



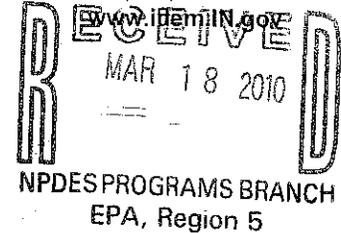
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

We Protect Hoosiers and Our Environment.

Mitchell E. Daniels Jr.
Governor

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March 10, 2010

The Honorable Lisa Jackson
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue
Washington, DC 20460

RECEIVED

MAR 15 2010

U.S. EPA REGION 5
OFFICE OF REGIONAL ADMINISTRATION

Dear Administrator Jackson:

**Re: Petition for Corrective Action or Withdrawal of Approval of the
National Pollutant Discharge Elimination System Program
For the State of Indiana
Submitted by the Environmental Law and Policy Center,
Hoosier Chapter of the Sierra Club and
Hoosier Environmental Council
Dated December 17, 2009**

The Indiana Department of Environmental Management ("IDEM") has received a copy of the above-referenced petition (which the petitioners have titled "Petition for Corrective Action or Withdrawal of the National Pollutant Discharge Elimination System Program Delegation From the State of Indiana" and is referred to in this letter simply as the "Petition") which has been submitted to you by the petitioners under 40 C.F.R. 123.64. IDEM is the state agency that administers the approved National Pollutant Discharge Elimination System ("NPDES") Program for the State of Indiana.

Although not required by 40 C.F.R. 123.64, IDEM is submitting this written response to the Petition. This response is an informal presentation of information intended to assist EPA in evaluating the Petition. By submitting this informal response, IDEM does not waive its right to include additional facts and issues in its formal response to any order which EPA may issue under section 123.64.

Since the presentation of issues in the Petition does not precisely follow the outline set forth at the beginning of the Petition, our response will address the issues raised in the order discussed in the Petition, but not necessarily under the same outline numbering.

1. Antidegradation

The petitioners' first set of issues concern the Clean Water Act's requirement that Indiana's NPDES program contain a statewide antidegradation policy and identify methods for the implementation of that policy. The petitioners first suggest that Indiana's NPDES program approval should be withdrawn because Indiana has failed to finalize antidegradation implementation rules. (Petition Item I.A, pp. 3-4). Indiana has an antidegradation policy which is set forth in 327 IAC 2-1-2. For some years now IDEM and the Indiana Water Pollution Control Board have been working to adopt rules defining implementation procedures for Indiana's antidegradation policy. It is important to bear in mind that while EPA's rules provide general standards for state antidegradation implementation policies in 40 C.F.R. 131.12, they do not provide a precise template for their content. Adoption of antidegradation implementation procedures in other NPDES state programs has proven to be a contentious issue. IDEM has worked with numerous interested parties, including the petitioners, in an attempt to develop its antidegradation implementation rules on a consensus basis.

Since the current antidegradation implementation rulemaking was commenced¹, IDEM has held four general meetings of stakeholders as follows:

March 7, 2008
April 29, 2008
June 25, 2008
August 4, 2009

Stakeholders were invited to designate representatives to take part in workgroup discussions on the proposed rulemaking. Workgroup meetings were devoted to specific aspects of the rule:

July 15, 2008	Applicability
August 12, 2008	Exemptions
September 16, 2008	De Minimis Discharges
October 30, 2008	Applicability
	Exemptions
	De Minimis Discharges
December 11, 2008	Antidegradation Demonstrations
January 6, 2009	Public Notice/Comment
January 26, 2009	Water Quality Improvement Projects

In spite of this unprecedented degree of outreach to interested parties, consensus on antidegradation implementation issues has remained elusive and IDEM recognizes that it will be necessary to proceed with the rulemaking even in the absence of full agreement among affected parties. Therefore IDEM proceeded to publish a second notice on the proposed rule on December 16, 2009.² This publication meets the goal identified in our Environmental Performance

¹ IDEM published its first notice of proposed rulemaking on October 15, 2008, but began meeting with stakeholders to discuss the proposed rule even before that publication.

² The statutory procedure for adoption of the rules administered by IDEM is different from the federal procedure and from that applicable to most other Indiana state agencies. Briefly, IDEM publishes a first notice of proposed rulemaking explaining the proposed rulemaking in general terms and requesting comments on alternative approaches.

Partnership Agreement for the 2009-2011 biennium that IDEM would publish its second notice on the antidegradation rulemaking by December 31, 2009. (EnPPA Item W-9, p. 31).

Petitioners also suggest that Indiana's adopted antidegradation implementation rules for the Great Lakes basin are deficient. (Petition Item I.B, pp. 4-5). These rules were part of the Great Lakes Initiative rulemaking and were submitted to and approved by EPA. 65 FED. REG. 47864, 47868 (Aug. 4, 2000). Petitioners had the opportunity to appeal the approval under the Administrative Procedures Act but did not.

