



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

MAR 09 2010

REPLY TO THE ATTENTION OF:

R-19J

Thomas W. Easterly, P.E., DEE, QEP
Commissioner
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, Indiana 46204-2251

Dear Mr. Easterly:

I want to alert you to the United States Environmental Protection Agency's concerns with Indiana's National Pollutant Discharge Elimination System (NPDES) general permit rule program. As you know, this program provides that the Indiana Water Pollution Control Board (the Board) issues general permits as administrative rules. It has come to our attention that Indiana amended Ind. Code § 13-18-1-2 (a)(2)(B) in 1998 to provide, among other things, that one member of the Board must be employed by an entity holding a major NPDES permit. As explained below, this statutory provision contravenes the requirements for state NPDES permits programs in the Clean Water Act (CWA) and its implementing regulations. Separately, EPA understands that the general permits issued by the Board contain no expiration date, in contrast to the fixed term of 5 years contemplated by the CWA and regulations.

I. Conflict of Interest

The Indiana statute conflicts with EPA regulations governing state NPDES programs at 40 CFR §123.25(c), which provides:

(c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

EPA promulgated this regulation consistent with nearly identical language at CWA Section 304(i)(2)(D), 33 U.S.C. § 1314(i)(2)(D). Under the CWA and its implementing regulations, an NPDES permit cannot be issued by a board a member of which is employed by an entity holding an NPDES permit, as mandated by Ind. Code § 13-18-1-2 (a) (2) (B).

The State provision creating this conflict was added after EPA approved Indiana's general permit program in 1991. Indiana has not submitted the provision to EPA for approval. Under 40 CFR § 123.62, a revision to a State NPDES program, such as that prompted by the amended Indiana statute, becomes effective for the purpose of the CWA only after EPA has approved, and EPA can approve only when the revision meets the requirements of the Act and regulations.

II. Lack of an Expiration Date

The lack of an expiration date in the general permits issued by that Board presents an additional concern since CWA Section 402(b)(1), 33 U.S.C. §1342(b)(1), and 40 CFR § 122.46 provide that permits shall be issued for a fixed term not exceeding 5 years. (327 Ind. Adm. Code r. 5-2-6 similarly provides that Indiana NPDES permits shall be issued for a term not to exceed five years.) The Act and regulations require permit renewal so that the permit-issuing authority can apply new technologies and water quality standards to point source discharges. The renewal process allows the public and EPA to comment on the choices that the permit authority makes in the course of drafting a new permit. At present, the public and EPA are denied these rights with respect to Indiana's general permits. Inadequate public participation in the Indiana general permit program was one of the issues raised in a December 17, 2009, petition in which three citizens groups asked EPA to withdraw our approval of Indiana's NPDES program.

III. Conclusion

Due to the direct conflict with CWA requirements for the composition of boards or bodies that issue NPDES permits, Indiana must revise its NPDES program by: 1) amending the statute to eliminate the requirement that a member of the Board possess a permit (and Indiana must actually remove any such person from the Board), or 2) transferring the authority to issue general permits from the Board to the Indiana Department of Environmental Management. EPA strongly recommends that Indiana select the second option for resolving the conflict of interest within the State's NPDES program. We believe this option will be resource efficient for the State given the burdens associated with the process for adopting administrative rules. In addition, Indiana needs to revise its practice to limit the term of general permits to 5 years.

Please reply with a commitment and a plan to timely resolve the concerns expressed in this letter. Indiana could enact legislation to resolve the NPDES conflict of interest at the same time that it enacts legislation to resolve EPA's concerns, as expressed in a June 24, 2009 letter from this office to the Office of the Governor of Indiana

(enclosed), about Indiana's criminal enforcement authority. Do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Mathur", with a long horizontal flourish extending to the right.

