state-designated brownfield or clean-up site) that involve earthwork where shallow groundwater is expected to be encountered and dewatered.

The EPA reserves the right to review an exempt project upon written notice to FHWA and INDOT should new information lead it to conclude the project may contaminate an SSA so as to create a significant hazard to public health.

VI. DURATION, MODIFICATION, AND TERMINATION

This MOU will remain in effect for a period of five (5) years from the effective date. This MOU may be extended or modified, at any time through the mutual written consent of the PARTIES. Additionally, a PARTY may terminate its participation in this MOU at any time by providing written notice to the other PARTIES, at least ninety (90) days in advance of the desired termination date.

VII. COORDINATION AND CONTACTS

Materials furnished to EPA by INDOT, with a copy to FHWA, under this MOU will be addressed to the attention of the SSA Coordinator listed on the Region 5 EPA SSA website.

Agency contact information is listed as follows:

- FHWA: FHWA Environmental Program Manager
FHWA Indiana Division
575 N. Pennsylvania St., Room 254
Indianapolis, IN 46204
Indiana.FHWA@dot.gov

- INDOT: Indiana Department of Transportation
Director of Environmental Services, IGCN, 758-ESD
100 N. Senate Ave.
Indianapolis, IN 46204
ESDReview@indot.in.gov

- EPA: Sole Source Aquifer Coordinator
Water Division, Groundwater and Drinking Water Branch
U.S. Environmental Protection Agency, Region 5 (WG-15J)
77 W. Jackson Blvd.
Chicago, IL 60604

VIII. AGREEMENT APPROVALS

Effective date: This MOU will become effective upon the date signed by the last of the Parties. This MOU is subject to revision upon agreement of all of the following agencies.



Travis Underhill, Deputy Commissioner
Indiana Department of Transportation

Date: 7-15-21

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HANNON

Digitally signed by JERMAINE R
HANNON
Date: 2021.07.16 10:54:47 -04'00'
Jermaine R. Hannon, Division Administrator
Federal Highway Administration

Date:

Cheryl Newton, Acting Regional Administrator/Deputy Regional Administrator
Environmental Protection Agency, Region 5

Date:

