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December 17, 2009

Sent via usps certified mail, return receipt requested

The Honorable Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: PETITION FOR CORRECTIVE ACTION OR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE STATE OF INDIANA

Dear Administrator Jackson:

Enclosed is our Petition for Corrective Action, filed pursuant to 40 C.F.R. §123.64, regarding the National Pollutant Discharge Elimination System (NPDES) program for the State of Indiana on behalf of the Hoosier Environmental Council, the Hoosier Chapter of the Sierra Club, and the Environmental Law & Policy Center of the Midwest. These citizens' groups petition the United States Environmental Protection Agency (EPA) to evaluate the systematic failure of the Indiana Department of Environmental Management (IDEM) to properly administer and enforce the NPDES program. Although IDEM is staffed by many skilled and dedicated public officials, the Indiana program is subject to withdrawal, because:

- The Indiana Legislature has enacted legislation that requires IDEM to issue permits that do not conform to the procedural and substantive requirements of the Clean Water Act;
- Indiana has failed to develop provisions that would restore waterbodies recognized as impaired waters and continues to issue permits that exacerbate known impairments, inconsistent with Tier 1 antidegradation requirements. 40 CFR § 131.12(a)(1) and 40 CFR §§ 122.4, 122.44.
- IDEM has failed to exercise control over new and increased discharges as required by the Clean Water Act's Tier 2 antidegradation regulations at 40 C.F.R. § 131.12(a)(2);
- IDEM has failed to exercise control over pollution from coal mining and processing operations as required by 40 C.F.R. §§ 122.4, 122.28, 122.44, 124 and 131.12;
- IDEM has repeatedly issued NPDES permits that do not conform to the requirements of the Clean Water Act;
- IDEM has failed to comply with the public participation requirements of the applicable NPDES permit regulations;
- IDEM has failed adequately to inspect and monitor facilities subject to NPDES permitting requirements; and
- Indiana has developed general permits that systematically allow discharges that are not subject to proper water quality-based effluent limits.

EPA should take immediate action to correct Indiana's NPDES program or withdraw the delegation of the program from the Indiana Department of Environmental Management.

We would be pleased to participate in discussions with your staff and the staff of IDEM that may occur as part of any informal investigations you chose to conduct under 40 C.F.R. § 123.64(b)(1). We must, however, insist that the investigation proceed as expeditiously as possible as the problems in Indiana are longstanding and the ongoing issuance of improper permits is seriously affecting Indiana rivers, lakes and streams, as well as water bodies downstream from Indiana.

Respectfully submitted,

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Cc: Commissioner Thomas Easterly, Indiana Department of Environmental Management
Bruno Pigott, Indiana Department of Environmental Management
Tinka Hyde, U.S. EPA Region 5

Enclosures

PETITION FOR CORRECTIVE ACTION OR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE STATE OF INDIANA

The Hoosier Environmental Council, Sierra Club Hoosier Chapter, and the Environmental Law & Policy Center, through their undersigned lawyers and officers, hereby petition the United States Environmental Protection Agency (EPA) to initiate formal proceedings under 40 C.F.R. § 123.64(b) to correct the State of Indiana's National Pollutant Discharge Elimination System (NPDES) program, or in the alternative withdraw the delegation to administer the program from the Indiana Department of Environmental Management (IDEM). Petitioners request that EPA formally respond to this petition in writing, as required by 40 C.F.R. § 123.64(b)(1); that EPA notify the State of Indiana that it is not administering the permit program in accordance with the Clean Water Act; and that EPA schedule a public hearing regarding these violations. *See* 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.64(b)(1).

INTRODUCTION

The Indiana NPDES program does not comply with the requirements of the Clean Water Act or 40 C.F.R. part 123 and therefore meets the criteria for withdrawal of a state program under 40 C.F.R. §123.63 because:

> IDEM has repeatedly issued permits to discharge new or increased loadings of pollutants without satisfying the antidegradation and public participation requirements of 40 C.F.R. § 131.12, and the State's continuing failure to adopt legal antidegradation implementation procedures ensures that IDEM will continue issuing deficient permits in the future,
>
> The State Legislature, through action limiting the authority of IDEM, has required the enactment and renewal of certain general NPDES permits "by rule" in a manner that is inconsistent with 40 C.F.R. part 123,
>
> IDEM has repeatedly permitted discharges, pursuant to general permits enacted "by rule," which were not properly established or limited under 40 C.F.R. §§ 122.4, 122.28, 122.44(d), 124.
>
> In particular, IDEM has repeatedly permitted discharges by coal mining operations under a coal general permit (327 IAC 15-7) that plainly allows discharges that are not suitable to be allowed under a general permit and that will

cause or contribute to a violation of water quality standards, in violation of 40 C.F.R. §§122.4, 122.44(d),

IDEM has repeatedly issued permits in a manner that denies public participation by denying the public its right to comment on portions of the permit and through a coal general permit that includes terms that deny public participation rights,

IDEM has failed to adequately address violations of permits that have been granted to coal mining operations and concentrated animal feeding operations ("CAFOs"),

IDEM has failed to adequately inspect and monitor activities subject to regulation including discharges from coal mines and CAFOs,

Indiana has failed to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits relating to coal mining, and

Indiana has failed to develop provisions that would restore water bodies that are recognized as Tier 1 impaired waters and continues to issue permits that exacerbate known impairments.

The citizen group petitioners and their members are harmed by the continuing failure to administer the NPDES program in accordance with federal law. Members of each of these groups fish, swim, boat, hike and appreciate nature in and around Indiana water bodies that are adversely affected by loadings permitted under improper general permits and without compliance with antidegradation policies. Members of petitioners are also affected in their health because they drink water or swim in water that has received pollutant loadings that would not have been permitted were Indiana to follow proper procedures in the issuance of NPDES permits and 401 certifications.

Because the Indiana program does not comply with the requirements of federal law, EPA must either require IDEM to correct the program or withdraw its approval of the Indiana NPDES delegation and assume administration and enforcement of the program in Indiana. *See* 40 C.F.R. § 123.63(a)(2).

STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act provides that "[w]henever the Administrator determines ... that a State is not administering a program ... in accordance with requirements of this section, he shall notify the State and, if appropriate corrective action is not taken ... the

Administrator shall withdraw approval of such program." 33 U.S.C. § 1342(c)(3). EPA's regulations set forth a number of circumstances under which EPA may withdraw program approval, including the failure to exercise control over activities required to be regulated, issuing of permits that do not comply with federal regulations, failure to comply with public participation requirements, and failure to enforce or monitor permits. *See* 40 C.F.R. § 123.63(a). Where EPA is aware that a state program does not comply with CWA requirements, it has both the authority and obligation to initiate withdrawal proceedings. *See Save the Valley, Inc. v. U.S. EPA*, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000); *Save the Valley, Inc. v. U.S. EPA*, 223 F. Supp. 2d 997 (S.D. Ind. 2002).

THE DEFICIENCIES OF THE INDIANA NPDES PROGRAM THAT ARE THE SUBJECT OF THIS PETITION

I. Indiana's continuing failure to adopt antidegradation implementation rules that comply with 40 C.F.R. § 131.12 has resulted in repeated issuance of permits that do not comply with EPA regulations and failure to comply with the public participation requirements of federal law.

Since 1975, 40 C.F.R. § 131.12 has required each state to develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy. *Kentucky Waterways Alliance* v. *Johnson*, 540 F.3d 466, 471 (6th Cir. 2008); *Ohio Valley Environmental Coalition* v. *Horinko*, 279 F. Supp. 2d 732, 738-39 (S.D. W.Va. 2003). There is no serious debate regarding the fact that Indiana's current antidegradation procedures fail to comply with federal requirements at 40 C.F.R. § 131.12.

Issues surrounding the issuance of the U.S. Steel and BP Whiting NPDES permits made the public aware that Indiana fails adequately to review the necessity of increased loadings of pollutants prior to issuing NPDES permits. In fact all of the decisions regarding proposed NPDES permits for new or increased pollution loadings from any source have been tainted by Indiana's long-standing failure to adopt antidegradation implementation procedures or write permits that comply with federal requirements at 40 C.F.R. § 131.12. The inevitable result has been that NPDES permits and 401 certifications have been issued that fail to protect existing uses, allow unnecessary new or increased pollution and deny the right of the public to participate fully in decisions to allow new pollution loadings.

A. Failure to Adopt Statewide Antidegradation Implementation Procedures.

Indiana was required to establish an antidegradation policy and implementation rules by regulations established in 1975 (*See* 40 C.F.R. § 131.12) but has never fully fulfilled this federal requirement. Indiana has had antidegradation standards in its rules, however, this standard has never been implemented. IDEM has indicated that it could not implement this provision because it had no implementation procedures in place. While antidegradation implementation rules were established in 1997 under the Great Lakes Water Quality Initiative, this action only created antidegradation implementation rules as to the Lake Michigan Basin.[1]

As early as 1997, with the encouragement of EPA, IDEM began working to develop new (statewide) antidegradation procedures that would comply with federal law. These efforts derailed in 2005 and, thus there are no antidegradation implementation rules for Indiana water bodies outside the Great Lakes Basin. *See* Exhibit 1, IDEM, Developing and Implementing Indiana's Antidegradation Rule, Public Information Meetings August/September 2009, p.5.[2]

B. Shortcomings of Antidegradation Implementation Procedures in the Great Lakes Basin

The implementation rules that were adopted as to new or increased discharges in the Great Lakes Basin suffer from serious flaws which resulted in EPA Region 5's 2007 decision to object to a NPDES permit for a U.S. Steel facility in Gary and controversy over IDEM's decision to issue a NDPES permit for the BP refinery in Whiting. (Exhibits 2 and 3) As a result of the widespread dissatisfaction with IDEM's handling of the BP permit, Governor Mitch Daniels asked Professor A. James Barnes to study IDEM's handling of the issue. While sympathetic with IDEM officials who handled the BP permit under the current rules, Professor Barnes in his December 3, 2007 report made clear that there exists "a lack of desired clarity in the Indiana antidegradation regulations for waters of the Great Lakes system. For example, the regulations do not spell out when a permit applicant seeking to increase a discharge to Lake Michigan must submit an

[1] See IDEM, Implementation of Antidegradation Policies for Indiana Waters, p. 3 (available at http://www.in.gov/idem/files/wpcb_antideg_concept.ppt).
[2] Also available at http://www.in.gov/idem/files/antideg_overview_092009.pdf.

antidegradation demonstration, what the content of that demonstration must include, and the standard by which a decision as to an increase will be made."[3]

C. Shortcomings of Proposed Statewide Antidegradation Implementation Procedures

In 2007, IDEM began another round of interest group meetings, which led to several drafts of an antidegradation implementation rule.[4] These new rules were intended to mend the flaws in the antidegradation procedures now applicable to discharges to the Great Lakes and create rules for discharges to water bodies in the rest of Indiana. However (as will be described in more detail below) two years and many meetings later, IDEM's currently proposed draft rules do not come close to compliance with the Clean Water Act and cannot properly be approved by U.S. EPA.

Over the past two years, IDEM has issued several draft amendments to 327 IAC 2-1.3 intended to bring Indiana into compliance with 40 C.F.R. § 131.12. The Department issued "second notice" of its draft antidegradation implementation procedures on December 16, 2009. *See* Indiana Register, LSA Document #08-764 (Dec. 16, 2009), Exhibit 4.[5] As drafted, these amendments conflict with existing case law and are not consistent with 40 C.F.R. § 131.12.

