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TITLE 327 WATER POLLUTION CONTROL BOARD

Proposed Rule
LSA Document #00-136

DIGEST

Adds a new rule concerning public notification by National Pollutant Discharge Elimination System (NPDES) permit holders of the potential health impact of combined sewer overflows (CSOs) and amends 327 IAC 5-2-9. Effective 30 days after filing with the secretary of state.

HISTORY

First Notice of Comment Period: #00-136(WPCB) July 1, 2000, Indiana Register (23 IR 2613).

Second Notice of Comment Period and Notice of First Hearing: February 1, 2002, Indiana Register (25 IR 1736).

Date of First Hearing: April 10, 2002.

PUBLIC COMMENTS UNDER IC 13-14-9-4.5

IC 13-14-9-4.5 states that a board may not adopt a rule under IC 13-14-9 that is substantively different from the draft rule published under IC 13-14-9-4, until the board has conducted a third comment period that is at least twenty-one (21) days long.

REQUEST FOR PUBLIC COMMENTS

This proposed (preliminarily adopted) rule is substantively different from the draft rule published on February 1, 2002, at 25 IR 1736. The Indiana Department of Environmental Management (IDEM) is requesting comment on the entire proposed (preliminarily adopted) rule.

The proposed rule contains numerous changes from the draft rule that make the proposed rule so substantively different from the draft rule that public comment on the entire proposed rule is advisable. This notice requests the submission of comments on the entire proposed rule, including suggestions for specific amendments. These comments and the department's responses thereto will be presented to the board for its consideration at final adoption under IC 13-14-9-6.

Additionally, the public is advised that the proposed rule continues to be discussed by IDEM and interested persons at the direction of the Water Pollution Control Board (board) to address issues raised by the public during the first public hearing. This notice requests comments specifically on the version of the rule preliminarily adopted by the board on April 10, 2002. IDEM will also review any comment related to suggestions for inclusion in a version to be presented for final adoption. Individuals wanting information on current discussions related to this rule may contact Ms. Stevens at (317) 232-8635 or mstevens@dem.state.in.

Mailed comments should be addressed to:

LSA Document #00-136 [CSO Public Notification]

MaryAnn Stevens

Rules Section

Office of Water Quality

Indiana Department of Environmental Management

P.O. Box 6015

Indianapolis, Indiana 46206-6015.

Hand delivered comments will be accepted by the IDEM receptionist on duty at the twelfth floor reception desk, Office of Water Quality, Indiana Government Center-North, Room 1255, 100 North Senate Avenue, Indianapolis, Indiana. Comments may be delivered by facsimile to (317) 232-8406. Please confirm the timely receipt of faxed comments by calling the Office of Water Quality Rules Section at (317) 233-8903. Please note it is not necessary to follow a faxed comment letter with another sent through the postal system.

COMMENT PERIOD DEADLINE

Comments must be postmarked, hand delivered, or faxed by November 25, 2002.

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from February 1, 2002, through March

2, 2002, on IDEM's draft rule language. IDEM received comments from the following parties:

Brownsburg Waste Water Treatment Plant (BWWTP)
Gary Sanitary District (GSD)
Improving Kids' Environment, represented by Tom Neltner (IKE)
Indiana Association of Cities and Towns (IACT)
Kendallville Utilities (KU)
Mishawaka Utilities (MU)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: It appears that IDEM is once again redefining what water pollution control facilities do by determining with this draft rule that these facilities are water polluting facilities. (KU)

Response: Senate Enrolled Act (SEA) 431, now known as Public Law 140-2000, was passed by the 2000 General Assembly and contains SECTION 23 which specifically requires the Water Pollution Control Board to adopt a rule requiring National Pollutant Discharge Elimination System (NPDES) permit holders to give notification whenever information from any reliable source indicates that a CSO is discharging or may discharge within the next twenty-four (24) hours.

Comment: The CSO Public Notification rule will put an additional burden on CSO communities that are already having to comply with federal regulations requiring development of a public education program regarding the potential for combined sewer overflows (CSO). Treatment plant operators have been putting a tremendous amount of time and effort toward maximizing flows through their treatment facilities, but, under this draft rule, that effort toward maximizing flow to the treatment plant could be diminished so that notification phone calls can be made. (BWWTP)

Response: The draft rule at 327 IAC 5-2.1-4(b)(5) requires a CSO community's CSO notification procedure to assign responsibility within the community for implementing the CSO notification procedure but does not require the assignment to be made to treatment plant personnel.

Comment: People need to use common sense. Sewers have been discharging to our receiving streams for over eighty (80) years, and, by this time, people should be knowledgeable about this problem. The requirement of a twenty-four (24) hour notice every time there is a chance for rain will be a tremendous economic burden to communities. It would make more sense to educate everyone with a single public announcement once each year that provides the information that a combined sewer overflow could occur with any chance of rain at any time during the year. (BWWTP)

Response: The conditions in the draft rule concerning when and under what circumstances notification must be made were taken directly from Public Law 140-2000, SECTION 23, as written by the Indiana General Assembly in the 2000 legislative session.

