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

MAY 16 2012

REPLY TO THE ATTENTION OF:

WN-16J

Mr. Bruno Pigott, Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Mail Code IGCN 1315
Indianapolis, Indiana 46204-2251

Dear Mr. Pigott

Enclosed please find a protocol that describes the U.S. Environmental Protection Agency's plan for responding to the December 17, 2009 petition from the Environmental Law and Policy Center, Sierra Club, and Hoosier Environmental Counsel for corrective action or withdrawal of the Indiana National Pollutant Discharge Elimination System program. We look forward to working with you as we implement the enclosed protocol.

Please contact Janet Pellegrini of my staff or Maria Gonzalez, Office of Regional Counsel, if you have any questions. Ms. Pellegrini can be reached at (312) 886-4298 and Ms. Gonzalez can be reached at (312) 886-6630.

Sincerely,

Tinka G. Hyde
Director, Water Division

Enclosure

cc: Albert Ettinger
Kim Ferraro, Hoosier Environmental Council
Jessica Dexter, Environmental Law and Policy Center
Bowden Quinn, Sierra Club

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REGION 5
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CHICAGO, IL 60604-3590

MAY 16 2012

REPLY TO THE ATTENTION OF:

WN-16J

Kim Ferraro
Hoosier Environmental Council
3951 North Meridian Street, Suite 100
Indianapolis, Indiana 46208

Dear Ms. Ferraro:

Thank you for your January 27, 2012, letter providing the petitioners' comments on the draft protocol for responding to issues raised in your December 17, 2009, petition for corrective action or withdrawal of the Indiana National Pollutant Discharge Elimination System program. We have taken your comments into account in the course of preparing the enclosed protocol.

The U.S. Environmental Protection Agency, Region 5, will proceed to implement the enclosed protocol. We will communicate the outcome to you when implementation is complete. Please contact Janet Pellegrini of my staff or Maria Gonzalez, Office of Regional Counsel, if you have any questions. Ms. Pellegrini can be reached at (312) 886-4298 and Ms. Gonzalez can be reached at (312) 886-6630.

Sincerely,

Tinka G. Hyde
Director, Water Division

Enclosure

cc: Mr. Bruno Pigott, IDEM

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CHICAGO, IL 60604-3590

MAY 16 2012

REPLY TO THE ATTENTION OF:

WN-16J

Jessica Dexter
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1300
Chicago, Illinois 60601

Dear Ms. Dexter:

Thank you for your January 27, 2012, letter providing the petitioners' comments on the draft protocol for responding to issues raised in your December 17, 2009, petition for corrective action or withdrawal of the Indiana National Pollutant Discharge Elimination System program. We have taken your comments into account in the course of preparing the enclosed protocol.

The U.S. Environmental Protection Agency, Region 5, will proceed to implement the enclosed protocol. We will communicate the outcome to you when implementation is complete. Please contact Janet Pellegrini of my staff or Maria Gonzalez, Office of Regional Counsel, if you have any questions. Ms. Pellegrini can be reached at (312) 886-4298 and Ms. Gonzalez can be reached at (312) 886-6630.

Sincerely,

Tinka G. Hyde
Director, Water Division

Enclosure

cc: Mr. Bruno Pigott, IDEM

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REGION 5
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CHICAGO, IL 60604-3590

MAY 16 2012

REPLY TO THE ATTENTION OF:

WN-16J

Bowden Quinn
Sierra Club, Hoosier Chapter
1915 W. 18th Street, Suite D
Indianapolis, Indiana 46202

Dear Mr. Quinn:

Thank you for your January 27, 2012, letter providing the petitioners' comments on the draft protocol for responding to issues raised in your December 17, 2009, petition for corrective action or withdrawal of the Indiana National Pollutant Discharge Elimination System program. We have taken your comments into account in the course of preparing the enclosed protocol.

The U.S. Environmental Protection Agency, Region 5, will proceed to implement the enclosed protocol. We will communicate the outcome to you when implementation is complete. Please contact Janet Pellegrini of my staff or Maria Gonzalez, Office of Regional Counsel, if you have any questions. Ms. Pellegrini can be reached at (312) 886-4298 and Ms. Gonzalez can be reached at (312) 886-6630.