Specifically, the current draft only covers pollutants that will have a "potentially detrimental effect on the designated or existing uses" with reference to whether the discharge will have a "reasonable potential" to violate established state water quality criteria. *See* Exhibit 4, Section 2(43). Applying antidegradation only where a pollutant may have a "detrimental effect" so defined fails to protect the assimilative capacity of receiving waters (i.e. the increment of water quality that is better than the levels necessary for protecting designated uses) and therefore violates 40 C.F.R. § 131.12(a)(2). *See* Exhibit 5, Memorandum of Ephraim King August 10, 2005 (protection of assimilative capacity is major purpose of antidegradation). Indeed, waiting until there is a potentially "detrimental effect" before conducting an antidegradation review misses the whole point that antidegradation is meant to "keep clean waters clean." This definition

[3] Letter of A. James Barnes to the Honorable Mitchell E. Daniels Jr. Re: Review of BP-Whiting Refinery permit to discharge to Lake Michigan. (Ex. 3)

[4] For information on the workgroup process, *see* http://www.in.gov/idem/5387.htm.

will also apparently exempt from antidegradation controls increased discharges of nitrogen, phosphorus, sediment and other important pollutants that currently lack numeric water quality criteria in Indiana, even though these pollutants are well-known as major causes of impairment of Indiana water bodies and water bodies downstream from Indiana, including the Gulf of Mexico.[6]

The draft rule also allows dischargers to avoid a full analysis of alternative treatment techniques by accepting limits based on a number of conditions labeled as "Best Available Demonstrated Control Technology" or "BADCT." *See* Exhibit 4, Sections 2(3) and 6(d)(1). Even assuming that such an approach might be acceptable in theory, the current proposal if adopted would allow much unnecessary new pollution, in clear conflict with 40 C.F.R. § 131.12(a)(2). The current proposal requires only certain domestic pollutants to be treated out of the many pollutants that can be treated in domestic wastewater.[7] Further, the level of treatment required, even of the pollutants that must be treated, is not close to the "best" treatment that has been shown to be feasible for those pollutants.[8]

Still further, the draft allows IDEM to set BADCT on a "case-by-case basis" or through "best professional judgment" for lagoons, CSOs, and industrial discharges. This discretion essentially swallows the rule and conflicts with the requirement that any permitted lowering of water quality be demonstrated to be "necessary." *See* 40 C.F.R. § 131.12(a)(2). Furthermore, the draft provides no detail regarding how these "BADCT" numbers will be updated when treatment technology improves.

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[5] This document is also available at http://www.in.gov/legislative/iac/20091216-IR-327080764SNA.xml.pdf.

[6] State – EPA Nutrient Innovations Task Group, *An Urgent Call to Action – Report of the State-EPA Nutrient Innovations Task Group* August 27, 2009 pp. 2-11; Committee on the Mississippi River and the Clean Water Act, National Research Council. Mississippi River Water Quality and the Clean Water Act: Progress, Challenges, and Opportunities. Washington D.C. National Academies Press, 2008. http://www.nap.edu/catalog.php?record_id=12051; IDEM Clean Lakes Program, NLA Results show many Indiana Lakes with Algal Toxins, Water Control, Fall 2009 Vol. 21, No. 3. (Ex.6)

[7] Most notably no BADCT limit is set for phosphorus although numerous POTWs discharging in the Great Lakes Basin (including Indiana POTWs) have been meeting a limit of 1mg/L phosphorus for decades. Recently, the Environmental Appeals Board upheld a limit of 0.1 mg/L. *City of Attleboro, MA Department of Wastewater,* 14 E.A.D. ___ (9/15/09).

[8] There are certainly POTWs consistently meeting limits tighter than those set by BADCT for CBOD, TSS, ammonia and total residual chlorine (TRC). The BADCT limit for chlorine, in fact, does not even meet the current Indiana TRC water quality standard and would allow violation of state water quality standards under some critical low flow conditions. The BADCT TRC limit appears to be based on outdated detection limits.

The IDEM draft rule fails to comply with U.S. EPA policy and recent court decisions regarding "*de minimis*" discharges. In the current version, dischargers can avoid antidegradation review by demonstrating "insignificant" impact on loading capacity. *See* Exhibit 4, Section 4(b)(1). The calculations are extremely complicated and will be difficult and expensive to implement. Furthermore, the current draft's *de minimis* procedures (which take up several pages in the draft rule and include many cross-references to other code provisions) plainly conflict with the legal requirement that a *de minimis* exception – if appropriate at all – should only apply "when the burdens of regulation yield a gain of trivial or no value." *See Kentucky Waterways Alliance v. Johnson*, 540 F.3d at 483, 491. As in the Kentucky case, IDEM here has failed to carry its burden of justifying why the scenarios described in the draft rule are "truly *de minimis*" based on an "assessment of particular circumstances" in the record. *Id.* at 491. In addition to their complexity, the *de minimis* provisions further allow up to 25% of the assimilative capacity of a waterway to be consumed without any antidegradation review in certain situations. *See* Exhibit 4, Section 4(b)(1)(A)(i)(DD).[9] No authority suggests that a 25% reduction in water quality could possibly be considered insignificant.[10]

The draft rule also contains a number of exemptions that cannot be justified. These exemptions include:

- *4(b)(4)(A): Exemption for watershed offsets;*
- *4(b)(4)(B): Exemption for cross-pollutant trading;*
- *4(b)(4)(C): Exemption for cross-pollutant and cross-media trading;*
- *4(b)(4)(D): Exemption for socio-economic importance of public health concerns.*

See Exhibit 4, Section 4(b)(4). In order to approve Indiana's rules, EPA would need to provide detailed technical analysis of the combined effect of all of these exemptions and determine whether all of the "Tier-II-review exemptions together permit significant degradation." *Kentucky Waterways Alliance,* 540 F.3d at 492. IDEM has presented no

[9] Comment "MCM8" in IDEM's June 19, 2009 draft indicates that the language in subsection DD addressing a 75% "benchmark" loading capacity "equates to allowing the cumulative maximum use of 25% of the benchmark unused loading capacity for the discharge to be considered *de minimis*." *See* IDEM Draft Rule 6-19-09 (show chgs since 4-6-09) at p. 15 (available at http://www.in.gov/idem/files/antideg_subgrp_20090804_draft_rule_changes.pdf). (Ex. 7)

[10] EPA recently disapproved proposed Utah antidegradation rules because they allowed more than a cumulative de minimis of 10%. (Ex. 8)

evidence that any of the four "exemptions," as a class of loadings, will have a truly *de minimis* impact upon the water quality of the impacted waters. Furthermore, the "Exemption Justification" in Section 5 of the draft rule does not sufficiently substitute for the antidegradation demonstration requirements in Sections 6 and 7 of the draft rule for significant loadings.

