

April 9, 2008

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Thank you for the opportunity to present comments on IDEM's March 14, 2008 draft antidegradation rule. The following comments do not include all possible comments on this draft rule, but reflect the most obvious issues caught on our first pass of the draft.

Our general comments appear after our specific comments. The specific comments are classified as follows: (1) Contrary to Federal Requirements; (2) Incomplete Provision; (3) Unjustified Provision; (4) Inconsistent Provisions; (5) Important Term Undefined; (6) Drafting Issue.

SPECIFIC COMMENTS
(In order of appearance in March 14, 2008 draft rule)

Comment (1)

Section: 327 IAC 2-1.3-2(5)

Subject: Drafting Issue: Definition of BAF

In the 3/14/08 draft rule, Section 2(5) states:

“Bioaccumulation factor” or “BAF” means the ratio (*in liters per kilogram*) of a substance's concentration in tissue of an aquatic organism to its concentration in the ambient water in situations where:

- (A) both the organism and its food are exposed; and
- (B) the ratio does not change substantially over time.

BAF is the ratio of two terms, each with units of concentration (mg/liter). The resulting ratio is dimensionless and does not have the stated units of “liters per kilogram,” unless the definition is wrong.

Comment (2)

Section: 327 IAC 2-1.3-2(14), (58)

Subject: Drafting Issue: Definitions of “De minimis lowering of water quality” and “Significant lowering of water quality.”

In the 3/14/08 draft rule, the definitions of de minimis and significant lowering of water quality read as follows:

(14) “De minimis lowering of water quality” means a water quality lowering that is not a significant lowering of water quality and meets the criteria of section 6 of this rule.

(58) “Significant lowering of water quality” means the following: (A) There is a new or increased permit limit for a pollutant of concern that results in an increase in the ambient concentration of the pollutant and the increased loading is greater than a de minimis lowering of water quality. (B) None of the provisions of 327 IAC 2-1.3-4 apply.

The definition of “de minimis” relies on the term “significant lowering of water quality,” and the definition of “significant lowering of water quality” relies on the term “de minimis.” These are circular definitions. To capture IDEM’s intent, the definitions should read as follows:

(14) “De minimis lowering of water quality” means a water quality lowering that meets the criteria of section 6 of this rule.

(58) “Significant lowering of water quality” means the following:
(A) There is a new or increased permit limit for a pollutant of concern that results in an increase in the ambient concentration of the pollutant and the increased loading is greater than a de minimis lowering of water quality.
(B) None of the provisions of 327 IAC 2-1.3-4 apply.

Comment (3)

Section: 327 IAC 2-1.3-2(32)

Subject: Drafting Issue: Definition of “mixing zone”

In the definition of “mixing zone,” the 3/14/08 draft rule states: “The mixing zone *should* not be considered a place where effluents are treated.” The term “should” is a term of discretion. The proper term in this sentence is “*must*.”

Comment (4)

Section: 327 IAC 2-1.3-2(65)

Subject: Drafting Issue: Definition of “total loading capacity”

In the 3/14/08 draft rule, the definition of “total loading capacity” is as follows:

the *product* of the applicable water quality criterion *multiplied by* the *sum of* the existing effluent flow *plus* the stream design flow for the waterbody in the area where the water quality is proposed to be lowered expressed as a mass loading rate.

This definition does not follow the common standards used for writing out mathematical expressions. The terms “product” and “multiplied by” are redundant and thus confusing. Similarly, the terms “sum of” and “plus” are redundant and thus confusing. The definition should read as follows:

“Total loading capacity” means the applicable water quality criterion multiplied by the sum of the existing effluent flow and the stream design flow for the waterbody in the area where the water quality is proposed to be lowered expressed as a mass loading rate.