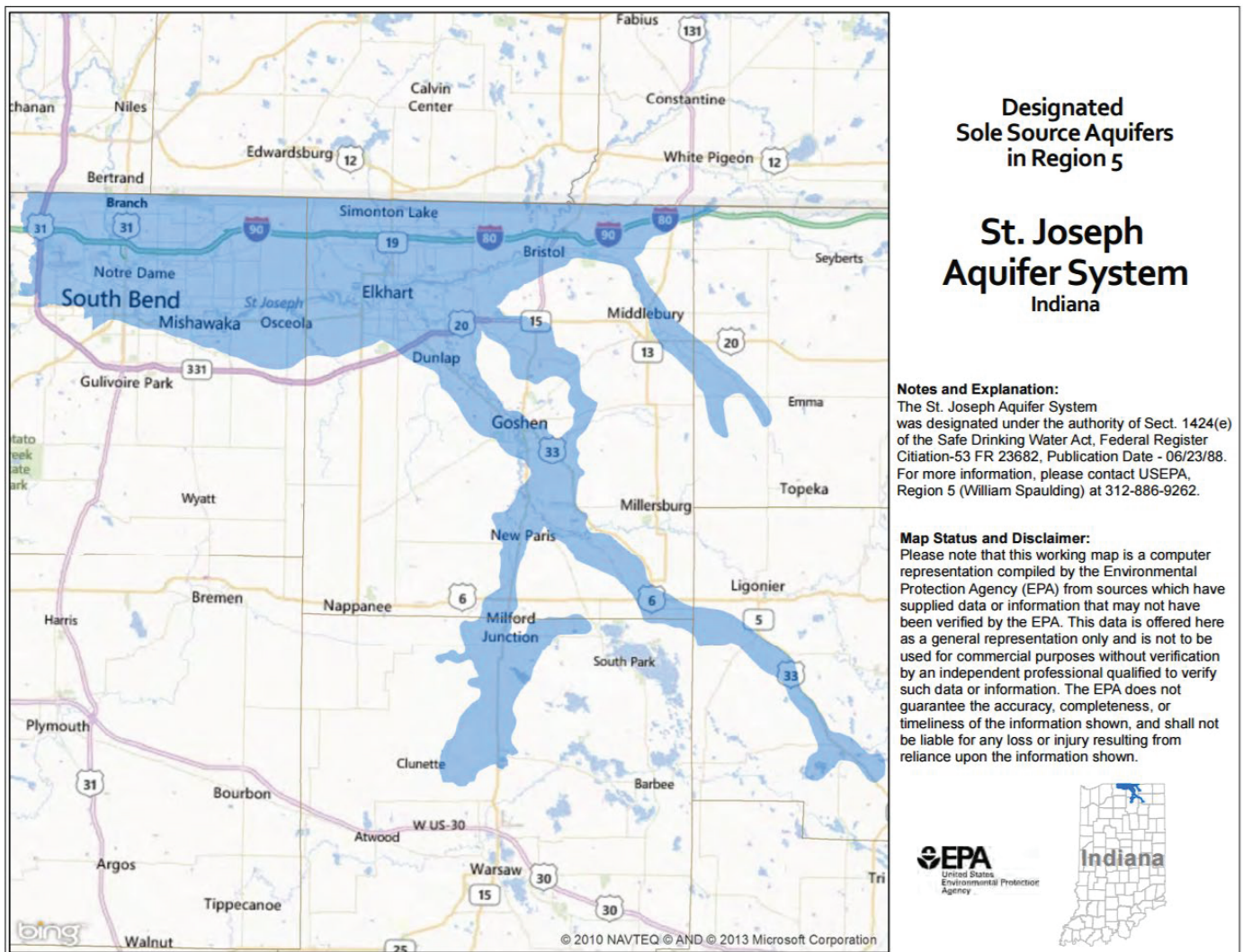
Attachments

- A. Designated SSA
- B. Definitions

ATTACHMENT A – Designated Sole Source Aquifer

Pursuant to the Safe Drinking Water Act, EPA has determined that the St. Joseph Sole Source Aquifer System in Indiana is the sole or principal drinking water source for its designated area. See EPA's June 23, 1988 Notice of Determination at 53 FR 23682. As such, no commitment for Federal financial assistance identified by FHWA as Federal-aid highway funding may be authorized, and no FHWA approval may be given, for projects within the boundaries of the St. Joseph SSA's designated Project Review Area for any project that EPA determines may contaminate this designated aquifer through its recharge area so as to create a significant hazard to public health. A searchable interactive map of designated SSA project review areas is available at <https://www.epa.gov/dwssa>.

Map of the St. Joseph Sole Source Aquifer Project Review Area:



ATTACHMENT B - DEFINITIONS

Aquifer means a geological formation, group of formations, or part of a formation that is sufficiently permeable that when saturated can yield useful quantities of groundwater to wells, springs, or streams.

Designated area means the surface area above the aquifer and its recharge area.

Federal financial assistance means any financial benefits provided directly as aid to a project by a department, agency, or instrumentality of the Federal government in any form including contracts, grants, and loan guarantees. It does not include actions or programs carried out directly by or on behalf of the Federal government (e.g., U.S. Army Corps of Engineers 404 permits, U.S. Coast Guard permits, etc.). EPA determines whether projects receive "federal financial assistance" (referred to in Section 1424(e) of the Safe Drinking Water Act) on a case-by-case basis and based on the specific project, person, or entity completing the project, source of Federal funds involved, and any other relevant factors.

Federal-aid highway proposed project or federal-aid highway project is any roadway or bridge project that may receive federal-aid highway funding for which an application for Federal financial assistance has been made.

Pollution generating impervious surface (PGIS) means an impervious surface that is considered a significant source of pollutants in storm water runoff, including surfaces that receive direct rainfall (or run-on or blow-in of rainfall) and are subject to vehicular use; industrial activities; or storage of erodible or leachable materials, wastes, or chemicals. Erodeable or leachable materials, wastes, or chemicals are substances that, when exposed to rainfall, measurably alter the physical or chemical characteristics of the rainfall runoff. Examples include roadways, sidewalks that are regularly treated with salt or other deicing chemicals, erodible soils that are stockpiled, uncovered process wastes, fertilizers, oily substances, ashes, kiln dust, and garbage container leakage. A surface, whether paved or not, is considered subject to vehicular use if it is regularly used by motor vehicles. The following are considered regularly used surfaces: roads, un-vegetated road shoulders, bicycle lanes within the travel lane of a roadway, driveways, parking lots, unfenced fire lanes, vehicular equipment storage yards, and airport runways.

Project review area means the area within which federal financially assisted projects will be reviewed, which could include all or part of the designated area and streamflow source areas, identified on the Project Review Area map.

Significant hazard to public health means any level of contaminant which causes or may cause the aquifer to exceed any maximum contaminant level set forth in any promulgated National Primary Drinking Water Standard at any point where the water may be used for drinking purposes or which may otherwise adversely affect the health of persons, or which may require a public water system to install additional treatment to prevent such adverse effect.

Sole source aquifer (SSA) means an aquifer designated by EPA as a Sole or Principal Source Aquifer under section 1424(e) of the Safe Drinking Water Act which supplies at least 50% of the drinking water for its service and where there is no reasonably available alternative sources should the aquifer become contaminated.

A project that is "located within a sole source aquifer" means a federal-aid highway project with any associated construction element that is situated within the boundaries defined on the Sole Source Aquifer Project Review Area map.