UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

OCT 1 1 2016

REPLY TO THE ATTENTION OF:

WC-16J

Martha Clark Mettler
Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana 46204

Dear Ms. Mettler:

The U.S. Environmental Protection Agency (EPA) appreciates the statutory, regulatory and permitting changes Indiana has effected to respond to EPA's June 6, 2011 legal authority review (LAR), May 16, 2012 petition protocol, and March 9, 2010 conflict of interest and term limit correspondence with respect to the State's approved National Pollutant Discharge Elimination System (NPDES) program. Pursuant to 40 C.F.R. § 123.62, revisions to the controlling State statutory or regulatory authority may constitute revisions to the approved State NPDES program, and EPA approval of program revisions is necessary before the revisions become effective as part of the State's approved program. EPA has reviewed the regulatory revisions that went into effect in July 2015, which the Indiana Department of Environmental Management (IDEM) forwarded, and EPA has determined that these revised regulations are revisions to the approved NPDES program requiring EPA approval.

EPA approved Indiana's General Permit program in 1991, before many of its particular general permits-by-rule went into effect; and those permits-by-rule differed from draft general permits submitted with the application EPA approved. Since the last approval, Indiana has enacted numerous changes to statutes and regulations that control Indiana's approved NPDES program.[1] To complete the process of revising Indiana's approved program under 40 C.F.R. § 123.62(b), EPA requests that IDEM submit additional documentation. Specifically, we ask that IDEM

[1] Among other statutory changes, Indiana enacted the permit term limit at Ind. Code § 13-15-2 in 1996; and a provision, at Ind. Code § 13-18-3-15, in 2011, requiring amendment of regulations at Ind. Admin. Code. Tit. 327 r. 5 and 15 to eliminate the requirement that NPDES general permits be contained in a rule, allowing the department to develop and issue general permits in accordance with 40 C.F.R. 122.28, saying the existing general permits remain binding until a person submits a notice of intent not later than 90 days after IDEM makes a Notice of intent available to the person or the person applies for an individual permit. The July 2015 regulatory amendments, among other things, add provisions governing Storm Water Run-Off Associated with Construction Activity (Rule 5), Storm Water Discharges Exposed to Industrial Activity (Rule 6), Facilities Engaged in Mining of Coal, Coal Processing, and Reclamation Activities (Rule 7), Storm Water Run-Off Associated with Municipal Separate Strom Sewer system Conveyances (Rule 13), On-site Residential Sewage Discharging Disposal Systems within Allen County On-Site Waste Management District (Rule 14), and Concentrated Animal Feeding Operations (CAFOs) (Rule 16). These rules also shift the authority for issuing general permits from the Water Board to IDEM, bringing them under statutory provisions that apply to IDEM.

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provide an updated Attorney General's statement (See 40 C.F.R. §§ 123.23 and 123.62(b) and (d)) to explain whether the scope of IDEM's authority remains adequate to issue permits in compliance with all applicable Clean Water Act requirements. In addition, the AG's statement should specifically address the questions in the enclosure to this letter.

We have enclosed questions on particular rules and statutes and request that the Attorney General statement clarify the State's interpretation of specific provisions. We request an Attorney General's opinion within 60 days of the date of this letter. Among other things, we note the regulations IDEM promulgated in July 2015 continue to reference permits-by-rule, and seek clarification on how existing permits-by-rule will be phased out and replaced by the IDEM-issued general permits, as well as whether and how statutory and regulatory permit term limits apply to general and individual NPDES permits and existing permits-by-rule.

In the meantime, we request that IDEM provide a schedule for: (1) submitting the general permits to EPA for each of the following sectors: Coal Mining, Industrial Stormwater, Municipal Separate Storm Sewer Systems (MS4), and the Allen County On-site Systems, (2) issuing the general permits for those permit sectors listed previously, and (3) making notice of intent forms available for all sectors. The scheduled due dates provided by IDEM previously have long passed and action to address discharges authorized through existing permits-by-rule is essential. IDEM should also provide an updated program description (See 40 C.F.R. §§ 123.22 and 123.62(b) and (d)) reflecting the regulatory and program changes.