Comment (5)

Section: 327 IAC 2-1.3-3(c)(3)

Subject: Important Term Undefined: How to measure “overall improvement in water quality”

In the 3/14/08 draft rule, the term “overall improvement in water quality” is found in several provisions (*e.g.*, 327 IAC 2-1.3-1(16)(B)(i)(AA), -3(c)(3), - 4(b)(10)(C), -11(c)). However, the term is not defined for most occurrences within the draft rule. For example, Section 3(c)(3) states:

Any new or increased discharge of a pollutant of concern that results in a significant lowering of water quality for that pollutant of concern shall be prohibited, unless: (A) the activity causing the increased discharge: (i) results in an *overall improvement in water quality* in the OSRW or EUW; and (ii) meets the applicable requirements of 327 IAC 2-1-2(1), 327 IAC 2-1-2(2), 327 IAC 2-1.5-4(a), and 327 IAC 2-1.5-4(b); or (B) the person proposing the increased discharge undertakes a water quality improvement project in accordance with IC 13-18-3-2 in the watershed of the OSRW or EUW that: (i) results in an *overall improvement in water quality* in the OSRW or EUW; and (ii) meets the applicable requirements of 327 IAC 2-1-2(1), 327 IAC 2-1-2(2), 327 IAC 2-1.5-4(a), and 327 IAC 2-1.5-4(b);

The phrase “*overall improvement in water quality*” is an important and likely contentious concept, and is addressed elsewhere in the rule in some contexts (see *e.g.*, “improvement in water quality” addressed in Section 4(b)(10)(C)) but not others (*e.g.*, Sections 3(c)(3) and 11(c)). Do all occurrences of this phrase or similar phrases have the same definition? The term “improvement in water quality” should be defined in the definitions section or at each specific occurrence in the rule.

Comment (6)

Section: 327 IAC 2-1.3-4(b)

Subject: Incomplete Provision: BCCs are not treated special, but should be, in activities that do not constitute a significant lowering of water quality

In the 3/14/08 draft rule, Section 4(b) lists thirteen activities that do not constitute a significant lowering of water quality for HQWs, including OSRWs and EUWs.¹ These activities apparently apply to both BCCs (bioaccumulative chemicals of concern) and non-BCCs alike. The thirteen nonsignificant activities are:

- (1) change in loadings within capacity and processes covered by existing permit;
- (2) bypasses not prohibited by 327 IAC 5-2-8(11);
- (3) existing discharger, and new or improved monitoring or analysis or new or modified criteria or guidelines;
- (4) new or increased discharge due solely to pollutant in intake water;
- (5) new or increased discharges due solely to storm water controls;
- (6) new or increased discharges resulting in short term (< 12 months) lowering of water quality;
- (7) new or increased discharges due to CERCLA, RCRA, or other response or abatement actions;
- (8) new or increased discharges due to increase in sewerage or trucked in wastes;
- (9) new or increased discharges where a simultaneous enforceable decrease in other sources resulting in net decrease in loading of pollutant;
- (10) new or increased discharge is necessary to reduce another pollutant of concern and reasonable and cost-effective methods taken and improvement in water quality such that new pollutant is less bioaccumulative and less toxic than reduced pollutant;
- (11) new or increased discharges are noncontact cooling water;
- (12) new or increased discharges are non-BCC used to treat nuisance species and blessing of commissioner;
- (13) new or increased discharges are less than de minimis.

In the 2005 draft rule, in contrast, nonsignificant activities in HQWs were divided into two classes based on whether the pollutant was a BCC or not. There were only four nonsignificant activities that applied to BCCs in HQWs, as follows:

- (1) changes in loadings of any BCC within the existing capacity and processes that are covered by an existing applicable control document;
- (2) bypasses not prohibited by 327 IAC 5-2-8(11);
- (3) new or increased discharges due to increase in sewerage or trucked in wastes;

¹ In IDEM's comment #124 to this section, IDEM states: "by definition, HQWs may include OSRWs and EUWs." This is problematic, since in other parts of the rule HQWs are treated separately from OSRWs and EUWs.

(4) new or increased discharges due to CERCLA, RCRA, or other response or abatement actions.

The number and scope of nonsignificant activities that apply to BCCs are substantially greater in the 3/14/08 draft rule than in the 2005 draft rule. Thus, the 2005 draft rule was potentially more protective of the environment. IDEM should reduce the number and scope of nonsignificant activities that apply to BCCs.

