



ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

August 27, 2009

Sent via USPS and email to hyde.tinka@epa.gov

Ms. Tinka Hyde
US EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

Re: Indiana Water Program

Dear Ms. Hyde

In view of a number of serious and pressing problems in Indiana's implementation of the Clean Water Act, we would like to meet with Region 5 officials responsible for oversight of Indiana standards and permitting. Such a meeting should address at least the following problems with the Indiana Department of Environmental Management's implementation of the Act:

1. Indiana's permitting of discharges from coal mines under a general permit "by rule" that plainly allows discharges that may cause or contribute to violations of state numeric or narrative water quality standards in violation of 40 CFR § 122;
2. The very serious flaws in the latest draft Antidegradation rules;
3. The persistent permit backlog at IDEM, resulting in certain permits remaining in effect although they are clearly not protective of Indiana waters;
4. Indiana does not require disinfection of wastewater in a number of circumstances in which it appears clear that it should do so;
5. Development of phosphorus standards is not on track despite the known problems caused by phosphorus in numerous Indiana waters and
6. The serious flaws that exist in Indiana regulation of concentrated animal feeding operations.

Coal NPDES permits- We do not believe that coal mines should be allowed to discharge under a general NPDES permit. Coal mining is simply too invasive and fraught with potential for damaging discharges to be handled appropriately under a general permit.

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However, if coal mining discharges were ever appropriately addressed through a general permit, the general permit and procedures now in place in Indiana would fall far short of what is needed. Most obviously, insofar as the permit extends longer than five years (it has no time limit on its face but may be limited by Indiana sunset rules) the period for the general permit violates the five-year limit on NPDES permits set forth by 40 C.F.R. § 122.46. Further, opportunity for public participation is very limited in the permit-by-rule scheme currently in place in Indiana. Still further, the permit allows discharges that would violate Indiana numeric and narrative water quality standards and allows new loadings that are not necessary to accommodate important social or economic development. Discharges from coal mines can involve pollutants that are not limited at all by the Indiana general permit and the technology-based limits in the permit are not even tight enough to prevent violation of water quality standards as to the pollutants covered.

It is our understanding from IDEM officials that, due to staff constraints, consideration of the coal general permit might have to wait until after the antidegradation rules are completed. However, very important new coal mine developments are immediately before IDEM and completion of the antidegradation rules is nowhere in sight.

We believe, of course, that IDEM should immediately go forward with proper antidegradation rules (or U.S. EPA should establish such rules under Section 303(c)(a)), but realistically there is no way to address the current coal mine discharge permits properly under the current general permit. Accordingly, we ask that Region 5 immediately begin to remedy the problems with the coal general permit. We have asked IDEM to use its discretion to require an individual NPDES permit for the proposed Bear Run mine in Sullivan County, which would reportedly be the largest surface mine in the Eastern United States. If they do not do so, Region 5 should take over this permit.

Antidegradation – Despite many years of stakeholder meetings, Indiana appears to be on the way to adopting antidegradation rules that cannot properly be approved by EPA. While the language of the current draft is somewhat unclear, it appears that the current draft - through its definition of “pollutants of concern,” its allowance for de minimis discharges of pollutants for which there is no numeric criteria, and its provisions that allow unjustified new discharges if they conform to what the draft calls “Best available demonstrated control technology” - would exempt all new or increased discharges of nutrients and most new or increased discharges of toxics from antidegradation review. There are numerous other problems in the draft rules that we should discuss.

Permit Backlog – Although at one point IDEM was making progress in working off its permit backlog, it appears that IDEM is again having a hard time looking at permits that need to be addressed. We hope to learn from you the status of the U.S. Steel permit.

A particular example of a permit that IDEM has not been able to address is the Hoosier Energy Merom Generating Station NPDES permit (IN0050296), administratively extended since 2002. We believe that continuation of the current variance from any temperature limits is not justifiable, but it is our understanding that because of staff constraints the Merom permit cannot be considered seriously until after a number of steel plant permits are renewed. Accordingly, the Merom permit may not be considered until fall or later.

We hope that Region 5 can help IDEM in its consideration of the Merom permit. Certainly, U.S. EPA cannot allow IDEM's staff constraints to prevent it from carrying out its responsibilities under the Clean Water Act. If IDEM has not been given sufficient resources to do the work that has been delegated to it, U.S. EPA must withdraw IDEM authority under 40 CFR § 123.63.

Incidentally, other Wabash River power plants will need to have their permits renewed in the foreseeable future. While most of those plants, unlike Merom, have some temperature limits, they do not appear to be supported by proper Section 316 demonstrations, to meet Indiana water quality standards or to be protective against cold shock.

Disinfection- Disinfection of wastewater should be practiced far more broadly in Indiana than is currently required. Indiana currently requires disinfection only during the April – October period, but there are many good reasons to reconsider this seasonal disinfection practice. Further, we have seen a number of permits recently where onsite WWTPs discharge at schools or parks where children are likely to play in streams. Immediate action should be taken to expand seasonal disinfection in order to protect the children's likely use of those streams. Specifically, wastewater treatment facilities that discharge near parks and playgrounds should be disinfected pursuant to 327 IAC 2-I-8.9 (2).

Phosphorus Standards- We are told that an IDEM proposal for numeric phosphorus standards for lakes is now anticipated for this fall. We hope that IDEM will be able to adhere to this schedule and that phosphorus standards for rivers and streams can be proposed early next year. However, we are doubtful that this hope will be realized, particularly if Region 5 does not make clear that it is prepared to act if Indiana fails to propose numeric standards.

As a permitting matter, IDEM should limit phosphorus discharges to prevent violation of Indiana's narrative "free from" standards (e.g. to prevent discharges that "Are in concentrations or combinations that will cause or contribute to the growth of aquatic plants or algae to such degree as to create a nuisance, be unsightly, or otherwise impair the designated uses" 327 IAC 2-1-6 (a) (1) (D)). We gather that there are phosphorus limits in Indiana permits in the Great Lakes basin and above certain lakes, but IDEM should also impose phosphorus limits as to any point source that might otherwise cause or contribute to a violation of the narrative standard. This is particularly clear given the algae and cyano-bacteria blooms that have occurred in Indiana waters this year.

Concentrated Animal Feeding Operations - IDEM's enforcement of existing cafo rules has been very lax and they are in the process of re-writing rules. The Indiana Department of Environmental Management is still not including the manure management plan as an enforceable part of the permit and we are concerned about the direction that the new rule-making is heading.

We appreciate that it will be difficult to find acceptable dates but would initially propose September 25th, 28th, October 8th and 9th.

Sincerely,



A handwritten signature in cursive script, appearing to read "Albert Ettinger".

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/s/

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