

LSA Document #08-764 (Antidegradation)  
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**OFFICIAL COMMENT**

**RE: Environmental Coalition Comments, LSA Document #08-764 (Antidegradation),  
"Third Notice" Draft Rule**

Dear Ms. Stevens:

The Conservation Law Center, Environmental Law and Policy Center, Hoosier Environmental Council, Save the Dunes, Sierra Club Hoosier Chapter, Porter County Chapter of the Izaak Walton League of America, Indiana Division of the Izaak Walton League of America, and the Alliance for the Great Lakes are pleased to submit the following comments on the proposed "third notice" antidegradation rule published in the Indiana Register on December 7, 2011 (LSA Document #08-764). Our organizations have members or clients in Indiana and surrounding states who will be directly affected by the implementation of Indiana's antidegradation rules.

Our organizations have been involved in antidegradation policy development efforts in Indiana for many years. We have participated throughout IDEM's workshop and rulemaking processes initiated in 2007 and submitted formal comments to IDEM on numerous occasions, including by correspondence dated April 9, 2008, June 23, 2008, October 15, 2008, November 13, 2008, May 7, 2009, January 29, 2010, June 18, 2011, July 29, 2011, and September 14, 2011. On December 17, 2009, members of our coalition filed a petition under 40 CFR § 123.64 requesting U.S. EPA to correct several serious deficiencies in the Indiana water program, including the absence of adequate antidegradation implementation procedures. EPA has yet to respond to our petition.

We are pleased that this long delayed rulemaking process is moving forward and close to completion. The Department incorporated several substantive and structural revisions that improve the overall readability and substance of the draft rule in several respects. We are

confident that the current draft will help to protect the quality of Indiana waters and should be approved, subject to several concerns noted below. Avoiding further delay, these remaining concerns can be addressed by statements or clarifications included in IDEM's response to comments, U.S. EPA's approval document, or in separate guidance. We expect that EPA's decision document will address and discuss IDEM's assumptions, interpretations, and clarifications in order to minimize any disputes or confusion about the proper interpretation of these rules.

It is critical that IDEM and the Indiana Water Pollution Control Board avoid further delay in the adoption of these important rules. Indiana's rivers, streams, and lakes have endured years of unnecessary degradation and will continue to do so until the state adopts and begins implementing the antidegradation implementation procedures required by federal law. We appreciate the opportunities for public participation and input in the development of these rules over the past five years. All parties have had an adequate opportunity to participate and comment on issues of concern. It is now time to complete this process and adopt these rules.

#### **I. Inclusion of Threatened or Endangered Species Defined Under State Law**

Several commenters expressed concern that prior versions of the draft rule failed to specifically include threatened and endangered species defined under state law. In its response to comments, IDEM agreed that "the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species." IDEM Summary/Response to Comments at p. 81. Thus, IDEM stated that it "anticipates changing the definition for consideration by the Water Pollution Control Board" to include state listed species. *Id.* We agree that this change should be made.

#### **II. General Permits**

There has been extensive discussion in the stakeholder process of ways to reconcile general permits with case-specific antidegradation review. In particular, we discussed U.S. EPA's concern that activities covered by general permits are not given a "blanket exemption" (Jan 2010 letter), how IDEM intends to avoid cumulative degradation resulting from the use of

general permits, and how IDEM will exercise independent review and require an individual permit when necessary to avoid significant cumulative degradation.

The environmental coalition submitted detailed comments on these issues in response to IDEM's second notice draft rule. We had hoped that the revised draft would respond to these comments and recommendations and include more detail on how IDEM intends to conduct antidegradation review of activities authorized by general permits. Unfortunately, the third notice draft does not provide much additional guidance or clarification for how the rule will be implemented.

As discussed in our June 16th, 2011 letter (attached), it is our understanding that IDEM's antidegradation review of NPDES general permits as set forth in Sec. 1(c)(1) of the draft rule should lead to conditions in the general permits to ensure that:

1. sufficient information is provided in the applicant's notice of intent for general permit coverage (NOI) for IDEM to determine the magnitude of the proposed lowering of water quality;
2. there is adequate public notice and access to the information contained in these NOIs;
3. any water quality lowering resulting from use of the general permit has been determined to either be "insignificant" or "necessary to accommodate important social or economic development" on an individualized basis;
4. general permits will not be used if they would have the effect of lowering water quality in OSRWs or ONRWs; and
5. an individual permit will be required if the project would lead to significant degradation on an individual or cumulative basis.

Please confirm in response to comments if our understanding is correct to avoid the need for further clarification and discussion with EPA before the rule is approvable.