Comment (7)

Section: 327 IAC 2-1.3-4(a) and (b)

Subject: Unjustified Provisions: Activities that do not constitute a significant lowering of water quality

In the 3/14/08 draft rule, Section 4 lists fourteen nonsignificant activities for ONRWs and HQWs (HQWs apparently include OSRWs and EUWs) combined. An antidegradation analysis will not be required for these activities. Some of these categories are reasonable. Others are not.

- Section 4(a)(1) and 4(b)(6) – A “temporary” lowering of water quality should be limited to three months. Allowing degradation for a whole year is improper.
- Section 4(b)(3) – The first line of this Section must make clear that it only excludes an existing permitted *discharge*, not an existing permitted *discharger*.
- Section 4(b)(7) defines as “not significant” clean up activities undertaken under a proper CERCLA or RCRA plan. Instead of denying the fact that such activities can be significant, it would make more sense to recognize that such clean up activities should be approved summarily under Section 8. It is then unclear why this Section is needed in addition to similar language in Section 8(c), which allows the discharger to provide information demonstrating that a proposed action will minimize a “significant” lowering of water quality and will use the most cost-effective techniques when proposing response actions under CERCLA and corrective actions under RCRA.

Also, this provision regarding CERCLA clean ups assumes that the exception is limited to situations in which a thorough consideration of alternatives takes place as part of the process. Any exception relying on another legal provision to satisfy Tier II protection requirements

should be drafted to assure that it is not applied to situations where the true equivalent of a Tier II analysis has not occurred.

- Section 4(b)(10) – It seems fairly clear that an applicant that can prove that its proposed new or increased discharge will have the net environmental benefits discussed in this category described by this exception will have made the Tier II antidegradation showing. The question really is whether this should be handled through an exception (or definition of “not significant”) as opposed to letting the Tier II necessity showing be made.
- Section 4(b)(11) – While non-contact cooling water is frequently harmless, the rule should not allow non-contact cooling water to be exempted if it contains additives (e.g. chlorine, bromine). Further, we are concerned regarding some power plant proposals in which huge amounts of water are taken for cooling and then lost to the water body with the effect of changing water levels and flows and concentrating pollutants.
- Section 4(b)(12) – This Section creates an exception for, or rather defines as not “significant”, discharges designed to control zebra mussels and other nuisance species. We do not see why the fact that a discharge is intended to control a nuisance is relevant to the level of antidegradation analysis it should receive.

Comment (8)

Section: 327 IAC 2-1.3-4(b)(7)

Subject: Inconsistent Provisions: CERCLA and RCRA discharges

In the 3/14/08 draft rule, Section 4(b)(7) states:

For HQWs, the following new or increased discharges are not considered a significant lowering of water quality:

(7) New or increased discharges of a pollutant of concern due to:

(A) response actions under CERCLA, as defined in IC 13-11-2-24, as amended;

(B) corrective actions under RCRA, as amended; or

(C) actions utilizing federal or state authorities with regulations to alleviate a release into the environment of hazardous substances, pollutants, or contaminants that may pose an imminent or existing and substantial danger to public health or welfare, including one (1) or more of the following:

(i) An underground storage tank (UST) corrective action under IC 13-23-13.

(ii) A remediation of petroleum releases under IC 13-24-1.

(iii) A voluntary remediation under IC 13-25-5.

(iv) An abatement or correction of any polluted condition under IC 13-18-7.

In comparison, Section 8(c) addresses the same class of actions:

Instead of the information and analysis required by Section (b), a discharger may submit information to the commissioner demonstrating that the proposed action will minimize the proposed significant lowering of water quality and the discharger will use the most cost-effective pollution prevention and treatment techniques available when proposing the following:

- (1) A response action under CERCLA.
- (2) A corrective action under RCRA.
- (3) An action utilizing federal or state authorities, including:
 - (A) an underground storage tank (UST) corrective action under IC 13-23-13;
 - (B) a remediation of petroleum releases under IC 13-24-1;
 - (C) a voluntary remediation under IC 13-25-5; or
 - (D) an abatement or correction of any polluted condition under IC 13-18-7.