Comment: "Community notification", the term used in Senate Enrolled Act 431 (now known as Public Law 140-2000), is distinct from the individual notification that is emphasized in the draft rule. Impacts to water quality from combined sewer overflows are triggered by the obvious occurrence of rainfall, and the most effective way to protect the community is to educate it. Basic public education regarding bacteria counts in certain streams after rain should be the goal. Other typical safety and health hazards in municipalities do not require individual notification. Trying to make notifications based on prediction or at the actual time of occurrence will be wasteful of resources and will not serve the community good. (IACT, MU)

Response: Public Law 140-2000, SECTION 23 does not deal with other typical safety and health hazards but with the requirement that the Water Pollution Control Board must adopt a rule to require NPDES permit holders to give notification whenever information from any reliable source indicates that a CSO is discharging or may discharge within the next twenty-four (24) hours.

Comment: If the goal of the draft rule is to protect the public, the message quite simply is, "When it rains, bacteria go up. When it might rain, bacteria might go up.". This simple message could be ingrained in the community consciousness through public service announcements, billboards, bill enclosures, warning signs, public meetings, and the like. The draft rule's extensive notification burden is not sufficiently supported by comparative health risk data and will place undue burden and liability on communities. (IACT)

Response: The Indiana General Assembly in the 2000 legislative session directed the Water Pollution Control Board to adopt a rule providing for community notification under specified conditions. IDEM's understanding of community notification does not include a prohibition on notification being made to individuals. However, the individuals required to be notified by the draft rule should not be extensive or burdensome. An early version of the draft rule presented to the workgroup did focus on a generalized, community-wide, education program with the use of public service announcements, billboards, bill enclosures, warning signs, and the like. That rule version met with great opposition from community representatives on the workgroup. The draft rule produced through the workgroup process includes an approach that adheres to Public Law 140-2000, SECTION 23 and is complementary to federal provisions that require CSO communities to give the public adequate notification of CSO occurrences and CSO impacts.

Comment: Mishawaka has submitted a version of the draft rule with changes that in general achieve the following: (1) Substitute community education for individual notification made to affected persons; (2) Rename the "CSO notification procedure" in section 4 as a "CSO notification program"; (3) Limit notification to the recreation season and to be given to private property owners adjacent to the receiving water and within one thousand (1,000) feet of a combined sewer overflow outfall only if the private property owner requests notification; (4) Eliminate the CSO community's requirement to document a private property owner's refusal to accept the community's offer to post a warning sign; and (5) Eliminate the rule language taken from Public Law 140-2000, SECTION 23 concerning when and under what conditions notification must be made. (MU)

Response: Mishawaka is thanked for its submission of rule modifications; however, the draft rule has been through a several months workgroup review process prior to being published for a second public comment period. It is not possible to eliminate any requirements the General Assembly placed on the Water Pollution Control Board for adopting a rule concerning CSO notification. IDEM does not believe that individual notifications, where they are required in the draft rule, are outside the meaning of the

community notification term used in SEA 431. The legislative mandate for this rulemaking does not state that the requirement to provide notification applies only during the recreational season.

Comment: Do rules exist for providing community notification or notifying persons who would most likely be affected by non-point source pollution? (KU)

Response: No.

Comment: The draft rule only addresses risks from water borne pathogens associated with actual combined sewer overflows rather than also considering the contamination from any significant precipitation resulting in storm water run-off which can also cause or contribute to a violation of Indiana's recreational water quality standard of two hundred thirty-five (235) colonies per liter. It can be assumed that the pathogens in storm water run-off are not of human origin, but health and environmental professionals have all concluded that nonanthropogenic water borne pathogens pose a similar health risk as those of human origin. Despite this knowledge that waterbodies receiving substantial amounts of storm water run-off pose the same health risk as those that receive CSO discharge, IDEM is not making any effort to require anyone to be notified of the health risks from recreating in or on waterbodies recently contacted by storm water discharges. Likewise, the draft rule also ignores sanitary sewer overflows (SSO) which indisputably have the potential to contain an even greater concentration of anthropogenic pathogens than combined sewer overflows. As a result, the notification required by the draft rule would, by implication, falsely assure that there is no risk in coming into contact with rain affected waters that have received discharges from storm water run-off or sanitary sewer overflows. The draft rule should be modified to provide a much more protective message that there are potential health risks from coming into contact with any waterbody that has recently been affected by a substantial wet weather event. For example, the message could state the following: "If it rains more than a half inch, stay out of the water for forty-eight (48) hours." In addition, any CSO, sanitary sewer overflow, and storm water outfall should have a sign posted with the appropriate warning about staying away from them when they are flowing, and a community should be required to provide appropriate, separate public notice each time there is a dry weather CSO or sanitary sewer overflow. (GSD)

Response: Dry weather discharging from a CSO or a SSO is a violation of NPDES permit conditions. Rule 13 addresses storm water run-off. As required by Public Law 140-2000, SECTION 23, the draft rule requires CSO communities to educate the public, by way of providing notification, about the risk of coming into contact with waters impacted by CSO discharges. However, CSO communities are free to be more comprehensive and educate the public about risks associated with other sources of pollutants.