Bharat Mathur
Acting Regional Administrator

Enclosure

cc: Mr. Bruno Pigott, IDEM



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REGION 5
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JUN 24 2009

REPLY TO THE ATTENTION OF:

David L. Pippen, Policy Director
Office of the Governor
State House, Room 206
Indianapolis, IN 46204

C-14J

Dear Mr. Pippen:

As you know, applicable federal statutes and regulations require Indiana to maintain an adequate criminal enforcement program under the Clean Air Act, 42 U.S.C. Section 7401 *et seq.*, the Clean Water Act, 33 U.S.C. Section 1251 *et seq.*, the Resource, Conservation and Recovery Act, 42 U.S.C. Section 6901 *et seq.* and the Safe Drinking Water Act, 42 U.S.C. Section 300f, *et seq.* Regulations concerning these provisions are listed at 40 CFR 51.230, 40 CFR 63.91(d), 40 CFR 70.11, 40 CFR 123.27, 40 CFR 271.16 and 40 CFR 142.10(b)(6)(vi), among others. We previously reviewed draft Indiana legislation which attempted to address shortcomings with these federal requirements, and advised you of our comments in a letter dated January 14, 2008.

The legislation we reviewed at that time made substantial changes to existing law, and we appreciate your efforts to address many of our concerns. However, the legislation enacted as P.L. 137-2007 was significantly different from the draft legislation we reviewed, and fails to achieve the minimum standards required by the above regulations. We therefore have continuing concerns about the adequacy of Indiana's criminal enforcement program. In particular:

- Although the new legislation provides for enforcement of air permits, it does not provide a clear mechanism to enforce violations of the underlying air regulations, such as state implementation plans (SIPs), new source performance standards (NSPS) or national emission standards for hazardous air pollutants (NESHAPs). As a result, major program areas such as asbestos violations would not be criminally enforceable, as persons involved in asbestos removals are not required to obtain a permit. While we understand that IC 13-17-3-5 provides for criminal enforcement of *air pollution control laws*, the definition of this phrase does not include IDEM regulations. By contrast, we note that Indiana's civil enforcement provision specifically authorizes enforcement of rules or standards adopted by one of the Boards. See IC 13-30-4-1.

- The new bill does not appear to authorize enforcement for a failure to obtain an air permit. We understand that IDEM's view is that this authority is contained in IC 13-17-7, but this provision appears to us merely to provide an exemption from liability for those who have submitted a permit application.

- The new legislation provides an inadequate crime addressing unpermitted discharges to waters of the State. At IC 13-18-4-5, the new bill authorizes criminal enforcement of unpermitted discharges only if the discharge "caused or contributed to a polluted condition" of any water. This provision is substantially narrower than required by the EPA delegation regulation.

- The new bill applies criminal sanctions to those "regulated under" specific state statutory provisions relating to air, water and hazardous waste. However, those statutory provisions only authorize IDEM to enact regulations, and do not themselves apply to the regulated community. A defendant may argue that this language fails to provide adequate notice of the intention to apply criminal sanctions to IDEM regulations. We suggest that you clarify this point with Indiana's Attorney General, or alternatively, amend the statute to authorize criminal enforcement of relevant IDEM regulations.

- The new bill requires a court to consider sentencing factors relating to harm "if found by a jury." We assume this phrase was not intended to establish a defendant's right to introduce evidence of lack of harm at trial. We ask that you confirm that this is Indiana's interpretation as well. As you know, one of the issues we identified with the prior statute was the imposition of a defense due to purported lack of environmental harm, and the added burden of proof this would place on all prosecutions.

- The water crimes in the new legislation apply to those who "willfully" or "recklessly" violate water laws. The Clean Water Act was amended in 1987 to provide crimes for negligent and knowing violations. The *mens rea* terms in the federal statute are each broader in application than the terms in the new state legislation, and we recommend the federal statutory terms be adopted (note that the federal standard for criminal negligence is simple negligence under federal caselaw).

The obligation to maintain adequate state criminal enforcement statutory authority is a condition of U.S. EPA's grant of authority under the federal environmental statutes listed above. We will be evaluating the steps U.S. EPA needs to take if these issues cannot be

resolved. We hope that Indiana will amend the statute to address these problems, and look forward to working with you to resolve our concerns.

Sincerely yours,

Robert A. Kaplan

Robert A. Kaplan
Regional Counsel