Sincerely,

Tinka G. Hyde
Director, Water Division

Enclosure

cc: Mr. Bruno Pigott, IDEM

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

MAY 16 2012

REPLY TO THE ATTENTION OF:

WN-16J

Albert Ettinger
53 West Jackson Boulevard, Suite 1664
Chicago, Illinois 60604

Dear Mr. Ettinger:

Thank you for your January 27, 2012, letter providing the petitioners' comments on the draft protocol for responding to issues raised in your December 17, 2009, petition for corrective action or withdrawal of the Indiana National Pollutant Discharge Elimination System program. We have taken your comments into account in the course of preparing the enclosed protocol.

The U.S. Environmental Protection Agency, Region 5, will proceed to implement the enclosed protocol. We will communicate the outcome to you when implementation is complete. Please contact Janet Pellegrini of my staff or Maria Gonzalez, Office of Regional Counsel, if you have any questions. Ms. Pellegrini can be reached at (312) 886-4298 and Ms. Gonzalez can be reached at (312) 886-6630.

Sincerely,

Tinka G. Hyde
Director, Water Division

Enclosure

cc: Mr. Bruno Pigott, IDEM

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Protocol for Correcting or Reviewing Issues Raised in the December 2009 Petition
from the
Environmental Law and Policy Center, Sierra Club, and Hoosier Environmental Council
April 2012

Protocol for Responding to Issues Related to Permitting

Allegation 1: The petition alleges that the Indiana Department of Environmental Management (IDEM) has failed to adopt antidegradation implementation rules and procedures.

The petitioners allege that Indiana was required to establish, under 40 C.F.R. § 131.12, rules to implement the Indiana antidegradation policy at Ind. Admin. Code tit. 327, r. 2-1-2. Indiana has indicated, the petitioners allege, that it could not implement the policy because it has no implementation procedures in place, except those covering the Lake Michigan basin.

Response: 40 C.F.R. part 131 applies to the water quality standards program. 40 C.F.R. § 131.12 requires the State to "identify" the methods for implementing their statewide antidegradation policy.

Indiana adopted a revised antidegradation policy and implementation rules in March 2012. Indiana is preparing the newly adopted rules for submittal to EPA for review under section 303(c) of the CWA, 33 U.S.C. § 1313(c)(3). EPA will review the rules submitted by Indiana for consistency with the federal regulations at 40 C.F.R. § 131.12 and part 132.

Allegation 2: The petition alleges that the draft implementation rule covering new or increased discharges in the Lake Michigan basin suffers from serious flaws, pointing to the NPDES permits for the U.S. Steel facility in Gary and the BP refinery in Whiting, and a December 2007 report by Professor A. James Barnes, who wrote that the draft rule lacked clarity.

Response: The Board's final adopted rule addresses discharges inside as well as outside the Lake Michigan basin. EPA will review the rule under Section 303(c)(3) of the Clean Water Act, 33 U.S.C. § 1313(c)(3), after submittal by the State.

EPA reviewed the draft permits for the U.S. Steel facility in Gary and the BP refinery in Whiting. We did not object to the BP Whiting permit. We objected to the U.S. Steel permit on the grounds that the State did not explain how certain new or increased limits satisfied the State's antidegradation policy. Indiana resolved the objection in 2009.

Allegation 3: The petition alleges that there are shortcomings with Indiana's draft antidegradation implementation rule.

Response: Indiana adopted a revised antidegradation policy and implementation rules in March 2012. Indiana is preparing the newly adopted rules for submittal to EPA for review under section 303(c) of the CWA, 33 U.S.C. § 1313(c)(3). EPA will review the rules submitted by Indiana for consistency with the federal regulations at 40 C.F.R. § 131.12 and part 132.