Thus, Section 4(b)(7) states that CERCLA response actions and RCRA corrective actions are “nonsignificant” activities, but Section 8(c) sets forth requirements for “significant” CERCLA response actions and RCRA corrective actions. This dual and apparently conflicting consideration of such actions is at best confusing.

Comment (9)

Section: 327 IAC 2-1.3-5(c) and (d)

Subject: Incomplete Provision: IDEM consideration of comments

In the 3/14/08 draft rule, Section 5(c) refers to a notice and comment period. IDEM should say in the rule how long the comment period will last, or refer to such details in another regulation or statute.

Also, Section 5(d) states in part:

The commissioner *shall review the submitted information* and determine whether the information provided in the nonsignificant lowering justification application is administratively complete and whether the proposed new or increased discharge constitutes a nonsignificant lowering of water quality.

The Commissioner should be required to review the submitted information AND evaluate the public comments received AND consider the comments made in the public meeting if one is held.

Comment (10)

Section: 327 IAC 2-1.3-6(1)(A)(i)

Subject: Drafting Issue: De minimis lowering of water quality

In the 3/14/08 draft rule, Section 6(1)(A)(i) reads as follows:

(i) The proposed increase in mass-based effluent limits is less than or equal to: (AA) *the mass calculated using* the new or increased flow, and; (BB) the water quality-based effluent limit (WQBEL) calculated without the benefit of a mixing zone, or the DTBEL, whichever is more stringent

First, the text is improperly divided among the subparts. This provision should read as follows:

(i) The proposed increase in mass-based effluent limits is less than or equal to *the mass calculated using*: (AA) the new or increased flow, and; (BB) the water quality-based effluent limit (WQBEL) calculated without the benefit of a mixing zone, or the DTBEL, whichever is more stringent”

Second, if IDEM can say how the terms in AA and BB will be combined mathematically, it should do so. For example, are the terms multiplied? If so, then the provision can more clearly state: “(i) The proposed increase in mass-based effluent limits is less than or equal to *the mass calculated as the product of*: (AA) the new or increased flow, and; (BB) the water quality-based effluent limit (WQBEL) calculated without the benefit of a mixing zone, or the DTBEL, whichever is more stringent.”

Comment (11)

Section: 327 IAC 2-1.3-6(1)(A)(i)(AA); 327 IAC 2-1.3-6(2)(A)

Subject: Important Term Undefined: “new or increased flow”

In the 3/14/08 draft rule, Section 6(1)(A)(i)(AA) reads as follows:

(i) The proposed increase in mass-based effluent limits is less than or equal to: (AA) the mass calculated using *the new or increased flow*, and; (BB) the water quality-based effluent limit (WQBEL) calculated without the benefit of a mixing zone, or the DTBEL, whichever is more stringent.

The phrase “the new or increased flow” is ambiguous. Is this flow the incremental addition to the discharge flow out of the pipe? Or the sum of the stream design flow and the incremental discharge flow?

Comment (12)

Section: 327 IAC 2-1.3-6(1)(A)(ii)

Subject: Contrary to Federal Requirements: De minimis lowering of water quality

EPA views the total loading capacity as a valuable natural resource that should be protected. See EPA guidance in letter from Ephraim S. King, U.S. EPA, Office of Water, to water management division directors, dated August 10, 2005.

In the 3/14/08 draft rule, Section 6(1)(A)(ii) reads as follows for HQWs:²:

The proposed increase in mass discharged is less than *ten percent (10%) of the unused loading capacity* and, so long as at least *ten percent (10%) of the total loading capacity* remains unused after the lowering of water quality, shall be determined as follows.

This provision sets forth a 10% de minimis for individual discharges and a 10% cumulative cap for HQWs. That is, 90% of the total loading capacity can be used up by the accumulation of “de minimis” increases in discharges, without any antidegradation demonstration ever required, as long as each individual de minimis discharge is less than 10% of the capacity remaining at the time of permitting.