Comment: Applying the requirements of the rule to every CSO discharge in every community is excessive, can mislead the public, and can create unnecessary expenses for the community. Instead of such universal application of the rule, there should be an established threshold based on the contamination content of the CSO discharge that must be exceeded before the requirements of the rule are triggered. A CSO containing a very diluted sewage component due to an extremely high rainwater volume or a high volume stream may have negligible health risk. One of Mr. Neltner's first notice comments printed in the Indiana Register with the draft rule at second notice of comment period states that, "People need to be notified about the magnitude of the CSO problem because the higher the level of contamination the more severe is the hazard." Conversely, the lower the level of contamination the less severe is the hazard. Therefore, this rule should simply not apply to all CSOs. (IACT)

Response: IDEM believes that including such a threshold would not comply with the provisions of Public Law 140-2000, SECTION 23 which requires notification "whenever information from any reliable source indicates that: (1) a discharge or discharges from one or more combined sewer overflow points is occurring; or (2) there is a reasonable likelihood that a discharge or discharges from one or more combined sewer overflow points will occur within the next twenty-four (24) hours."

Comment: The draft rule actually increases the odds that someone will get sick from coming into contact with contaminated water because the required notification does not focus on storm water run-off or sanitary sewer overflow in addition to combined sewer overflow. A community may not be held liable for illness or injuries for not providing any notice of the hazards of coming into contact with rain contaminated water but will be held liable for harms resulting from unreasonably deficient notices. If this rule is adopted with its requirement for insufficiently protective notification, then it also needs to contain language stating that IDEM and the state will defend and indemnify any community that uses the language required by the rule. (GSD)

Response: As required by Public Law 140-2000, SECTION 23, the draft rule requires CSO communities to educate the public, by way of providing notification, about the risk of coming into contact with waters impacted by CSO discharges. However, CSO communities are free to be more comprehensive and educate the public about risks associated with other sources of pollutants.

Comment: The draft rule needs to include an exemption for CSO communities to protect them from any liability associated with individuals who choose to enter CSO receiving streams but claim they were not notified. Any reports provided to IDEM by a CSO community regarding notification should serve as proof that a good faith effort was made on behalf of the CSO community to notify citizens of health issues related to CSO. (IACT)

Response: The Water Pollution Control Board does not have the authority to provide any such protection from liability to CSO communities.

Comment: The City of Kendallville has been aggressively separating sewer systems over the past forty (40) years, has submitted its CSO Operation Plan with long term strategy, and has reached the level that Indiana's CSO Strategy has defined as attainable. For these reasons, Kendallville is opposed to the CSO Public Notification rule. However, one revision to the draft rule could be an expansion on the requirement for posting warning signs. Signs should be posted every one-eighth (C) mile downstream to the community's corporate limit rather than just one (1) sign posted at the combined sewer overflow outfall. (KU)

Response: Public Law 140-200, SECTION 23, passed by the Indiana General Assembly, requires every CSO community to provide public notification as specified by the draft rule. If a community ceases to have combined sewer overflows then it would not be affected by this rule. The CSO Public Notification rule states minimum requirements that CSO communities must meet. The rule does

not prohibit a community from providing additional notification with warning signs posted at regularly spaced intervals.

Comment: The definitions of “combined sewage”, “combined sewer system” and “wet weather event” should be removed from the rule because the terms are not used anywhere in the rule other than in the definitions. As well, the definition of “combined sewage” differs from the statutory definition. (IKE)

Response: While it is most normal to include definitions only for terms used in a rule, the meanings of combined sewage and a combined sewer system are essential to understanding the meaning of a combined sewer overflow community and combined sewer overflow outfall and do serve a purpose in this rule. The definition of “combined sewage” is taken directly from the statutory definition and has the same meaning; the only difference is that the references made in the statutory definition to other statutory definitions have been omitted causing no difference in the meaning of “combined sewage”. The definition of “wet weather event” will be eliminated from the rule.

Comment: Several references to “CSO points” should be changed to “CSO outfalls” for sake of consistency, and the term should be defined. (IKE)

Response: “CSO outfall” is defined at 327 IAC 5-2.1-3(5) and will be used consistently throughout the rule in replacement of “CSO point”.

Comment: An undefined term, “CSO impacted waterbody”, is used at 327 IAC 5-2.1-4(b)(4). This term should be defined as follows: “Combined sewer overflow impacted waterbody” or “CSO impacted waterbody” means waters of the state that exceed the water quality standards due to a combined sewer overflow without regard to other sources of pollution. (IKE)

Response: A definition of “affected water” has been added to the draft rule at 327 IAC 5-2.1-3(2), and revisions to section 4 and other sections of the draft rule have been made in response to this comment.

Comment: A length of time longer than the four (4) months allowed by 327 IAC 5-2.1-4(c)(2) would be appreciated for submission and implementation of the CSO community’s CSO notification procedure. (BWWTP)

Response: A rule normally takes a minimum of four (4) months to become effective after it is final adopted by the board. Four (4) months beyond the effective date of the rule would provide the CSO communities eight (8) months from the time of the rule’s final adoption to complete and submit their CSO notification procedures.

Comment: Section 4 or an additional section needs to include a requirement that the CSO notification procedure be included in the CSO communities’ CSO operational plans and in the Long Term Control Plans. (IKE)

Response: A new subdivision has been added to the draft rule at 327 IAC 5-2.1-4(c) to require the CSO notification procedure to be included in a community’s CSO operational plan.

