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TITLE 327 WATER POLLUTION CONTROL BOARD

FIRST NOTICE OF COMMENT PERIOD

#03-44(WPCB)

DEVELOPMENT OF NEW RULES AND AMENDMENTS TO RULES CONCERNING ANTIDegradation STANDARDS AND IMPLEMENTATION PROCEDURES

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on new rules and amendments to rules concerning antidegradation standards and implementation procedures. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

CITATIONS AFFECTED: 327 IAC 2-1; 327 IAC 2-1.5; 327 IAC 5-2.

AUTHORITY: IC 13-18-2-1; IC 13-18-3-1; IC 13-18-3-2; IC 13-18-3-11; IC 13-18-4.

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose and Background

This rulemaking will review and consider additions and modifications to Title 327 concerning antidegradation standards and implementation procedures. Federal rules require states to develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation. The antidegradation policy and implementation procedures serve as the mechanism states use to assure that water quality improvements obtained through the implementation of permits and best management practices are maintained and protected. The subject matter of this rulemaking has been under consideration since the initiation of rulemaking document #97-1(WPCB) in February 1997. However, that 1997 rulemaking was withdrawn on May 1, 2001, 24 IR 2471, and its subject matters divided into a number of individual new rulemakings, including this rulemaking. These rulemakings are required to satisfy the federal requirement to conduct triennial review of the state's water quality standards. The purpose of this rulemaking is to meet, in part, that requirement found at Section 303(c) of the Clean Water Act (33 U.S.C. 1313(c)), which specifies that a review of state water quality standards must be done at least every three (3) years.

Applicable Federal Law

The federal rules require states to have, at a minimum, three tiers of antidegradation. Tier 1 (40 CFR 131.12(a)(1)) protects existing uses by providing the absolute floor of water quality in all waters of the United States. Tier 2 (40 CFR 131.12(a)(2)) applies to waters whose quality exceeds that necessary to protect the section 101(a)(2) goals of the Clean Water Act (criteria, 33 U.S.C. 1251(a)(2)). In this case, water quality may not be lowered to less than the level necessary to fully protect the "fishable/swimmable" uses and other existing uses. Water quality in Tier 2 waters may only be lowered after a determination is made that allowing lowered water quality is necessary and will accommodate important economic or social development in the area in which the waters are located. Any such lowering must still assure water quality adequate to protect existing uses fully. Tier 3 (40 CFR 131.12(a)(3)) applies to Outstanding National Resource Waters (ONRWs) where the ordinary use classifications and supporting criteria may not be sufficient or appropriate. States may allow some limited activities which result in temporary and short-term changes in water quality in the ONRW, but such changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW.

Alternatives To Be Considered Within the Rulemaking

In addition to the three federally mandated tiers, there are alternatives to be considered in this rulemaking that are specific to Indiana. Indiana currently has two additional types of "high quality" waters: Exceptional Use Waters and Outstanding State Resource Waters. P.L. 140-2000 (also known as SEA 431) provided certain antidegradation requirements to be adopted by the Water Pollution Control Board. P.L. 140-2000 also required the Board to consider redesignating Exceptional Use Waters as OSRWs. The antidegradation provisions of that Public Law are part of the issues related to this rulemaking. It may also be appropriate to include the Exceptional Use Water redesignation consideration as part of this rulemaking, and provide an additional antidegradation "Tier" (i.e., Tier 2.9) in Indiana's antidegradation policy. The U.S. EPA has approved states having an additional "Tier" to incorporate

Outstanding State Resource Waters that are not being proposed for an Outstanding National Resource Water classification. This would mean that Indiana would have four (4) antidegradation "Tiers".

Another alternative to be considered for the rulemaking is the existing antidegradation provisions applied to waters within the Great Lakes basin at 327 IAC 2-1.5-4 and 327 IAC 5-2-11.2 through 327 IAC 5-2-11.7, and the extent to which, or even whether, those provisions might be extended to waters of the state outside the basin.

Other issues that may be considered during the rulemaking include establishing thresholds for what constitutes a "*de minimis*" lowering of water quality in Tier II waters, and what constitutes a "significant lowering" of water quality in Tier II waters that would trigger an antidegradation demonstration; and to what extent sediment and biological integrity may be used as water quality standards.

Rulemaking Workgroup Information

An external workgroup has been established to discuss issues involved in this rulemaking. The workgroup is made up of IDEM staff and a wide cross-section of stakeholders. The first meeting was held on November 6, 2002 and there have been meetings held approximately once every four (4) weeks since then. The minutes from these meetings and other information regarding this workgroup can be viewed at IDEM's Triennial Review website at <http://www.in.gov/idem/water/planbr/wqs/review/trirev.html>. Some issues that the workgroup has been focusing on include: how many tiers should be established, qualifications to get into a tier, and what happens after being placed in a tier.

If you wish to provide comments to the workgroup on the rulemaking or attend meetings please contact Megan Wallace, Rules Section, Office of Water Quality at (317) 233-8669 or (800) 451-6027 (in Indiana). The public is also encouraged to submit comments and questions to members of the workgroup who represent their particular interests in the rulemaking.

STATUTORY AND REGULATORY REQUIREMENTS

IC 13-14-8-4 requires the board to consider the following factors in promulgating rules:

- (1) All existing physical conditions and the character of the area affected.
- (2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
- (3) Zoning classifications.
- (4) The nature of the existing air quality or existing water quality, as the case may be.
- (5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
- (6) Economic reasonableness of measuring or reducing any particular type of pollution.
- (7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
- (2) The submission of suggestions for the development of draft rule language.

Mailed comments should be addressed to:

#03-44(WPCB) Antidegradation Standards and Implementation Procedures
Megan Wallace
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, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 232-8406, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Office of Water Quality Rules Section at (317) 233-8903.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by April 29, 2003.

Additional information regarding this action may be obtained from Megan Wallace, Rules Section, Office of Water Quality, (317) 233-8669 or (800) 451-6027 (in Indiana).

Mary Ellen Gray
Deputy Assistant Commissioner
Office of Water Quality