We thank you and your staff for the efforts to update State statutes, regulations, permits and forms, and look forward to working together to ensure a robust and enforceable NPDES program that meets the requirements of the Clean Water Act, and protects the Waters of the State of Indiana.

Please do not hesitate to contact me at (312) 886-9296, if you have any questions or comments or need further information.

Sincerely,

Tinka G. Hyde
Director, Water Division

Enclosure

cc: Nancy King, IDEM, electronically

Questions on Particular Rules and Statutes

1. New language at Ind. Admin. Code tit. 35, r. 5-2-1.8 contains exceptions to the exclusion from permitting that differ from the wording of EPA's exceptions at 40 C.F.R. § 122.3. Please provide an explanation regarding how the provisions below are as stringent as the federal requirements at 40 C.F.R. § 122.3:

    a. Ind. Admin. Code tit. 35, r.5-2-1.8(4) omits the permitting exemption exceptions found at 40 C.F.R. § 122.3(e) for concentrated aquatic animal production processes (40 C.F.R. § 122.24); and discharges to aquatic aquaculture projects (40 C.F.R. § 122.25).

    b. Ind. Admin. Code tit. 35, r. 5-2-1.8(5) exempts from permitting discharges in compliance with the instructions from a state employee acting in a similar capacity to an on-scene coordinator acting pursuant to 40 C.F.R. Part 300 or 33 C.F.R. § 153.10(c).

2. 40 C.F.R. § 122.4(d) states no permit may be issued: "When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." Ind. Admin. Code tit. 35, r. 5-2-7, does not include this prohibition. Is there a separate provision in Indiana statue or regulation that would preclude issuance of a permit consistent with 40 C.F.R. § 122.4(d)? If so, please cite that provision.

3. Ind. Admin. Code tit. 35, r. 5-2-16(b) omits the endangerment cause for permit termination included at 40 C.F.R. § 122.64(a)(3) that states: a determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination. Is there a separate provision that would authorize IDEM to terminate a permit consistent with 40 C.F.R. § 122.64(a)(3)?

4. EPA Region 5 previously notified IDEM, in its March 9, 2010 letter that enclosed a June 24, 2009 letter EPA sent to the Office of the Governor of Indiana, that Ind. Code §13-30-10-1.5(k) includes only willful and reckless crimes for most CWA violations, among other issues. Federal delegation regulations at 40 C.F.R. § 123.27(3) require the inclusion of knowing and negligent crimes. When the underlying statute is changed to comport with federal law, this descriptive language will need to be amended as well.

5. Ind. Admin. Code tit. 327, r. 15-2-6(a)(2) and (b) state that an individual permit must be required when a discharge results in a "significant" lowering of water quality in a downstream water. Please cite the provision in Indiana rules or statutes that delineates how a determination of "significance" is made. Include an explanation of how the Indiana rule or statute is as stringent as the federal program, when making a determination of "significance".

6. Ind. Admin. Code tit. 327, r. 15-2-7(a) provides: "Compliance with a general permit **rule** constitutes compliance with all applicable standards and limitations of the CWA and state law" (emphasis added). Does this shield provision address permits-by-rule, general permits, or both types of permits? This wording suggests Indiana is not terminating permits-by-rule.

7. Does Ind. Admin. Code tit. 327 require that all general permits specify the application deadline and include specific language explaining when a discharge will be authorized as required by 40 C.F.R. § 122.28(b)(2)(iii) and (iv)?

8. Ind. Admin. Code tit. 327, r. 15-4-1(l)(2) requires a regulated person to maintain records and allow officials to have access to and copy those records. Please cite the state regulation(s) which also requires that the permittee provide any information the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with a general permit consistent with 40 C.F.R. § 122.41(h). We note Ind. Admin. Code tit. 327, r. 5-2-8-7 (2015) requires this for individual permits.