Comment: The “affected persons” listed at 327 IAC 5-2.1-5(a)(1), who are to be among the intended recipients of notification, need to be limited to those who live within a five (5) mile radius of the CSO outfall. If there is no reasonable limit placed on who must be notified, then prisoners, people living in foreign countries, all members of a national environmental group, etc., may request and be required to receive notification. This would present a CSO community with a crippling administrative burden. (IACT)

Response: A definition of “affected persons” has been added to the draft rule in section 3. Each CSO community will determine the extent of the affected persons requiring notification. This will be accomplished, in part, through use of the data the CSO community has collected to determine the extent of in-stream impacts caused by its CSO discharges. The collection of this information is a requirement of all CSO permittees; therefore, IDEM does not believe using this information to determine the extent of affected persons will present CSO communities with a crippling administrative burden.

Comment: “Drinking water supply companies” used in 327 IAC 5-2.1-5(a)(3) is not defined and implies that notice is only needed to be given to private businesses. The term should be replaced with “public water suppliers”. (IKE)

Response: The intent of section 5 is to require CSO communities to provide notice to any supplier of drinking water, public and private, located within the specified range. The questioned term will be modified to “drinking water suppliers”.

Comment: An introductory phrase stating “Unless specifically required in this rule,” should be added at 327 IAC 5-2.1-5(c). Without such an addition to subsection (c), its current language contradicts 327 IAC 5-2.1-6(a)(1)(A)(ii)(BB) which requires documentation of refusal by a property owner or operator. As well, there could be other situations where a CSO community and the recipient of notification mutually could agree to confirmation of receipt of the notification, and the rule should not prevent that possibility. (IKE)

Response: The suggested introductory phrase has been added at 327 IAC 5-2.1-5(c).

Comment: In 327 IAC 5-2.1-6(a)(1), the terms “recreation” and “downstream” should be much more clearly defined or replaced with more appropriate language that relates to a realistic public health threat from contact with combined sewer discharge waters. The area determined in section 6(a)(1) needs further clarification such as the following: “In areas where there is a reasonable likelihood that full body contact will occur at this location during or after a wet weather event and such likelihood is based upon sworn testimony that voluntary, full body contact with the water has been observed on at least two (2) occasions during any given recreational season.”. While requiring testimony may seem excessive, it is not prudent to utilize tax payer and ratepayer dollars to fund any activity based only upon assumption such as the draft rule does concerning areas having recreation. Additionally, the notification requirements of section 6 should be limited to the recreational season because disinfection is not a requirement of publicly owned treatment works outside of the recreational season based, in part, upon the reasonable conclusion that recreation is not occurring. (IACT)

Response: A recreation season limitation was considered during the workgroup process and rejected because nothing in Public Law 140-2000, SECTION 23 limits the notification requirement to a portion of the year. It is certainly an observable and frequent occurrence to find boating, swimming, and fishing activities ongoing in times of the year outside the recreational season so to limit the rule’s applicability to the recreational season would be to limit its effectiveness in achieving its intent as established by the legislature. As well, recreational activities in the water may occur that do not involve full body contact; therefore, IDEM does not

believe the language suggested by the comment would be appropriate. Section 6 of the draft rule has been revised to improve its clarity. The revision does not use the terms “recreation” and “downstream”.

Comment: The language “sewage pollution” and “sewage may be in this water” used in the required warning sign to be posted according to 327 IAC 5-2.1-6(a)(1)(A)(i)(BB) is objectionable because, though it is arguably accurate language, it closely resembles and, therefore, subtly supports and helps perpetuate the misrepresentation of other, inaccurate terminology consistently used by some groups. Specifically, the term “raw sewage overflow” rather than the appropriate term “combined sewer overflow” is consistently used by some with the intent to rally public outrage. In order to accurately notify the public and to function within the proper public educational component of the CSO Long Term Control Plan, it is recommended that each place where the term “sewage” occurs on signage it should be replaced with the following: “rainwater combined with sewage”. Furthermore, it would be sufficient that warning signs simply state that the public not swim, wade, or ingest the water in an appropriate effort to prohibit full body contact. (IACT)

Response: It was felt by IDEM and the workgroup that the language “sewage pollution” and “sewage may be in this water” used in the required warning sign is accurate and more understandable to the general public.

Comment: The language of 327 IAC 5-2.1-6(a)(1)(A)(ii) is awkward and needs to make clear that a CSO community is responsible for asking to post a sign each year and document refusals. (IKE)

Response: Section 6 of the draft rule has been revised to improve its clarity.