Under the reasoning of *Ohio Valley Envtl. Coalition v. Horinko*, 279 F. Supp. 2d 732 (S.D. W.V. 2003), IDEM’s 10% cumulative cap for HQWs is contrary to federal requirements. The *Ohio Valley* court rejected a cumulative cap of 80% of “available assimilative capacity” [*i.e.*, an 80% cumulative cap]. Although the *Ohio Valley* decision reflects uncertainty over the terms “available assimilative capacity” and “total assimilative capacity,” the decision nevertheless indicates that IDEM’s 10% cumulative cap for HQWs, particularly for discharge of BCCs, would not survive litigation.

Moreover, the EPA and the *Ohio Valley* court have concluded that any individual de minimis for BCCs in Tier 2 waters within the Great Lakes Basin would be contrary to federal requirements. Yet, contrary to these authorities, IDEM in its 3/14/08 draft rule apparently applies the 10% individual de minimis and the 10% cumulative cap to BCCs as well as non-BCCs in Tier 2 waters within the Great Lakes Basin.³

² In this section, HQWs apparently do not include OSRWs or EUWs.

³ In its March 1995 Great Lakes SID, EPA stated: “EPA does not agree that even small increases in the loadings of BCCs to the Great Lakes Basin can be considered de minimis. Low levels of BCCs in the Great Lakes have adverse impacts on the organisms that inhabit them. Further, because BCCs are both resistant to degradation and hydrophobic, they tend to

IDEM should (1) designate a separate de minimis and cumulative cap in the case of threatened and endangered species; (2) use an 85% cumulative cap for HQWs; and (3) remove the individual de minimis for BCCs in HQWs, OSRWs, and EUWs within the Great Lakes Basin.

Comment (13)

Section: 327 IAC 2-1.3-7(a)

Subject: Drafting Issue: No Section 4(c)

Section 7(a) refers to Section 4(c), which does not exist.

Comment (14)

Section: 327 IAC 2-1.3-8(b)(7)

Subject: Contrary to Federal Requirements: Necessary test

In the 3/14/08 draft rule, Section 8(b)(7) sets forth the social and economic evaluation for the “necessary” test (*i.e.*, the evaluation of whether the new or increased discharge is necessary to accommodate important social or economic development). Section 8(b)(7) requires the applicant to assess both positive and negative social and economic development impacts. Section (8)(b)(7)(B) requires that IDEM evaluate both positive and negative impacts listed in Section (8)(b)(7)(A).

IDEM’s proposed evaluation framework has two major conceptual problems. First, the list of social and economic impacts referred to in (8)(b)(7)(B), and specified in (8)(b)(7)(A), includes only three negative impacts out of fifteen total listed impacts:

- (i) Creating, expanding, or maintaining employment. [positive]
- (ii) Reducing the unemployment rate. [positive]
- (iii) Increasing median household income. [positive]
- (iv) Reducing the number of households below the poverty level. [positive]
- (v) Increasing needed housing supply. [positive]
- (vi) Increasing the community tax base. [positive]

accumulate in sediments and biota, amplifying their effects. For these reasons, even small increases in loadings of this type of pollutant must be considered significant.”

In contrast, in IDEM’s 3/14/08 draft rule, BCCs discharged to Great Lakes Basin HQWs, OSRWs, such as the open waters of Lake Michigan, and waters upstream of OSRWs are subject to a de minimis. For example, Section 3(c)(1) states: “The Tier 2.9 antidegradation standard for OSRWs and EUWs is as follows: (1) For BCCs in OSRWs and EUWs, as well as waters upstream of an OSRW or EUW, no new or increased loading shall be allowed that causes a significant lowering of water quality.” Section 4(b)(13) states that a new or increased discharge is not a significant lowering of water quality if “less than or equal to the de minimis lowering of water quality as defined in section 6 of this rule.” Thus, under the draft rule a loading of a BCC in an OSRW will be allowed if the loading is less than de minimis.