9. Ind. Admin. Code tit. 327, r. 15-4-2(c) only prohibits a bypass "which causes or is likely to cause, applicable effluent limitations to be exceeded." See also Ind. Admin. Code tit. 327, r. 5-2-8(12)(B). That prohibition appears to cover only a subset of the bypasses prohibited by 40 C.F.R. § 122.41(m)(4). Limiting the types of bypass prohibited appears to be inconsistent with the federal regulation. Please explain how this provision is consistent with 40 C.F.R. § 122.41(m)(4). Please cite the provision in the Indiana rules that is the equivalent of 40 C.F.R. § 122.41(m)(2), which allows bypass where there is no effluent violation only if it is necessary for maintenance.

10. Ind. Admin. Code. tit. 327, r. 15-4-2(f)(1)-(3), concerning a permittee who wishes to establish an affirmative defense in response to an upset, does not appear to be consistent with the federal regulations at 40 C.F.R. § 122.41(n)(3) and (4). 40 C.F.R. § 122.41(n)(3) requires a demonstration that i) an upset occurred and the permittee can identify the causes; ii) the facility was being properly operated at the time; iii) the permittee submitted the required notices of the upset; and iv) the permittee complied with any remedial measures required under 122.41(d). 40 C.F.R. § 122.41(n)(4) imposes the burden of proof on the permittee seeking to establish the occurrence of an upset. The State regulation, at Ind. Admin. Code tit. 327, r. 15-4-2(f) requires a demonstration that i) an upset occurred and the person identified the specific cause, **if possible**; ii) the facility was at the time being operated **in compliance with proper operation and maintenance procedures**; and the person complied with remedial measures required under 15-4-2(d) (emphasis added to words that are different from 40 C.F.R. § 122.41(n)(3)). Please provide an explanation as to how the Indiana rules, which differ from the language of 40 C.F.R. § 122.41(n)(3)(i), (ii), and (iv) and omit 40 C.F.R. § 122.41(n)(3)(iii) and 122.41(n)(4) federal subsection (iii), are consistent with federal regulations.

11. Ind. Admin. Code tit. 327, r. 15-4-3(c) is inconsistent with the 24 hour reporting requirement of 40 C.F.R. §122.41(l)(6) as related specifically to the following state provisions which:

    - omit the requirement to report any "upset" which exceeds any effluent limitation in the permit (See 40 C.F.R. §122.4(l)(6)(ii)(B));
    - only requires reporting of noncompliance which may pose "significant" danger (see 40 C.F.R. § 122.41(l)(6), which requires reporting of any noncompliance which may endanger health or the environment); and
    - equates 24 hours with "1 business day," which would seemingly delay notification of endangerment situations over weekends and holidays.

    Please provide an explanation as to how these provisions are as stringent as the federal requirement and/or cite the state regulations which require reporting of upsets, any noncompliance which may endanger human health or the environment, and which requires those notices within 24 hours.

12. Section 402(b)(1) of the Clean Water Act, 33 U.S.C. § 1342(b)(1), and the regulations promulgated at 40 C.F.R. § 123.46, stipulate that permits shall be issued for a fixed term not exceeding 5 years. This provides an opportunity for the permitting authority to apply new technologies and water quality standards, and the public and EPA to comment during the renewal process. A general permit must expire 5 years from issuance, and no new facilities may obtain coverage under the permit after that date. In addition, facilities cannot renew their coverage under a general permit by filing a second NOI.

    Various provisions of Indiana rules appear to be inconsistent with these requirements of the Clean Water Act (CWA) by allowing for permits that last longer than 5 years. Indiana's general permits by rule grant coverage for a period of five years from the date coverage commences, but only required submission of an NOI to continue those permits beyond those initial 5 years. (See Ind. Admin. Code tit. 327, r. 15-5-12, r. 15-6-10, r. 15-7-10, r. 15-13-19, r. 15-14-11, r. 15-16-6). The rules do not appear to require the State to go through the process of reissuance, including public noticing the general permit-by-rule.