There are a number of other problems with the draft antidegradation implementation procedures, including:

- The draft Rule's failure to clarify how antidegradation reviews will be conducted for general permits aside from a generic statement that "the department shall complete an antidegradation review of the rules of the board that authorize NPDES general permits." Exhibit 4, Section 1(c)(1).
- The draft's narrow focus on NPDES permits and pollutant loads and apparent failure to address antidegradation review of activities conducted pursuant to CWA § 404 permits or § 401 certifications.[11]
- The draft's exemption for "short-term and temporary" lowering of water quality, which does not address the fact that "short-term" discharges may still be unacceptable if of a sufficient magnitude to impact existing uses or significantly impact assimilative capacity. *See* Exhibit 4, Sections 4(a) and 4(b)(3)(C).[12]
- The draft inappropriately requires that "substantial weight" to be given to "any applicable determination by a governmental entity." *See* Exhibit 4, Section 6(c)(1). If construed to require IDEM to give special deference to governmental bodies whose purpose is not implementation of the CWA, this provision undermines the federal requirement for the delegated entity (here IDEM) to make decisions on NPDES permits after allowing full public participation in the decision.

D. The Indiana Legislature has limited IDEM's authority to implement 40 C.F.R. § 131.12.

Several of the problems with Indiana's implementation of the federal antidegradation policy are related to limitations imposed on IDEM by the state legislature. The Indiana Code contains a number of provisions addressing antidegradation requirements. *See* IC 13-18-3-2. The legislature most recently amended this statute in the

[11] IDEM's "Summary/Response to Comments" accompanying the Second Notice Rule states that "in most cases, the avoidance and minimization and mitigation necessary to satisfy the CWA 401 certification and 404 permit requirements will also satisfy antidegradation demonstration requirements." *See* Exhibit 4 at p. 7. However, there is nothing in the rule itself that describes how IDEM intends to implement antidegradation requirements for activities authorized by Section 404 permits or Section 401 certifications.

spring of 2009. *See* House Bill 1162 (2009). The statute and amendments can be interpreted to unlawfully limit IDEM's authority to implement 40 C.F.R. § 131.12. For example:

- The statute requires a *de minimis* threshold for discharges to outstanding state resource waters. *See* IC 13-18-3-2(l). Although EPA and the courts have approved *de minimis* thresholds in the past if they are narrowly drawn, it is now quite clear that EPA's authority to approve *de minimis* exceptions is "quite limited." *See Kentucky Waterways*, 540 F.3d at 484 n. 12. IDEM's method of implementing the required *de minimis* exception in this case cannot be properly approved by EPA.
- The statute exempts activities covered by NPDES general permits from antidegradation review, provided that there is some review of the Indiana Water Pollution Control Board's rules that authorize NPDES general permits. IC 13-18-3-2(p). There is no discussion of what this review will entail or how it will ensure that individual discharges under the Board's rules will not result in unnecessary degradation of state waters.
- The statute requires IDEM to give "substantial weight" to determinations of other governmental entities regarding the socioeconomic importance of a proposed discharge, even if they are not the agencies or entities responsible for ensuring compliance with the Clean Water Act. *See* IC 13-18-3-2(t)(1). We are concerned that this improperly limits IDEM's primary authority to determine compliance with 40 C.F.R. § 131.12 by delegating such authority to potentially unrelated governmental entities.

To the extent that the deficiencies in Indiana's draft antidegradation implementation procedures are attributable to limitations imposed on IDEM by state law, these actions of the state legislature are further grounds for EPA's withdrawal of state program authority. *See* 40 C.F.R. § 123.63(a)(1)(ii).

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[12] Compare U.S. EPA Region 8's antidegradation guidance, which provides an exception for activities that would result in temporary *and limited* effects on water quality. U.S. EPA Region VIII Guidance: Antidegradation Implementation, p. 11 (available at http://www.epa.gov/region8/water/wqs/wqsdocs.html).

E. Ongoing degradation of water quality allowed to injure existing uses.

Although petitioners have worked in good faith with IDEM to develop statewide antidegradation implementation procedures, IDEM routinely issues discharge permits that are likely to degrade water quality. Indiana's 2008 impaired waters list includes more than 2500 individual impairments. In spite of this, new permits, especially general permits, are routinely approved in these watersheds. For example, more than 900 stream segments are known to be impaired for *E. coli*, yet CAFOs are routinely sited in these watersheds. Land applied manure is likely to contribute additional *E. coli* to streams -- and thus exacerbate the impairment -- even when applied at fertilizer rates that are agronomically correct for nitrogen.

While some TMDLs have been written and approved to address existing recognized impairments, there are major systemic obstacles to implementation. For example, some TMDLs and watershed management plans indicate that the sale and/or use of phosphorus fertilizer should be banned, yet the agency charged with authority for regulating fertilizer (the Office of the Indiana State Chemist) has made no move to implement these plans. Even when IDEM has jurisdiction, there are institutional obstacles. For example, IDEM has documented numerous manure releases from CAFOs yet, as these releases continue to be viewed by the agency as spills rather than discharges, few such releases result in an IDEM enforcement action. IDEM then uses the lack of enforcement actions for manure releases as evidence that such releases have negligible impact on water quality; for example, a TMDL for E. coli states that "animal operations in Kessinger Ditch watershed have no open enforcement actions at this time. . . . Therefore, these operations are not considered a significant source of *E. coli* for the Kessinger Ditch TMDL."[13] This circular logic -- deciding not to enforce releases and then using the lack of enforcement action as evidence that a facility is not a significant source of impairment -- prevents improvements in water quality.

[13] *See* IDEM, *Total Maximum Daily Load for Escherichia coli (E. coli) for the Kessinger Ditch Watershed, Knox County*, p. 4 (available at http://www.in.gov/idem/files/tmdl_kessinger_report.doc).