### **III. 401 Certifications**

Our comments on the second notice draft pointed out that the Department has failed to adequately explain how antidegradation reviews will take place for CWA Section 404 permits and Section 401 certifications. In response, the Department stated that it believes that its current 401 certification process satisfies antidegradation review requirements. IDEM Summary/Response to Comments at p. 10. The Department further explained that it uses

USACE guidance on 404 permitting when issuing 401 certifications. (40 CFR Part 230, Section 404(b)(1) Guidelines). Id.

Although the 404(b) Guidelines' "avoid, minimize, and mitigate" framework, if properly applied, may provide an adequate substitute for the "alternatives analysis" part of the antidegradation review, it is not clear how the 404(b) Guidelines provide an adequate substitute for the socioeconomic review. The Department should clarify how it intends to administer its 401 certification process to ensure that degradation is necessary to accommodate "important economic or social development in the area in which the waters are located" as required by Section 131.12(a)(2). Further, the Department should not simply "rubber stamp" the Corps' 404 permitting determination but should make clear that it will undertake an independent review of the alternatives analysis as well as the socioeconomic considerations implicated by activities requiring Section 401 certifications.

#### **IV. Exemptions**

The draft continues to exempt certain cross-pollutant and intra-watershed trades from a full socioeconomic analysis. (See Sec. 5(b)(5) and Sec. 5(d)(2)). IDEM's rationale is apparently that such trades are presumptively socially and economically beneficial so there is no need to independently perform a socioeconomic review. We have expressed concern about this blanket assumption on a number of occasions. See, e.g., June 18, 2011 Letter at p. 11 (attached). Specifically, it is not clear how IDEM can determine ahead of time that every single cross-pollutant or intra-watershed trade will lead to important economic or social development. A socioeconomic review is necessary to distinguish "good" trades from "bad" trades. Id. U.S. EPA Region 5 has informed IDEM that "to the extent that Indiana is finding, by rule, that the exempted actions are always socially and economically beneficial, Indiana must provide some factual information in the record supporting that assertion." Jan. 29, 2010 Letter at p. 2. IDEM should further explain how it intends to ensure that any listed activities exempted from a full socioeconomic review are nonetheless "necessary to accommodate important economic or social development in the area in which the waters are located," as required by Section 131.12(a)(2).

#### **V. Loading capacity / cumulative de minimis caps**

IDEM's response to comments has helped to clarify the concept of "de minimis" discharges to lakes. We now understand that an increased loading to an Indiana lake can be considered "de minimis" only in cases where an alternative mixing zone has been established. As the Department explained, "[a] discharge to a lake that does not have an approved alternate mixing zone does not have any available loading capacity." IDEM Summary/Response to Comments at p. 63. Thus, "[a]ny discharger without a pre-existing alternate mixing zone that proposes a new or increased discharge will be required to submit an antidegradation demonstration." Id. at p. 23.

We remain concerned, however, with the method that the Department will use to calculate the available loading capacity of rivers and streams. In particular, we are concerned about IDEM's proposed use of additional wastewater discharge flow in the calculation of the loading capacity of a receiving water. See IDEM Summary/Response to Comments at 90. How does IDEM intend to treat a situation where process water is withdrawn upstream of the discharge point and then returned to the river in the effluent stream? Under such a circumstance there is no water "added" to the river when the effluent is discharged so it does not make sense to include the volume of effluent when calculating loading capacity. A similar situation is present where the discharger takes clean groundwater that had been reducing pollution concentrations in the receiving water body. IDEM should clarify for the record how it intends to calculate total loading capacity in these situations.

We emphasize again that any proposal to limit antidegradation analysis only to situations where an increased permit limit is contemplated must be rejected. Antidegradation is about preserving assimilative capacity and avoiding unnecessary new or increased pollution. This is true even as to pollutant loadings that were not limited in the past because they were not viewed as having a reasonable potential to cause or contribute to violations of water quality standards.

## **VI. BADCT concept**

The draft rule includes a technology-based treatment limit (BADCT) as a way to expedite and simplify a full evaluation of technology alternatives in situations where the applicant has demonstrated that there are no nondegradation or mitigation alternatives available. As we have pointed out in the past, it is not clear from the record what process the Department will use to

review and update BADCT limits to ensure that the limits continue to reflect the best control technology available as treatment technology continues to improve. See June 18, 2011 Letter at 13. IDEM should further explain how it intends to keep BADCT limits up-to-date.

Respectfully submitted,

For the Antidegradation Environmental Coalition:



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