- (vii) Providing necessary public services (e.g., fire department, school, infrastructure). [positive]
- (viii) Correcting a public health, safety, or environmental problem. [positive]
- (ix) Improving or reducing quality of life for residents in the area. [positive and negative]
- (x) Promoting or harming fishing, recreation and tourism industries. [positive and negative]
- (xi). Enhancing or harming threatened and endangered species. [positive and negative]
- (xii). Maintaining economic competitiveness. [positive]

This list omits even the most obvious negative social and economic impacts such as:

- creation of a public health, safety, or environmental problem;
- negative impacts to species that are unique or rare within the locality or the state (such as a mussel bed);
- increased risk to human health due to the new or increased concentration of carcinogens or bioaccumulative chemicals of concern;
- harm to characteristics of the receiving waterbody that are unique or rare within the locality or state potentially impacted by the significant lowering;
- increased risk to a downstream public water supply;
- reduced effectiveness of government or privately sponsored conservation projects that have specifically targeted improved water quality or enhanced recreational opportunities on the proposed receiving waterbody in the area of the new or increased discharge.

Thus, any demonstration under Section (8)(b)(7)(B) would risk being substantially skewed toward the positive effects of the proposed discharge due to the numerical dominance of positive effects alone. Moreover, both the 2005 draft rule and the current interim rule (see 327 IAC 5-2-11.3(b)((3)(C))) include a more searching evaluation of environmental and public health impacts. IDEM should attempt to equalize the positive and negative effects analyzed in the “necessary” demonstration.

Second, the negative impacts listed in Section (8)(b)(7)(A) are highly uncertain and non-monetized, whereas the positive impacts are highly certain and monetized, and this difference makes any comparison of these positive and negative impacts almost certainly arbitrary and capricious. For example, under IDEM’s framework, at least some jobs will be produced by, say, a facility expansion, and the income gain resulting from those jobs is relatively certain. On the other hand, the adverse

impact of the expansion on fisheries, recreation, or tourism, will be highly uncertain and will not be monetized. Highly uncertain and non-monetized impacts cannot be justifiably and rationally compared to certain and monetized impacts. IDEM should select impacts that can be effectively compared in a documented weighting scheme.

Comment (15)

Section: 327 IAC 2-1.3-10(b)

Subject: Incomplete and Inconsistent Provisions: IDEM determination based on factors

In the 3/14/08 draft rule, Section 10(b) requires the Commissioner to make a determination using information provided by the applicant in the antidegradation demonstration in Section 8 and based on factors listed in Section 10(b). However, the information provided by the applicant pursuant to an administratively complete demonstration application (under Section 8) will not allow the Commissioner to make a decision based on the factors in Section 10(b). The information provided to IDEM in the Section 8 application is much less extensive than the information in the Section 10(b) factors, and it is unlikely that IDEM will have or collect the missing information. Therefore, the information in the Section 10(b) factors must be provided by the applicant in the Section 8 demonstration application.

Specifically, the following Table compares the information provided in the Section 8 demonstration with the information in the Section 10(b) factors to be considered by IDEM.

| Section 10(b) Factors for IDEM’s Decision | Section 8(b) Information Provided to IDEM |
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| Once the commissioner determines that the information provided in the antidegradation demonstration application is administratively complete, the commissioner shall make a determination based on the following factors as appropriate: | An antidegradation demonstration application for the necessary test shall include the following: |
| (1) The magnitude of the proposed lowering of water quality. | (1) An identification of all pollutants of concern for which the antidegradation application is required. (2) An estimate of the mass and concentration of all pollutants of concern proposed to be discharged. (3) An identification of the receiving water or waters that would be affected by the new or increased discharge. (4) A description of the physical, biological, and chemical conditions of the receiving water or waters as determined by: (A) available information; or (B) additional information, including the results of additional water quality chemical, biological, or both analysis, if requested by the department. |