F. IDEM continues to issue NPDES permits that do not comply with the federal antidegradation requirements at 40 C.F.R. § 131.12(a)(2).

All of the problems described above have resulted in IDEM's continued issuance of NPDES permits for new or increased loadings without appropriate consideration of the necessity of the degradation or "full satisfaction" of public participation provisions as required by 40 C.F.R.§ 131.12(a)(2). Improper issuance of permits results in irreparable harm to both Indiana and downstream waters. Most obviously, IDEM routinely allows new or increased discharges of phosphorus that would be prohibited in Illinois, where most new or increased discharges of phosphorus in concentrations higher than 1 part per million are prohibited. 35 Ill. Adm. Code 304.123 (g). But many other types of pollution are also being allowed that are not necessary to accommodate important social or economic development---to the detriment of Indiana and downstream waters.

For example, in the last year IDEM has issued a number of NPDES permits for new and increased discharges without conducting a proper antidegradation analysis:

- The City of Jeffersonville Wastewater Treatment Plant sought a permit to relocate an outfall to another stream, thereby increasing the pollutant loading in the new receiving stream. ELPC's comment letter on NPDES permit IN0023302 requested a demonstration that the degradation of the receiving water was "justifiable on the basis of necessary economic or social factors" (the current antidegradation language that applies outside of Indiana's Great Lakes Basin), and asked whether phosphorus treatment was considered as an alternative to reduce phosphorus loading to the receiving stream. The responsiveness summary included with the final permit as issued stated that "Phosphorus limitations are not included in the permit. Therefore no antidegradation demonstration for phosphorus is required." *See* Exhibit 9. It also contained a memorandum from the applicant (dated months after the draft permit was put on notice) documenting the purported antidegradation analysis. Rather than providing a proper antidegradation analysis, the memo instead compares the cost of constructing a new effluent sewer to the cost of increasing the capacity of the existing sewer, and makes no reference at all to the necessity of increased pollutant loading or the ways such loading might have been reduced. (Ex. 9) Moreover, the fact that there is no phosphorus limit in the permit is certainly not an excuse for failing to determine whether a phosphorus limit *should* be in the permit to prevent unnecessary degradation of water quality from phosphorus discharges.

- The City of Austin Wastewater Treatment Plant sought a permit to increase the facility's discharge from 1.0 MGD to 2.0 MGD. The draft permit allowed the facility to double the pollutant loading of CBOD, TSS and Ammonia-

Nitrogen to the receiving stream. ELPC's comment letter on NPDES permit IN0025135 requested a demonstration that the increased pollutant loading was indeed necessary and asked what alternatives were considered to reduce that pollutant loading. The letter also pointed out that the receiving stream flows into a waterbody that is already listed as impaired on Indiana's 2008 Section 303(d) list of impaired waters. The responsiveness summary in the final permit included an "antidegradation justification," consisting of a few paragraphs explaining the need for the facility expansion in order to accommodate development in the City of Austin, but again contained no mention of the need to increase pollutant loading or what pollution control technologies were considered to reduce that loading. This description was submitted by the applicant in response to ELPC's letter several months after the draft permit was put out on public notice. Exhibit 10.

- The Town of McCordsville Wastewater Treatment Plant sought a permit to increase the facility's discharge from 0.225 MGD to 0.50 MGD. The draft permit allowed the facility to increase the pollutant loading of CBOD, TSS and ammonia-nitrogen by the same factor as the capacity expansion. Again, ELPC's letter requested an antidegradation analysis justifying the pollutant load increase, and again, the responsiveness summary included with the final permit contained an "antidegradation justification" consisting of a few paragraphs explaining the need for the facility expansion in order to accommodate growth. Again, these paragraphs were submitted by the applicant to IDEM in response to ELPC's letter, months after the draft permit was put out on public notice. Exhibit 11.

- IDEM issues numerous general permits without regard to the fact that many of the permitted operations are situated in watersheds with known impairments.

From these examples, it is clear that IDEM is not conducting antidegradation analyses as a matter of course when it receives requests for increased pollutant loading at a facility. Further, none of the so-called antidegradation analyses that IDEM has approved begins to answer the relevant question of whether the increase in pollution is necessary.

G. Indiana's general permits "by rule" allow activities to degrade water quality without a proper consideration of necessity as required by 40 C.F.R. § 131.12(a)(2).

Indiana is allowing new and increased loadings to Indiana waters on a wholesale basis under all of Indiana's general permits "by rule."[14] As set forth in Title 327, Article

[14] Some of the discharges allowed pursuant to these general permit rules might be allowed without an antidegradation demonstration under an exception established in valid rules and others of these discharges

15 of the Indiana Administrative Code, 327 IAC 15-1-1 *et seq.*, parties may begin---and are beginning---new and increased discharges without any antidegradation demonstration, if the discharge occurs in the course of the following activities:

> Rule 5. Storm Water Run-Off Associated with Construction Activity
> Rule 6. Storm Water Discharges Exposed to Industrial Activity
> Rule 7. Facilities Engaged in Mining of Coal, Coal Processing, and Reclamation Activities
> Rule 8. Facilities Discharging Noncontact Cooling Water
> Rule 9. Wastewater Discharge Associated with Petroleum Products Terminals
> Rule 10. Wastewater Discharge Associated with Ground Water Petroleum Remediation Systems
> Rule 11. Wastewater Discharge Associated with Hydrostatic Testing of Commercial Pipelines
> Rule 12. Facilities Engaged in Sand, Gravel, Dimension Stone, or Crushed Stone Operations
> Rule 13. Storm Water Run-Off Associated with Municipal Separate Storm Sewer System Conveyances
> Rule 14. On-Site Residential Sewage Discharging Disposal Systems within the Allen County On-Site Waste
> Rule 15. Concentrated Animal Feeding Operations

Many of the discharges allowed by these permits would not be allowed under proper antidegradation rules. Certainly, these general permits have never been demonstrated on the record to allow only *de minimis* increased loadings on an individual and cumulative basis. *See Kentucky Waterways Alliance*, 540 F.3d at 492. IDEM has failed to produce a "reasoned analysis, or a reasonable factual basis" to justify how the activities allowed under these general permits categorically satisfy the requirements of the federal antidegradation policy. *Ohio Valley Environmental Coalition,* 279 F. Supp. 2d. at 761-62.