    We seek clarification on how Indiana applies the permit term limits in the statutes and regulations consistent with the requirements of the Clean Water Act. The Attorney General Statement should discuss past, current, and future permit terms, and provisions governing permit terms and procedures; and include a discussion of the following items:

        a. Citations to all provisions that impose a 5 year term limit on individual NPDES permits, General NPDES permits issued by IDEM, and existing permits-by-rule; and explain how these provisions are as stringent as the federal requirements at 40 C.F.R. §§ 122.28(b), 122.6, 122.21 and 122.26.

The Attorney General should discuss how five-year term limits govern individual NPDES permits and all general NPDES permits, including existing permits-by-rule.

b. Clarify the scope and application of the overarching Indiana "period of permit" provision at Ind. Code § 13-15-3-2; and the effect of Ind. Admin. Code tit. 327, r. 3-18-3-15. The provision at Ind. Code § 13-15-3-2(a) states a permit issued under (1) this article (except 13-15-9), (2) IC13-17-11, (3) 13-18-18, or (4) 13-20-1 may be issued for any period determined by the department to be appropriate but not to exceed five (5) years. While the cross-reference to 13-18-18, at (3), addresses coal mine general permits, Ind. Code § 13-15-3-2(a) does not explicitly list other provisions that govern NPDES permit.

c. IDEM issues NPDES permits under Ind. Code § 13-18-20, which Ind. Code § 13-15-3-2(a) does not list. It does list Article 15 (this article), however; and Article 15 addresses "permits to control water pollution and atomic radiation" at Ind. Code § 13-15-1-2. Please explain whether this category also encompasses all NPDES permits, thus bringing them under the permit term limit through Article 15.

d. Ind. Code § 13-15-3-2(b) states except as provided in federal law, a valid permit that has been issued under this chapter that concerns an activity of a continuing nature may be renewed for a period of not more than ten (10) years as determined by the department. Please confirm whether this provision is sufficient to limit NPDES Permit terms to no more than 5 years, as required by federal law.

e. The Attorney General should also discuss other provisions that impose term limits or prescribe renewal processes, including Admin. Code tit. 327, r. 15-5-12, r. 15-6-10, r. 15-7-10). Please clarify how they are consistent with the federal term requirement and 40 C.F.R. §§ 122.28(b), 122.6, 122.21 and 122.26 and how the renewal processes allow the permitting authority to apply new technologies and water quality standards, and provide for public and EPA comment.

f. Please clarify what term limits apply to permits-by-rule issued prior to the regulatory revisions, what date triggers the running of the permit term (e.g. the date they were originally issued and the date they end); and what requirements and actions terminate them and their coverage.

Our March 9, 2010, correspondence discussed how the lack of an expiration date in general permits-by-rule the Water Pollution Control Board issued presented concern under Clean Water Act requirements, and this issue has also been raised in a petition EPA received on Indiana's NPDES program. We appreciate the steps IDEM has taken to establish a new general permit

procedure to address term limits and conflict of interest concerns going forward; but still need to verify that the pre-existing permits-by-rule end and identify the end point for each such permit.

The Statute Indiana enacted in 2011 at Ind. Code § 3-18-3-15 appears to require the Board to amend the NPDES permitting provisions and set a process for phasing out the permits-by-rule. Specifically, the Statute requires the Board to amend the rules at Ind. Admin. Code tit. 327 r. 5 and r. 15 to eliminate permits-by-rule; provides that after those rules are amended, the terms and conditions of an NPDES general permit under that article as they existed before the amendment remain in effect and are binding until the person submits a notice of intent to be covered by the new NPDES general permit issued under the new rules; and requires that NOI to be submitted no later than 90 days after IDEM makes the form of the notice of intent available to the person. Please explain how this impacts the expiration date of the existing permits-by-rule and their coverage, when are the forms considered available to the person (thereby triggering the 90 day period to submit an NOI) and what happens if a person does not submit an NOI.

13. Ind. Admin. Code tit. 327, r. 15-13-6(d) allows multiple municipal separate storm sewer systems (MS4) entities to submit a single NOI. Please provide an explanation as to how this rule complies with the requirement at 40 C.F.R. § 122.33(b)(1) that allows an operator and other municipalities or governmental entities to jointly submit an NOI; but requires identification of those that will implement specific provisions of the permit.