Comment: In 327 IAC 5-2.1-6(a)(2)(A), the language “within one (1) mile” should be replace with “within ten (10) miles”. The Indiana spill reporting rule acknowledges that ten (10) miles is a reasonable distance for determining the potential impact of spills to a flowing stream. The CSO Public Notification rule should also use the ten (10) mile distance because CSO contamination is often equally or more hazardous than spills. A less acceptable alternative to extending the distance to ten (10) miles would be to modify 327 IAC 5-2.1-6(a)(2)(B) to allow all affected persons to be on the registry–notification list even if such persons do not receive an invitation. (IKE)

Response: The idea of unlimited requests to receive notification through the invitation and registry option was discussed during the workgroup meetings held on the draft rule, and it was decided that a distance limitation was needed in order to prevent the rule requirements from becoming ever increasingly costly to the CSO communities that have to provide the notifications. The legislative goal in directing the Water Pollution Control Board to adopt this rule was to protect human health, and the workgroup reasoned that residents in close proximity of a CSO outfall most need notification as opposed to persons who may be interested in CSO occurrences but normally do not live within the affected area. However, IDEM recognizes that any distance limitation may be arbitrary due to the variation of impacts in the different CSO waters. Therefore, the draft rule has been revised to require notice to the media, providers of public access or recreational opportunities, and those who are most likely to come into contact with the contaminated water. This will include residents adjacent to CSO outfalls and those who live downstream of the outfall to such distance that the water is still potentially affected by the CSO discharge.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On April 10, 2002, the water pollution control board (board) conducted the first public hearing/board meeting concerning the development of new rule 327 IAC 5-2.1 concerning combined sewer overflow public notification by National Pollutant Discharge Elimination System (NPDES) permit holders of the potential health impact of combined sewer overflows (CSOs) and amendment of 327 IAC 5-2-9. Comments were made by the following parties:

Hoosier Environmental Council, represented by Rae Schnapp, PhD. (HEC)

Improving Kids’ Environment, represented by Tom Neltner (IKE)

Indiana Association of Cities and Towns, represented by Tonya Galbraith (IACT)

Following is a summary of the comments received and IDEM’s responses thereto:

Comment: The draft rule goes way beyond the requirements of the legislative mandate in Senate Enrolled Act 431. The legislative directive found in SECTION 23 of SEA 431 does not require communities to make individual notices and to do so as required by the draft rule would place a great burden on the communities affected by this rule. (IACT)

Response: Revisions will be proposed to the preliminarily adopted rule to require the identification of affected waters and affected public. The approach of the revised proposed rule should more closely comport with the requirements of SEA 431. Revisions also will be recommended that more accurately reflect the National CSO Policy requirements. The focus will be on notification of affected public that will likely come into contact with affected waters.

Comment: The notification requirements of the draft rule are greater than those required of public water suppliers when giving a warning to boil drinking water before consumption. (IACT)

Response: In addition to the requirements of SEA 431, the original requirement for public notification comes from the 1994 National CSO Policy. EPA guidance on CSO Policy implementation states: “The intent of the eighth minimum control, public notification, is to inform the public of the location of CSO outfalls, the actual occurrences of CSOs, the possible health and environmental effects of CSOs, and the recreational or commercial activities (e.g., swimming and shellfish harvesting) curtailed as a result of CSOs. Public notification is of particular concern at beach and recreational areas directly or indirectly affected by CSOs. The guidance recommends the following potential notification measures: (1) Posting signs at affected use areas; (2) Posting signs at selected public places; (3) Posting signs at CSO outfalls; (4) Notices in newspapers or on radio and TV news programs; (5) Letter notification to affected residents; and (6) Telephone Hot Line for interested citizen calls.” The rule is being revised since the board’s preliminary adoption to reflect the intent and requirements of the CSO Policy and SEA 431.

Comment: Section 5(b) of the draft rule is in conflict with section 6(b)(3). The former section only requires the notification to be appropriately worded to explain the nature of the potential health effects and steps a person can take to avoid exposure, but the latter

section requires specific language to be used. (IACT)

Response: The requirement of section 5(b) is intended to apply to notification mailed or telephoned to the affected public while the language specified in section 6(b) is to be used on signs posted within a community at locations where the public may come into contact with water affected by a combined sewer overflow.

Comment: The Water Pollution Control Board did not adopt this rule before September 1, 2001, as required by SEA 431; therefore, it would not be a problem to take more time to correct the deficiencies in the draft rule before it is preliminarily adopted by the water board. (IACT)

Response: IDEM will act according to the water board's directive to work further on the rule in coordination with interested parties before bringing the rule before the water board for final adoption.

Comment: The Hoosier Environmental Council supports the draft rule for preliminary adoption and believes it is very important to provide notification to individuals who use waterbodies that may be affected by combined sewer overflows. It is further suggested that the rule should require that notification be made when new connections that could cause more combined sewer overflows are made to a wastewater treatment plant. (HEC)

Response: The General Assembly did not include any provision to address new connections to a wastewater treatment plant in SEA 431. However, IDEM is currently working with stakeholders on a nonrule policy concerning wastewater treatment plants and the requirements for construction permits when sewer collection systems have capacity problems due to additional connections.

Comment: The Improving Kids' Environment organization supports the draft rule for preliminary adoption because it is going to take a long time to fix the combined sewer overflow problems in the various Indiana communities, and, until the overflows cease, notification is needed to alert and warn the public that is at risk of coming into contact with affected waterbodies. (IKE)

Response: IDEM believes the revised proposed rule that is being developed with stakeholder participation since preliminary adoption of the draft rule will meet the requirements of both SEA 431 and the National CSO Policy. The notification process and procedures will be effective in protecting the affected public while CSO communities continue to work on abating the impacts of CSO discharges.