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In summary, Indiana has had over 30 years to adopt proper antidegradation rules but such rules are still not in sight. Instead, it appears that Indiana is on a track to spend many more months to create rules that cannot properly be approved by EPA. In the

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might be found justifiable because they are necessary to accommodate important social or economic development. However, none of these rules have yet to go through a proper antidegradation analysis.

meantime, IDEM continues to issue permits for new or increased discharges without proper antidegradation review. It is time for EPA to take control of this process and correct Indiana's antidegradation rules or withdraw authority for the NPDES program so that IDEM does not continue to issue improper permits that allow unnecessary pollution and undermine the Clean Water Act's goal to restore and maintain the quality of our waters.

II. Indiana's general NPDES permit for coal mines fails to exercise control over activities required to be regulated under the Clean Water Act, fails to comply with the public participation requirements under the Act, and permits discharges that cause or contribute to violations of state water quality standards and the federal antidegradation policy.

Indiana's "permit by rule" system, 327 IAC 15, establishes rules that operate as NPDES general permits that are not appropriate under 40 C.F.R. § 122.28(a)(2) and without following the procedures required by 40 C.F.R. § 124.6. Indiana's "general permit" for regulating water pollution from coal mines (Rule 7) plainly allows discharges that may cause or contribute to violations of state numeric or narrative water quality criteria, in violation of 40 C.F.R. § 122.44(d) and/or § 122.4(i). While this has long been a serious problem, the current expansion of coal mining in Indiana makes the State's failure to properly regulate coal mining discharges even more pressing. Despite petitioners' continued objections to coal mining permits issued under 327 IAC 15-7, IDEM has failed to correct the situation or require individual NPDES permits. This failure includes failing to require an individual permit for the currently proposed Bear Run mine in Sullivan County, which would reportedly be the largest surface mine in the Eastern United States.[15]

Still further, the coal mining general permit does not comply with the antidegradation requirements of 40 C.F.R. § 131.12 because it does not protect existing uses, requires no consideration of alternatives to increased loadings of pollutants, and requires no demonstration by the operator that the new or increased discharge is necessary to accommodate important or social economic development.

[15] *See* "Peabody to Develop Indiana Mine," St. Louis Business Journal, Mar. 17, 2009. (Ex 12).

Petitioners have repeatedly notified IDEM of the problems with the coal general permit, most recently by letter dated July 31, 2009. (Ex. 13). IDEM's response explained that the general permit is required by state law and that therefore elimination of the general coal mine NPDES permits "would not be legally feasible." *See* Sept. 29, 2009 Letter (Ex.14); *see also* Ind. Code §§ 13-18-18-1 *et seq.* This action of the state legislature limiting IDEM authority to implement its NPDES program in accordance with federal law is grounds for withdrawal of Indiana's authority to administer the program. *See* 40 C.F.R. § 123.63(a)(1)(ii).

A. Coal mining is not suitable for general permits.

One can hardly imagine an industry less suitable for treatment under a general NPDES permit than coal mining.[16] Federal and Indiana regulations authorize creation of general permits for point sources that:

> (A) involve the same or substantially similar types of operations;
> (B) discharge the same types of wastes;
> (C) require the same effluent limitations or operating conditions; and
> (D) require the same or similar monitoring requirements.

40 C.F.R. § 122.28(a)(2); 327 IAC 15-2-2 (a) (2).

None of these characteristics apply to coal mines. Operations vary depending on the type of mining, whether surface or underground, and depending on the particular excavation techniques employed at an individual mine. Coal mines do not deal with uniform geological conditions. Subsurface rock strata vary from area to area, even within an individual mine site. These different rock strata have different chemical and physical characteristics, so when they are disturbed or removed, different pollutants may become exposed and incorporated into wastewater. Therefore, the composition of wastewater from a coal mine varies depending on the composition of the coal, the composition of the overburden, and the degree to which either are disturbed or processed on-site[17].

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[16] Mason, Christopher, Biology of Freshwater Pollution, Prentice Hall (2002) pp. 202-03 (describes serious effects of improperly regulated discharges from coal mines); Rahn, Perry, Engineering Geology, Prentice Hall (2d. Ed. 1996) p.571.

[17] Weller, J. Marvin and Harold R. Wanless (1939) Correlation of minable coals of Illinois, Indiana, and western Kentucky: Illinois State Geological Survey, Circular 48, 19 p. (reprinted from Bull. AAPG, v. 23, n. 9, pp. 1374-1392, September 1939); Maastalerz, M. and P.L.Padgett (2002) Coal Quality Controls of the Danville Coal in Indiana (Illinois Basin, central USA): International Journal of Coal Geology, v. 48,

Because of these differences in wastewater composition and important differences in the quality and sensitivity of receiving waters (including variations in background levels of chloride and hardness that must be taken into account to avoid allowing discharges of sulfide and other pollutants that cause or contribute to a violation of numeric or narrative water quality standards), required effluent limitations will necessarily vary from mine to mine, and perhaps even outfall to outfall. Similarly, the best management practices that should be required in order to minimize pollution from a particular site are not one-size-fits-all and need to be adapted on a site-specific basis.

Still further, monitoring requirements should vary depending on the effluent limitations required and the health of the receiving waters. This is partially (but not adequately) reflected in the several categories of coal mine discharges delineated in the effluent limitation guidelines for surface coal mining contained in 40 C.F.R. Part 434.

Finally, IDEM's *Guide for Citizen Participation* on the IDEM website states:

> Facilities and sources whose ... discharges could have [a] significant environmental impact are not eligible to operate under a [general] permit and must [apply] for an individual permit.