Allegation 4: The petition alleges that Indiana legislation has limited Indiana's authority to implement 40 C.F.R. § 131.12. Specifically, the petition questions: a) the approvability of the de minimis threshold at Ind. Code § 13-18-3-2(l); b) the antidegradation review by the Board contemplated by Ind. Code § 13-18-3-2(p); and c) the substantial weight that Ind. Code § 13-18-3-2(t) gives to discharge socioeconomic importance determinations by other governmental agencies.

a. While it recognizes that EPA and the courts have approved de minimis thresholds, the petition alleges that such thresholds are narrowly drawn, that EPA's authority to approve them is limited, and that EPA cannot approve Indiana's method of implementing the de minimis exception at Ind. Code § 13-18-3-2(l).

Response: Ind. Code § 13-18-3-2(l) provides that the procedures to prevent degradation for an outstanding state resource water must include:

(1) a definition of significant lowering of water quality that includes a de minimis quantity of additional pollutant load;
(A) for which a new or increased permit limit is required; and
(B) below which antidegradation implementation procedures do not apply.

The petition cites the Sixth Circuit's decision in *Kentucky Waterways Alliance v. Johnson*, 540 F. 3d 466 (6th Cir. 2008), to argue that IDEM's method of implementing this statutory de minimis exception cannot properly be approved. The petition does not challenge the de minimis exception itself. The courts have accepted a de minimis exception for antidegradation review. *Id.* at 484; *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732, 769 (S.D. W. Va. 2003). Rather, the petition questions the approvability of the rule proposed for implementing the statutory exception.

Indiana adopted a revised antidegradation policy and implementation rules in March 2012. Indiana is preparing the newly adopted rules for submittal to EPA for review under section 303(c) of the CWA, 33 U.S.C. § 1313(c)(3). EPA will review the rules submitted by Indiana for consistency with the federal regulations at 40 C.F.R. § 131.12 and part 132.

b. The petition objects that Ind. Code § 13-18-3-2(p) exempts activities covered by a general permit from undergoing an additional antidegradation review, after the antidegradation review of the rules authorizing general permits; and

questions the content of the rule review and the assurances it can provide with respect to individual discharges.

Response: Indiana amended Ind. Code § 13-18-3-2(p) in 2011 (*see* P.L. 81-2011, Sec. 1). The text now reads as follows:

> This subsection applies to all surface waters of the state. The department shall complete an antidegradation review of all NPDES general permits. The department may modify the general permits for purposes of antidegradation compliance. After an antidegradation review of a permit is conducted under this subsection, activities covered by an NPDES general permit are not required to undergo an additional antidegradation review. An NPDES general permit may not be used to authorize a discharge into an outstanding national resource water or an outstanding state resource water, except that a short term, temporary storm water discharge to an outstanding national resource water or to an outstanding state resource water may be permitted under an NPDES general permit if the commissioner determines that the discharge will not significantly lower the water quality downstream of the discharge.

EPA approved the current Indiana program for issuing NPDES general permits in 1991. (The approval did not include Ind. Code § 13-18-1-2(a)(2)(B) as amended in 1998.) The current program provides for the issuance of permits as administrative rules adopted by the Indiana Water Pollution Control Board. The rule adoption process included notice to the public with an opportunity to comment on draft general permit rules.

By letter dated April 8, 2010, IDEM provided a plan through which Indiana is moving administration of its NPDES general permits program from the Indiana Water Pollution Control Board to IDEM. Consistent with the plan, Indiana enacted 2011 Ind. Act 81, and in October 2010, IDEM asked for comment on amendments to the general permit program rules in Ind. Admin. Code tit. 327, r. 15. The plan provides that IDEM will draft new general permits for the discharge categories presently addressed by the permits-by-rule in Ind. Admin. Code tit. 327, r. 15. (The State may elect to use individual permits rather than a general permit to authorize discharges from a particular category for which a general permit-by-rule now exists.) In March 2012, IDEM sent EPA via electronic mail an updated Draft Implementation schedule for their Office of Water Quality General Permits Project (see attached file).

EPA will review Ind. Code § 13-18-3-2(p). EPA will review each general permit that IDEM develops. To the extent that any such general permit would authorize a new or increased discharge to a body of water the quality of which is better than water quality standards, EPA will evaluate whether the permit satisfies Indiana's approved antidegradation policy.

c. The petition questions the substantial weight that Ind. Code § 13-18-3-2(t)(1) gives to determinations by governmental entities on the need to accommodate

important economic or social development, arguing that this improperly limits and delegates IDEM's authority.