Comment: As a proponent of the legislation that directs the water board to adopt a rule for combined sewer overflow notification, the Improving Kids' Environment believes that the legislative negotiations did not distinguish how notification is to be made and whether it must be individual or community-wide. The intent of the legislation was to effectively provide the necessary information in the best manner possible to protect those members of the public who may be affected by waters contaminated by combined sewer overflow. The legislation places the water board in position to judge how best to effect public health protection. There will be circumstances when individual notification is the best manner to effectively protect the health of those in the public likely to be affected by combined sewer overflow. (IKE)

Response: Revisions to the preliminarily adopted rule that are being developed with stakeholder participation since preliminary adoption of the draft rule will more clearly define the dose/response relationship for an affected public coming into contact with affected waters and the appropriate notice a CSO community must give. Any water that receives a CSO discharge meets the definition of "affected waters". A CSO community is required to identify the affected public and make notification to those affected as they are the ones who will be at risk of exposure.

Comment: It would not create problems for this draft rule if it included a grandfather clause to allow the continued use of the warning signs presently in place at combined sewer overflow outfalls as required by the federal minimal controls/long term control plan. (IKE)

Response: The proposed (preliminarily adopted) rule that is the subject of this notice did not adequately address this issue of existing outfall signs that have been placed by CSO communities in accordance with provisions of their NPDES permits. However, the proposed rule is being revised since preliminary adoption, and those revisions will contain a new section 6(c) that makes provisions for the continued use of cautionary signs posted prior to October 2002.

Comment: Sufficient health protection would not be afforded by this rule if it were limited to the disinfection season. People, especially children, enter the water any time it is available. (IKE)

Response: IDEM agrees that SEA 431 does not direct the rule to be limited to the disinfection season (recreational season of April through October), and to do so would prevent compliance with the requirement clearly stated in SEA 431 that notification be given whenever any reliable source indicates that a combined sewer overflow is occurring or there is reasonable likelihood that a discharge from one or more combined sewer overflow points will occur within the next twenty-four (24) hours.

327 IAC 5-2-9

327 IAC 5-2.1

SECTION 1. 327 IAC 5-2-9 IS AMENDED TO READ AS FOLLOWS:

327 IAC 5-2-9 Notification requirements for toxic pollutants

Authority: IC 13-14-8; IC 13-14-9; IC 13-15-2; IC 13-18-4

Affected: IC 13-15-1-2; IC 13-18-3

Sec. 9. In addition to the reporting requirements of ~~327 IAC 5-2-8(j)~~, **section 8(10) of this rule**, permits issued

to ~~all~~ **any** manufacturing, commercial, mining, ~~and or~~ silvicultural ~~dischargers~~ **discharger** shall contain conditions requiring ~~such dischargers~~ **the discharger** to notify the commissioner as soon as ~~they know~~ **the discharger knows** or ~~have~~ **has** reason to ~~believe~~ **know the following**:

~~(a)~~ **(1)** That any activity has occurred or will occur ~~which that~~ would result in the discharge of any toxic pollutant ~~which that~~ is not limited in the permit if that discharge will exceed the highest of the following notification levels:

~~(1)~~ **(A)** One hundred **(100)** micrograms per liter. ~~(100 µg/l)~~;

~~(2)~~ **(B)** Two hundred **(200)** micrograms per liter ~~(200 µg/l)~~ for acrolein and acrylonitrile; five hundred **(500)** micrograms per liter ~~(500 µg/l)~~ for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one **(1)** milligram per liter ~~(1 mg/l)~~ for antimony.

~~(3)~~ **(C)** Five **(5)** times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7). ~~or~~

~~(4)~~ **(D)** A notification level established by the commissioner on a case-by-case basis, either at ~~his~~ **the commissioner's** own initiative or upon a petition by the permittee. This notification level may exceed the levels specified in ~~subdivisions (1); (2); or (3)~~ **clause (A), (B), or (C)** but may not exceed the level which can be achieved by the technology-based treatment requirements applicable to the permittee under the CWA (see 327 IAC 5-5-2).

~~(b)~~ **(2)** That ~~they have~~ **the discharger has** begun or ~~expect~~ **expects** to begin to use or manufacture, as an intermediate or final product or byproduct, any toxic pollutant ~~which that~~ was not reported in the permit application under 40 CFR 122.21(g)(9). However, this ~~subsection~~ **subdivision** does not apply to the permittee's use or manufacture of a toxic pollutant solely under research or laboratory conditions.

(Water Pollution Control Board; 327 IAC 5-2-9; filed Sep 24, 1987, 3:00 p.m.: 11 IR 622)

SECTION 2. 327 IAC 5-2.1 IS ADDED TO READ AS FOLLOWS:

Rule 2.1. Combined Sewer Overflow Public Notification

327 IAC 5-2.1-1 Purpose

Authority: IC 13-14-1-5; IC 13-14-8; IC 13-14-9; IC 13-18-4-1

Affected: IC 13-18-3

Sec. 1. The purpose of this rule concerning community notification of potential health impacts resulting from a combined sewer overflow discharge is to promote and accomplish the following:

(1) Educate the public, in general, and those persons who, specifically, may come into contact with water that may be affected by a combined sewer overflow discharge as to the health implications possible from combined sewer overflow discharge tainted water.