See http://www.in.gov/idem/6066.htm. Applying this principle it is clear that coal mines should not be allowed to operate under general permits because the long and unfortunate history of the effects of coal mining on the waters of Indiana and other coal mining regions demonstrate that coal mines are not sources without a serious potential to have significant impact if not properly regulated. In fact, Indiana's 305(b) Integrated Water Monitoring and Assessment Report for 2008 lists mining as the potential impairment source for 182 miles of streams and 105 acres of lakes listed as impaired.[18] Further, coal

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January 2002, pp. 217-231; Bobo, Linda L. and Stephen E. Eikenberry (1982) Water quality and other hydrologic data collected in and around a surface coal mine, Clay and Vigo Counties, Indiana, 1977-80: United States Geological Survey, Open File Report 82-639, 117 pp.; Ashley, George H. (1908) The coal deposits of Indiana: a supplemental report to the one issued in 1898: in Thirty-third Annual Report of Indiana Department of Geology and Natural Resources, W. S. Blatchley, State Geologist, pp. 13-153; Mastalerz, Maria, Agnieszka Drobniak, J. A. Rupp, N. R. Shaffer, N.R. (2004) Characterization of Indiana's coal resource; availability of the reserves, physical and chemical properties of the coal, and present and potential uses: Indiana Geological Survey Open-File Study 04-02, 74 p., 102 fig.

[18] IDEM, "Indiana Integrated Water Monitoring and Assessment Report: 2008," p. 48 and 54, available at http://www.in.gov/idem/files/waterbody_2008_assessment.doc.

mining has resulted in a large number of sites in Indiana where surface waters are contaminated with acid mine drainage.[19]

B. Indiana's coal mining general permit allows discharges that harm existing uses and discharges that cause or contribute to the violation of water quality standards.

327 IAC 15-7 ("Rule 7") was adopted by the Indiana Water Pollution Control Board authorizing a general "cookie cutter" permit for surface and underground coal mining and reclamation operations.[20] If coal mining discharges were ever appropriately addressed through a general permit, Indiana's Rule 7 would fall short of Clean Water Act requirements. Even if a facility complies with the terms of the general permit to the letter, the terms are not protective of existing uses, as required by 327 IAC 2-1-2 (1) and 40 C.F.R. § 131.12, nor do they ensure that water quality standards will not be exceeded. *See* 327 IAC 5-2-7(f); 40 C.F.R. §§122.4, 122.44 (d). The monitoring required is also plainly inadequate. *See* 40 C.F.R. § 122.46.

1. Rule 7 does not protect endangered species or other existing uses.

Rule 7 does not require any baseline monitoring of receiving streams to determine their sensitivity to the types of pollutants likely to be discharged by the mine. No effort is even required of the applicant to determine if endangered species are in waters receiving coal mining or processing wastewater. Accordingly, Indiana water bodies are not even given the minimal Tier 1 protections of existing uses required by federal law. 40 C.F.R. § 131.12(a)(1)

2. Rule 7 allows discharges that cause or contribute to the violation of water quality standards and waives necessary monitoring.

Under Rule 7, when a coal mine submits a Notice of Intent to discharge, IDEM and the public not only do not know the nature of the receiving stream, its flow or its sensitivity to pollution, IDEM and the public also have no real idea of the nature of the discharge. Accordingly, calculating a proper water quality-based effluent limit would be

[19] Allen S.K., Allen J.M., Lucas S., Dissolved Metal Concentrations in Surface Waters from West-Central Indiana Contaminated with Acidic Mine Drainage, Bull. Environ. Contam. Toxicol. (1996) 56:240-243.
[20] IDEM's Guide for Citizen Participation as of May 2004 properly referred to Indiana general permits as "cookie cutter" rules and, unfortunately, this is in fact the approach taken by IDEM to coal mining and processing pollution.

impossible---but it does not matter anyway as no such limits are even considered under Rule 7. Indeed, instead of the protection of Indiana water bodies required by basic principles of federal law prohibiting allowance of discharges that will violate water quality standards (see 33 U.S.C. §1311(b)(1)(c)), Rule 7 imposes only lax technological requirements.

Under Section 5(a)(4) of Rule 7, mining operations are required to determine the dry weather flow from each discharge point, but the only apparent purpose of requiring this calculation is to allow the already-weak effluent limits contained in the rule to be waived under Section 7(c) whenever the flow is higher than the dry weather flow. Rule 7 does not require any testing to determine the particular pollutants likely to be discharged or those being discharged by an alkaline mine except for TSS, pH and iron. Section 7(a)(2). The Rule requires monitoring of acid drainage mines for a few selected pollutants (TSS, pH, iron, manganese, aluminum, copper, zinc, and nickel) (Section 7 (a)(3)) but even that limited monitoring can be ceased after a year (Section 7(d)(3)). New sources of undetermined mine status are treated as acid drainage mines but only for six months, after which time the monitoring required of acid drainage mines may be abandoned by IDEM "without public notice or comment." Section 7(d)(2).

Rule 7 does not place any limits, or even reporting requirements, on numerous problematic pollutants known to be discharged in connection with coal mining operations, including chloride, sulfate, phosphorus, and selenium. Rule 7 allows the same discharge of contaminants whatever the dry weather base-flow of the stream, even though the impact of the pollutant may be greater on a stream with less assimilative capacity.

For example, the general permit does not regulate discharges of sulfate sufficiently to ensure that water quality standards are met. Indiana's water quality standards require maximum sulfate concentrations ranging from 500 to 2600 milligrams per liter depending on the hardness and chloride concentrations of the receiving waters. 327 IAC 2-1-6(a)(3), (5). Effluent from coal mines in the Illinois Basin "regularly exceed[s] these concentrations of sulfate."[21] Illinois Basin coals in both Illinois and

[21] *See In re: Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards: Hearing on Proposed Amendments to Ill. Admin. Code Before the Illinois Pollution Control Board*, at 64 (Apr. 23,

Indiana contain roughly the same concentrations of sulfate and sulfur compounds.[22] Yet Indiana's general permit contains no effluent limits or even monitoring requirements for sulfate whatever the hardness, chloride concentration or expected sulfate concentration.