Response: Giving weight to determinations by other governmental entities does not prevent IDEM from making its own determination.

Allegation 5: The petition questions the approval of permits in impaired watersheds, the lack of a ban on phosphorous fertilizers, and the designation of releases from concentrated animal feeding operations (CAFOs) as spills rather than discharges.

Response: Ind. Admin. Code tit. 327, r. 5-2-10(a)(4) provides that each NPDES permit shall provide for and ensure compliance with water quality standard based and other more stringent requirements, including those permit conditions necessary to achieve water quality standards established by the water pollution control board or by EPA in accordance with Sections 118 and 303 of the CWA. In addition, Ind. Admin. Code tit. 327, r. 5-2-7(f) provides that no permit may be issued to a new source or a new discharger if the discharge from the construction or operation of the facility will cause or contribute to the violation of water quality standards in the receiving waters, unless:

> (1) The commissioner has conducted a pollutant load allocation analysis for the pertinent segment of the receiving stream which will result in compliance with applicable water quality standards;
> (2) Sufficient pollutant load allocations remain to accommodate the proposed discharge and the permit contains effluent limitations consistent with the remaining allocations.
> (3) The commissioner has imposed schedules for compliance with the pollutant load allocation upon all existing dischargers into the segment.

The petition does not identify individual permits that allegedly do not comply with the Indiana rule provisions cited above. Nevertheless, EPA has reviewed or plans to review 13 draft permits for major Indiana dischargers in federal fiscal year 2012. EPA will determine whether any of the 13 discharge to impaired waters, and whether: (1) issuance of the permit(s) would meet 40 C.F.R. § 123.25(a)(1) (prohibitions), to the extent that this rule is applicable, or (2) includes conditions as may be required by 40 C.F.R. § 123.25(a)(15) (Establishing NPDES Permit Conditions) .

IDEM's April 2010 and March 2012 plans provide that the State will draft new general permits for the discharge categories presently addressed by the permits-by-rule in Ind. Admin. Code tit. 327, r. 15. EPA will review each general permit that IDEM develops. To the extent that a general permit would authorize the discharge of a pollutant for which a waterbody is listed as impaired, EPA will evaluate the permit under 40 C.F.R. § 123.25(a)(1) and (15).

The Clean Water Act does not require states to ban phosphorus fertilizers.

The petition does not cite to specific instances in which IDEM characterized a release from a CAFO as a spill rather than a discharge. It does not allege that the State has not acted on CAFO violations or has not sought adequate penalties or collected administrative fines when imposed (*see* 40 C.F.R. § 123.63(a)(3)(i) and (ii))[1].

The January 27, 2012 letter from the petitioners on the draft protocol asks EPA to review revisions to Indiana's NPDES administrative rules for CAFOs. While not part of the response to the petition, EPA will review the revisions under 40 C.F.R. § 123.62.

Allegation 6: The petition alleges that IDEM routinely issues discharge permits that are likely to degrade water quality. It alleges that IDEM has issued permits without appropriate consideration of the need for antidegradation and/or full satisfaction of public participation provisions, citing the City of Jefferson, the City of Austin, and the Town of McCordsville WWTP permits. The petition also alleges that IDEM issues general permits without regard to the impairment status of the watershed where the permitted operations are situated.

Response: With respect to public participation, 40 C.F.R. § 131.12(a)(1) requires satisfaction of the public participation provisions of the State's continuing planning process. The Petition does not cite to Indiana public participation provisions that the petitioners feel are not being met.

EPA will review application of the Indiana antidegradation policy to the Jefferson, Austin, and McCordsville permits. As mentioned in the response to Allegation 5, we have reviewed or plan to review application of the policy to 13 individual permits as well as the general permits that IDEM plans to draft.

Allegation 7: The Petition alleges that Indiana's general permits-by-rule allow discharges without providing an analysis of how the permits meet the antidegradation policy.