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| <p>(2) The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, considering the following: (A) Threatened and endangered species. (B) Important commercial or recreational sport fish species. (C) Other individual species. (D) The overall aquatic community structure and function.</p> | <p>No information on these issues required in demonstration application.</p> |
| <p>(3) The anticipated impact of the proposed lowering of water quality considering the following: (A) Human health. (B) The overall quality and value of the water resource.</p> | <p>No information on these issues required in demonstration application.</p> |
| <p>(4) The degree to which water quality may be lowered in waters located within the following: (A) National, state, or local parks. (B) Preserves or wildlife areas. (C) EUWs, OSRWs, or ONRWs.</p> | <p>No information on these issues required in demonstration application.</p> |
| <p>(5) The effects of lower water quality on the <i>economic value</i> of the receiving water or waters considering the following: (A) Recreation, tourism, and other commercial activities. (B) Aesthetics. (C) Other use and enjoyment by humans.</p> | <p>(7) Assessment of positive and negative social or economic development impacts, including the following: (A) Identification and review of the applicable positive and negative social or economic development impacts that will occur to the area in which the receiving water or waters are located if the significant lowering of water quality is allowed. Social or economic development impacts include the following: * * * (ix) Improving or reducing quality of life for residents in the area. (x) Promoting or harming fishing, recreation and tourism industries. (xi). Enhancing or harming threatened and endangered species.</p> |
| <p>(6) The extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state.</p> | <p>No information on these issues required in demonstration application.</p> |
| <p>(7) The cost of the water pollution controls associated with the proposed activity.</p> | <p>No information on these issues required in demonstration application.</p> |
| <p>(8) The availability, reliability, cost-effectiveness, and technical feasibility of: (A) nondegradation; (B) minimal degradation; or (C) degradation mitigation techniques or alternatives and the effluent reduction benefits and water quality benefits associated with the techniques or alternatives.</p> | <p>No information on these issues required in demonstration application.</p> |
| <p>(9) The availability, cost-effectiveness, and technical feasibility of central or regional sewage collection and treatment facilities, including long range plans outlined in: (A) state or local water quality management planning documents and (B) applicable facility planning documents.</p> | <p>(5) An identification of measures available to the applicant to minimize or prevent the proposed significant lowering of water quality. A separate analysis shall be performed for each pollutant or pollutant parameter for which there may be significant lowering of water quality. Each analysis shall include the following: (A) Identification and review pollution prevention alternatives and techniques, including the following: (i) A listing of alternatives and techniques including new and innovative technologies. (ii) A description of how the alternatives and techniques</p> |

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| | <p>available to the applicant would minimize or prevent the proposed significant lowering of water quality.</p> <p>(iii) The mass loadings and effluent concentrations attainable by employing the alternatives and techniques.</p> <p>(iv) The costs associated with employing the alternatives and techniques.</p> <p>(v) An identification of the pollution prevention alternatives and techniques selected to be employed and an explanation of why those selections were made.</p> <p>(B) Evaluation of the feasibility and costs of connecting to an existing POTW or privately owned treatment works, within the vicinity of the proposed new or increased discharge, that will effectively treat the proposed discharge and is willing to accept wastewater from other entities.</p> <p>(C) For POTWs, if the proposed significant lowering of water quality is a result of a proposed new or increased discharge from one (1) or more indirect dischargers, the analysis shall also include the following:</p> <p>(i) The requirements of clause (A) shall be completed for the indirect discharger or dischargers as well as for the POTW. The POTW may require the indirect dischargers to prepare this information.</p> <p>(ii) If one (1) or more of the indirect dischargers proposes or does discharge to a:</p> <p>(AA) combined sewer; or</p> <p>(BB) sanitary sewer that is connected to a combined sewer; all combined sewer overflows (CSOs) between the point of discharge to the sewer and the POTW shall be identified.</p> |
| <p>(10) The anticipated impact of the proposed lowering of water quality on the following economic and social factors:</p> <p>(A) The condition of the local economy.</p> <p>(B) The changes in the number and types of jobs.</p> <p>(C) The state and local tax revenue.</p> <p>(D) Other economic and social factors as the commissioner deems appropriate.</p> | <p>(7) Assessment of positive and negative social or economic development impacts, including the following:</p> <p>(A) Identification and review of the applicable positive and negative social or economic development impacts that will occur to the area in which the receiving water or waters are located if the significant lowering of water quality is allowed. Social or economic development impacts include the following:</p> <p>(i) Creating, expanding, or maintaining employment.</p> <p>(ii) Reducing the unemployment rate.</p> <p>(iii) Increasing median household income.</p> <p>(iv) Reducing the number of households below the poverty level.</p> <p>(v) Increasing needed housing supply.</p> <p>(vi) Increasing the community tax base.</p> <p>(vii) Providing necessary public services (e.g., fire department, school, infrastructure).</p> <p>(viii) Correcting a public health, safety, or environmental problem.</p> <p>(ix) Improving or reducing quality of life for residents in the area.</p> <p>(x) Promoting or harming fishing, recreation and tourism industries.</p> <p>(xi). Enhancing or harming threatened and endangered species.</p> <p>(xii). Maintaining economic competitiveness.</p> |