Indiana coal also is known to contain arsenic, cadmium, chromium, copper, lead, mercury, nickel, and zinc, and samples of Indiana coal show that the amount of these metals varies widely within any given coal seam.[23] Indiana's general permit does not contain effluent limits for any of these elements, and only requires monitoring for aluminum, copper, zinc, and nickel from certain types of mines. 327 IAC 15-7-7(a)(3).

Even for the two specific pollutants that are limited by Rule 7 for a few dischargers under a few circumstances, the Rule 7 limits are inadequate. While Rule 7 sets daily average limits of 3.0 mg/L for iron and 2.0 mg/L for total manganese, the Busseron Creek TMDL calculated that proper water quality standards for the creek for iron and manganese were 2.5mg/L and .514 mg/L, respectively. (*See* Exhibit 15, pages 15-18 & 36)[24] Thus, Rule 7 is not even protective during critical low-flow conditions as to the few pollutants it occasionally limits. In fact, following rain events, Rule 7 waives most of the few discharge limits that are in the permit. 15-7-7 (c).

C. The Indiana coal general permit does not allow for meaningful review by IDEM or the public.

Obviously, IDEM and the public have no role in developing water quality-based effluent limits under the coal general permit, as no such limits are ever developed. Rule 7 does purport to require the operator to employ best management practices to control stormwater run-off from the mining site (Section 7(b)(6)), but leaves the choice of which practices to employ up to the unsupervised discretion of the operator. Rule 7 does not require the operator to provide any plan to IDEM or the public for the specific Best Management Practices (BMPs) that are to be developed to control stormwater runoff under section (b)(6) of the Rule and provides no opportunity for the public to comment

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2007) (testimony of Phillip Gonet, President, Illinois Coal Association), *available at* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-57129.

[22] *See* United States Geological Survey, Resource Assessment of the Springfield, Herrin, Danville, and Baker Coals in the Illinois Basin, (J.R. Hatch & R.H. Affolter, eds. 2002), at E39 t.1, E41 t.3, E48 t.10, E50 t.12 (listing concentration and type of sulfur compounds in Illinois Basin coal seams in Illinois and Indiana), *available at* http://pubs.usgs.gov/pp/p1625d/.

[23] *See id.* at E77 t.2, E85 t.10.

[24] Also available at http://www.in.gov/idem/files/tmdl_busseroncrk_revdraft_v2.pdf

on the necessary BMPs. The Clean Water Act, however, requires that practices developed by regulated entities be subject to meaningful review by the appropriate regulatory entity and the public. *See Waterkeeper Alliance v. EPA*, 399 F.3d 486, 500-02 (2d. Cir. 2005); *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832 (9th Cir. 2003).

Further, the public receives no real notice of what pollutants may be coming from the mine, how they would affect receiving water bodies or of the practices that might be used to limit pollution and, thus, are not given information necessary for meaningful participation. Moreover, even if the public somehow intuited that there might be a problem with a particular proposed discharge, any ability of the public to comment on facilities opting to use the general permit is essentially non-existent. The public can only "comment" by filing a full-blown permit appeal within 15 days of the public notice of the intent to use the general permit. 327 IAC 15-7-5 (b). It often takes more than 15 days simply to request and review information sufficient to make such an objection. This eliminates any real opportunity for meaningful public participation.

Finally, the Rule explicitly allows IDEM to eliminate many of the few restrictions applicable to *acid* drainage mines "without public notice or comment." 327 IAC 15-7-7(d)(2), (3).

D. IDEM does not enforce even the few conditions that are required in the general permit.

IDEM has not properly enforced the few requirements that are imposed on coal mines and has failed to inspect and monitor coal mining activities to the extent necessary to ensure compliance. *See* 40 C.F.R. § 123.63(3)(iii). In 2008, there were twenty-nine active coal mines in Indiana.[25] In the last five years, Indiana has inspected only one of these mines – the Gibson County mine, which operates under both the coal mine general permit and an individual NPDES permit.[26] Inspecting a single mine out of nearly thirty operating under the general permit over the course of a five-year period is insufficient to ensure compliance.

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[25] Indiana Department of Natural Resources, "2008 Indiana Coal Production", *available at* http://www.in.gov/dnr/reclamation/files/re-coalproduction2008.pdf.

III. All of Indiana's Permits "by Rule" are improper and the permits issued under them thereby constitute repeated issuance of NPDES permits that do not conform to the requirements of the Clean Water Act.

All of the Indiana general permits by rule are illegal. Most obviously, the permits last seven years without any action by IDEM under Indiana law.[27] This violates the five-year limit on NPDES permits set forth in 40 C.F.R. § 122.46. Further, the permits-by-rule are established without following the requirements for writing general permits under 40 C.F.R. Part 124. They are renewed after seven years without anything like the required Fact Sheet and public discussion needed for renewal of general permits. *Compare* Ind. Code § 13-14-9.5-1.1 (listing required procedures for readoption of IDEM administrative rules) *with* 40 C.F.R. § 124.8 (listing elements of the fact sheet which "shall be prepared ... for every 404 and NPDES general permit.").

CONCLUSION

Indiana's NPDES program as currently administered does not comport with federal requirements, to the injury of Indiana rivers, lakes and streams, downstream waters, and petitioners. The joint petitioners respectfully request that EPA take steps, as set out in 33 U.S.C. § 1342(c) and 40 C.F.R. § 123.63, to require corrective action and, if necessary, initiate withdrawal of NPDES program approval.

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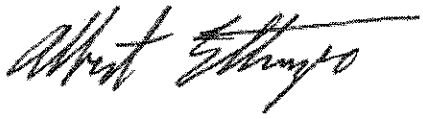
[26] http://www.epa-echo.gov/echo/compliance_report_water_icp.html (Under "SIC Code", select "12-Coal Mining", then under "State" select "Indiana" and click "Search") (listing number of inspections within the past five years under the heading "Inspections (5 yrs)").

[27] It is required that the person conducting the activity under the general permit send out a new notice of intent every five years but obviously this does not do anything to cause Indiana to consider whether the general permits should be reconsidered in light of improved technology, new water quality standards or other factors. Moreover, there is no real opportunity to comment on the notices of intent.

Respectfully submitted,



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