Response: This allegation echoes the allegation at 6, that the antidegradation analysis is conducted at the point when the general permits-by-rule are issued and not when a source is authorized under the permit-by-rule.

Under the April 2010 and March 2012 plans, IDEM will draft new general permits for the discharge categories presently addressed by the permits-by-rule in Ind. Admin. Code tit. 327, r. 15. EPA will review each general permit that IDEM develops. To the extent that any such general permit would authorize a new or increased discharge to a body of water the quality of which is better than water quality standards, EPA will evaluate whether the permit satisfies Indiana's antidegradation policy at Ind. Admin. Code tit. 327, r. 2-1-2.

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[1] In their January 27, 2012 letter, the petitioners said that the Indiana NPDES general permit-by-rule does not provide for an evaluation of CAFOs under 40 C.F.R. § 122.44(d). Please note that the permit, at 327 Ind. Adm. Code tit. 327 r. 15-15-4(f) provides that discharges from CAFOs must meet Indiana water quality standards.

Allegation 8: The Petition questions the appropriateness of allowing general permits by rule for coal mines.

Response: The federal regulations applicable to general permits, 40 C.F.R. § 122.28, do not categorically exclude coal mines from the potential to be authorized under general permits. IDEM plans to draft a new general permit for coal mines. EPA will review the permit to ensure that it contains all of the applicable conditions required by 40 C.F.R. § 123.25(a).

Allegation 9: The Petition questions the adequacy of the public comment period for general permits. Specifically, the petitioners appear to focus on a desire for public notice and comment when a facility seeks coverage under a general permit and not simply when the general permit is issued.

Response: As discussed above, the State is in the process of changing the way it issues general permits. With respect to public comment, 40 C.F.R. § 123.25 requires administration in conformance with, inter alia, 40 C.F.R. §§ 122.28 and 124.10(b). Under 40 C.F.R. § 124.10(b), the State must allow 30 days for public comment when it prepares a draft permit. The petition cites to the period allowed for comment on the application of a general permit to the particular facility, however, instead of the initial comment period allowed at the time of promulgation of the general permits-by-rule. With general permits, public comment takes place at the time the general permit is issued. Except for general permits issued to CAFOs (see 40 C.F.R. § 122.23(h)), public participation does not occur at the time a particular facility is authorized to discharge under that permit. For discharge categories other than CAFOs, federal regulations do not require a State to hold a public comment period at the time a facility submits a Notice of Intent to participate in the general permit. Moreover, 40 C.F.R. § 122.28 allows certain entities to be authorized to discharge under a general permit without submitting a Notice of Intent.

Allegation 10: The petition alleges that Indiana's permits-by-rule constitute repeated issuance of NPDES permits that do not conform to the requirements of the Act, citing the term of those permits beyond five years.

Response: By letter dated April 8, 2010, and e-mail dated March 14, 2012, IDEM provided a plan through which Indiana is moving administration of its NPDES general permits program from the Indiana Water Pollution Control Board to IDEM. Consistent with the plan, Indiana enacted 2011 Ind. Acts 81, and in October 2010, IDEM asked for comment on amendments to the general permit program rules in Ind. Admin. Code tit. 327, r. 15. The plan provides that IDEM will draft new general permits for the discharge categories presently addressed by the permits-by-rule in Ind. Admin. Code tit. 327, r. 15. EPA will review each such permit to ensure that they contain all of the applicable conditions required by 40 C.F.R. § 123.25(a). EPA expects that the duration of these permits will not exceed five years.

Protocol for Responding to Issues Related to Compliance Evaluation

Allegation 11: The Petition questions IDEM's enforcement of the requirements of general permits, citing the number of mine inspections.

Response: Under a September 2011 Memorandum of Understanding (MOU) that IDEM signed with the Indiana Department of Natural Resources (IDNR), IDEM issues NPDES permits to surface coal mining and reclamation operations and IDNR conducts monthly and quarterly inspections to check for compliance with these NPDES permits. EPA is reviewing the MOU and its implications for NPDES inspections and enforcement. EPA also intends to review IDEM's compliance and enforcement files for coal mines.