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| <p>(11) Any action or recommendation relevant to the antidegradation demonstration made by a: (A) state (B) county; (C) township; or (D) municipality; potentially affected by the new or increased loading.</p> | <p>(7)(C) Inclusion by the applicant of additional factors, if applicable, that may enhance the social or economic benefits associated with the new or increased pollutant discharge such as the approval to build a new facility given to the applicant by: (i) a legislative body; (ii) the local planning commission; or (iii) other government officials; that represent the surrounding community.</p> |
| <p>(12) The reliability of the selected alternative or alternatives, including, but not limited to, the possibility of recurring operational and maintenance difficulties that would lead to increased degradation.</p> | <p>No information on these issues required in demonstration application.</p> |
| <p>(13) Any other information regarding the proposed activities and the affected receiving water or waters that the commissioner deems appropriate.</p> | <p>No information on these issues required in demonstration application.</p> |
| | <p>(6) Documentation showing that the applicant has made a good faith effort to provide notice to representatives of all government or privately sponsored conservation projects in the area of the new or increased discharge that have specifically targeted the goal of improved water quality or enhanced recreational opportunities on the proposed receiving water or waters. The notice shall include a list of the parameters for which a significant lowering of water quality is proposed.</p> |

Comment (16)

Section: 327 IAC 2-1.3-10(c)

Subject: Incomplete Provision: denial of request to significantly lower water quality

In the 3/14/08 draft rule, Section 10(c) states:

The commissioner shall deny some or all of the request to significantly lower water quality if one (1) or more of the following applies:

- (1) Cost-effective measures that would prevent or minimize the proposed lowering of water quality are reasonably available but the discharger has chosen not to implement these measures.
- (2) The action that would cause the lowering of water quality is not necessary to accommodate important economic or social development in the area.
- (3) The action would jeopardize state listed endangered or federally listed threatened and endangered species.

A fourth and obvious factor should be added to Section 10(c), namely:

- (4) The negative environmental, social, and economic impacts of the action outweigh the positive environmental, social, and economic impacts of the action.

Comment (17)

Section: 327 IAC 2-1.3-11(e)

Subject: Incomplete Provision: OSRW improvement fund

In the 3/14/08 draft rule, Section 11(e) states:

The department shall use the fees collected in the OSRW improvement fund to fund projects that will lead to overall improvement to the water quality of the affected OSRW or EUW.

This provision should contain a time frame or limit for funding mitigation projects. A project implemented 20 years after the allowed increase in discharge will not effectively mitigate the discharge.

GENERAL COMMENTS

Comment (1): According to 327 IAC 2-1.3-1, the antidegradation implementation procedures apply only to “pollutants of concern” from point or non-point sources. An important component of non-point source pollution is nutrient pollution. Yet nutrients such as nitrogen and phosphorus are not within the definition of “pollutant of concern.” How will degradation in water quality from nutrient pollution be addressed?

Comment (2): How will degradation in water quality due to new or increased discharges from facilities operating under a general permit be addressed?

Comment (3): The draft rule does not make clear that the standards and implementation procedures apply to Section 401 certifications.

Thank you for considering our comments. We hope they are helpful.

Sincerely,

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