(2) Alert persons who most likely would be immediately affected by a combined sewer overflow discharge or the potential for a combined sewer overflow discharge to occur.

(3) Protect persons from possible exposure to waterborne pathogens resulting from contact with or ingestion of water from a waterway that may be affected by a combined sewer overflow discharge.

(4) Complement the combined sewer overflow discharge requirements contained in a National Pollutant Discharge Elimination System (NPDES) permit but not obviate or supersede any more stringent requirements contained in an NPDES permit.

(Water Pollution Control Board; 327 IAC 5-2.1-1)

327 IAC 5-2.1-2 Applicability

Authority: IC 13-14-1-5; IC 13-14-8; IC 13-14-9; IC 13-18-4-1

Affected: IC 13-18-3

Sec. 2. Any person required to possess a National Pollutant Discharge Elimination System (NPDES) permit and having one (1) or more combined sewer overflow outfalls into waters of the state must comply with this rule. *(Water Pollution Control Board; 327 IAC 5-2.1-2)*

327 IAC 5-2.1-3 Definitions

Authority: IC 13-14-1-5; IC 13-14-8; IC 13-14-9; IC 13-18-4-1

Affected: IC 13-11-2-158; IC 13-11-2-265; IC 13-18-3

Sec. 3. The following definitions apply throughout this rule:

(1) “Affected persons” means those persons who most likely would be exposed to waterborne pathogens through direct contact with or ingestion of water affected by a combined sewer overflow discharge and includes:

(A) residents adjacent to a combined sewer overflow outfall;

(B) residents downstream of a combined sewer overflow outfall on affected waters; and

(C) owners or operators of facilities that provide access to or recreational opportunities in or on a waterbody affected by a combined sewer overflow discharge.

(2) “Affected waters” means those waters where the E. coli criteria may be exceeded due to a combined sewer overflow discharge.

(3) “Combined sewage” means a combination of wastewater, including domestic, commercial, or industrial wastewater and storm water transported in a combined sewer.

(4) “Combined sewer overflow community” or “CSO community” means a recipient of a National Pollutant Discharge Elimination System (NPDES) permit that includes one (1) or more combined sewer overflow outfalls.

(5) “Combined sewer overflow discharge” or “CSO discharge” means the discharge of combined sewage from an overflow point listed in an NPDES permit.

(6) “Combined sewer overflow outfall” or “CSO outfall” means a structure that:

(A) conveys combined sewage into a receiving waterbody; and

(B) is listed in an NPDES permit.

(7) “Combined sewer system” means a system that:

(A) is designed, constructed, and used to receive and transport combined sewage to a publicly owned wastewater treatment plant; and

(B) may contain one (1) or more combined sewer overflow outfalls that discharge sewage when the hydraulic capacity of the wastewater treatment plant, combined sewer system, or part of the system is exceeded as a result of a wet weather event.

(8) “Commissioner” means the commissioner of the department of environmental management.

(9) “Department” means the department of environmental management except as specifically referenced in this rule.

(10) “Person” has the meaning set forth at IC 13-11-2-158.

(11) “Waters of the state” has the meaning set forth for “waters” at IC 13-11-2-265.

(Water Pollution Control Board; 327 IAC 5-2.1-3)

327 IAC 5-2.1-4 CSO notification procedure

Authority: IC 13-14-1-5; IC 13-14-8; IC 13-14-9; IC 13-18-4-1

Affected: IC 13-18-3

Sec. 4. (a) A CSO community shall develop a CSO notification procedure that meets the requirements of this rule.

(b) A CSO notification procedure must include the following information:

(1) Locations of the CSO outfalls, public access points, and recreational facilities located on affected waters.

(2) Method, according to section 6 of this rule, that shall be used to provide notification to affected persons within the area of each affected water.

(3) Assignment of responsibilities within a CSO community for implementing the CSO notification procedure.

(c) A CSO notification procedure must meet the following:

- (1) Be recorded on a form that is:
 - (A) designed by the commissioner; and
 - (B) made available from the commissioner within one (1) month after the effective date of this rule.
 - (2) Be submitted to the commissioner for approval before the latter of the following:
 - (A) Four (4) months after the effective date of this rule.
 - (B) Four (4) months after the form is available from the commissioner.
 - (3) Be included in the community's CSO operational plan.
 - (4) Immediately be implemented by the CSO community following submission according to subdivision (2)(A) or (2)(B).
 - (5) Be modified as necessary in accordance with comments received from the commissioner.
- (*Water Pollution Control Board; 327 IAC 5-2.1-4*)

327 IAC 5-2.1-5 Notification

Authority: IC 13-14-1-5; IC 13-14-8; IC 13-14-9; IC 13-18-4-1

Affected: IC 13-18-3

Sec. 5. (a) A CSO community shall provide notification to:

- (1) affected persons;
 - (2) persons who request to be notified; and
 - (3) local health departments and drinking water suppliers located within ten (10) river miles downstream of each CSO outfall experiencing or about to experience a CSO discharge.
- (b) The notification must be appropriately worded to explain the nature of the potential health effects of a CSO discharge and steps that affected persons can take to avoid exposure.
- (c) Unless specifically required in this rule, a CSO community is not responsible for confirming that the intended recipients of the notification required by subsection (a) received the notification.
- (d) Notification must be provided whenever information from a reliable source indicates one (1) of the following:
 - (1) A discharge or discharges from one (1) or more combined sewer overflow outfalls is occurring.
 - (2) A reasonable likelihood exists that a discharge or discharges from one (1) or more combined sewer overflow outfalls will occur within the next twenty-four (24) hours.
- (e) If a combined sewer overflow discharge occurs within the general time period predicted by a notification, then no additional notification is required to state that the discharge is occurring or has occurred.
- (f) If a CSO discharge occurred and notification was not provided according to subsection (d), the CSO community shall report this fact on the monthly report required according to section 7(a) of this rule. (*Water Pollution Control Board; 327 IAC 5-2.1-5*)

327 IAC 5-2.1-6 Community notification methods

Authority: IC 13-14-1-5; IC 13-14-8; IC 13-14-9; IC 13-18-4-1

Affected: IC 13-18-3

Sec. 6. (a) A CSO community shall do the following:

- (1) Send an invitation in March of each year to allow the following persons to request receipt of CSO notification:
 - (A) Media sources, such as newspapers, television, or radio.
 - (B) Affected persons.
- (2) Provide notification to persons who accept the notification invitation according to clause (A):
 - (A) when a CSO discharge is occurring or is reasonably likely to occur within twenty-four (24) hours;

and

(B) in a manner that is mutually agreeable to the recipient and the CSO community. If the recipient and CSO community do not reach agreement on an acceptable manner of notification, then the CSO community shall provide notice by telephone or facsimile.

(b) In addition to the requirements of subsection (a), a CSO community shall post a prominent sign:

- (1) at access points to the water, including boat ramps, bridges, parks, and school yards;**
- (2) along linear public areas, such as parkways and greenways, adjacent to affected waters at intervals frequent enough to provide notification to persons who may come into direct contact with the water; and**
- (3) with the following wording printed in English and any other language common in the locale (including the language necessary to fill in the blanks): “Caution–Sewage pollution. Sewage may be in this water during and for several days after periods of rainfall or snow melt. People who swim in, wade in, or ingest this water may get sick. For more information, please call [insert local sewer authority, telephone number, and, if available, a Web site address].”.**

(c) If an access point to an affected water is located on private property, then a CSO community shall:

- (1) annually offer to post the sign required under subsection (b) for the owner or operator of the private property;**
- (2) submit documentation to the department each March that the property owner or operator has refused to allow the CSO community to post the sign on the owner’s property; and**
- (3) not be required to post the sign required under subsection (b) provided the private property owner or operator has refused the community’s offer made according to subdivision (1).**

(d) A CSO community may submit a request for the commissioner’s approval to establish alternative notification methods specific to the CSO community’s needs for providing notification to affected persons if the CSO community can demonstrate to the department that such alternative notification methods are more effective at providing actual notice. (*Water Pollution Control Board; 327 IAC 5-2.1-6*)

327 IAC 5-2.1-7 Record keeping and reporting

Authority: IC 13-14-1-5; IC 13-14-8; IC 13-14-9; IC 13-18-4-1

Affected: IC 13-18-3

Sec. 7. (a) A CSO community shall document its public notification efforts on its monthly CSO discharge monitoring report (DMR).

(b) A CSO community shall maintain a record of reports submitted according to subsection (a) that is:

- (1) kept at the wastewater treatment plant; and**
- (2) available to the commissioner’s representatives during the department’s normal working hours.**

(Water Pollution Control Board; 327 IAC 5-2.1-7)

Notice of Public Hearing

Under IC 4-22-2-24, IC 13-14-8-6, and IC 13-14-9, notice is hereby given that on January 8, 2003 at 1:30 p.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Room A, Indianapolis, Indiana the Water Pollution Control Board will hold a public hearing on proposed new rule 327 IAC 5-2.1 concerning community notification by NPDES permit holders of potential health impacts of combined sewer overflows and amendments to 327 IAC 5-2-9.

The purpose of this hearing is to receive comments from the public prior to final adoption of these rules by the board. All interested persons are invited and will be given reasonable opportunity to express their views concerning the proposed new rule and amendments. Oral statements will be heard, but for the accuracy of the record, all comments should be submitted in writing.

Additional information regarding this action may be obtained from MaryAnn Stevens, Rules Section, Office of Water Quality, (317) 232-8635 or (800) 451-6027 (in Indiana).

Individuals requiring reasonable accommodations for participation in this event should contact the Indiana Department of Environmental Management, Americans with Disabilities Act coordinator at:

Attn: ADA Coordinator

Indiana Department of Environmental Management

100 North Senate Avenue

P.O. Box 6015

Indianapolis, Indiana 46206-6015

or call (317) 233-0855 or (317) 232-6565 (TDD). Speech and hearing impaired callers may contact IDEM via the Indiana Relay Service at 1-800-743-3333. Please provide a minimum of 72 hours' notification.

Copies of these rules are now on file at the Indiana Government Center-North, 100 North Senate Avenue, Room 1255 and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.

Tim Method

Deputy Commissioner

Indiana Department of Environmental Management