Petitioners next argue that the antidegradation implementation policies proposed in the current rulemaking are not adequate. (Petition Item I.C, pp. 5-8). It is important to note that this rule is not yet final. IDEM has published the proposed text of a rule and has solicited comment from the public, including all of the interested parties who have participated in the rulemaking process to date³. These comments will be considered before the proposed rule is recommended for preliminary adoption by the Indiana Water Pollution Control Board (see description of the IDEM rulemaking process in note 2 above). When the rule has been finalized, it will be submitted to EPA for approval under 40 C.F.R. 123.62(b). Because it is both premature to consider the adequacy of Indiana's draft antidegradation implementation rule and unnecessary to consider withdrawal of approval of Indiana's NPDES program to address any perceived deficiencies in the rule, we will not discuss the deficiencies alleged in the Petition in detail.

Next the petitioners argue that P.L. 78-2009 (HEA 1162), legislation enacted by the Indiana General Assembly during its 2009 session, limits IDEM's ability to adopt antidegradation implementation policies that will be consistent with federal law. (Petition, Item I.D, pp. 8-9). The petitioners raise several points:

- IC 13-18-3-2(l) requires the definition of a *de minimis* threshold for discharges to outstanding state resource waters.⁴ The petitioners argue that "it is clear that EPA's authority to approve *de minimis* exceptions is quite limited"⁵ and that "IDEM's method of implementing the required *de minimis* exception in this case [*sic*] cannot be properly approved by EPA." (Petition, p. 9) This appears to be a comment on IDEM's proposed rule rather than on the statute, which does not direct how the *de minimis* exception should be defined. As noted above, the proposed rule is not yet final and the petitioners would be better served to direct their efforts to commenting on the proposed rule.
- IC 13-18-3-2(p) directs IDEM to perform an antidegradation review of all Indiana general NPDES permits. It authorizes the Water Pollution Control Board to modify its general permit rules for antidegradation compliance, and provides that after completion of the antidegradation review, general permits are not required to undergo further antidegradation

IDEM next publishes a second notice containing the text of the proposed rule (and responses to comments on the first notice) also requesting comments. After receipt of comments from the second notice comment period, the proposed rule can be preliminarily adopted by the appropriate rulemaking board, in this case the Indiana Water Pollution Control Board. After an additional publication of the text of the preliminarily adopted rule and a further public comment period, the board can finally adopt the rule, which becomes effective when approved by the Indiana Attorney General and Governor.

³ IDEM has also received comments on the proposed rule from EPA dated May 15, 2009.

⁴ This subsection actually was already in the statute before the 2009 amendment, which merely renumbered it.

⁵ The petitioners cite Judge Clay's opinion in *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 484n.12. The majority of the Court did not join in this portion of the opinion. *Ibid.* at n. 9.

review. The petitioners complain that “there is no discussion of what this review will entail or how it will ensure that individual discharges under the [Water Pollution Control] Board’s rules will not result in unnecessary degradation of the state’s waters.” (Petition, p. 9) We agree that the statute leaves to IDEM’s discretion the details of the antidegradation review. The review itself has not yet been performed because the state antidegradation rule has not been finalized. The petitioners appear to be anticipating dissatisfaction with the result of the review, but it is not accurate to say that the Indiana General Assembly has limited IDEM’s authority to adopt appropriate antidegradation implementation policies.

- IC 13-18-3-2(t)(1) requires IDEM to give “substantial weight to any applicable determination of a governmental agency”⁶ in determining the socioeconomic importance of a proposed discharge. The petitioners note that “governmental entities” is not limited to “agencies or entities responsible for ensuring compliance with the Clean Water Act” and express concern that this provision “improperly limits IDEM’s primary authority to determine compliance with 40 C.F.R. 131.12 by delegating such authority to potentially unrelated governmental agencies.” (Petition, p. 9) It should be noticed first that the statute does not “delegate” any authority, it simply requires that substantial weight be given to determinations of other governmental agencies. Moreover, nothing in EPA’s rules requires that socioeconomic importance for antidegradation review purposes be determined by a water quality agency. On the contrary, 40 C.F.R. 131.12(a)(2) provides in relevant part that:

Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected *unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development* in the area in which the waters are located. (Emphasis added).

Also see the definition of “States” in 40 C.F.R. 131.3(j). It appears to be within the Indiana legislature’s discretion to determine how to assess the socioeconomic importance of proposed discharges.

2. Administration of Indiana’s NPDES Program

The petitioners raise several disparate points concerning the administration of Indiana’s NPDES program, the common theme of which appears to be that the lack of finalized antidegradation implementation procedures in the Indiana program is leading to an ongoing degradation of water quality.

The first point (Petition, Item I.E, p.10) concerns the waters listed as impaired in the lists IDEM prepares under Clean Water Act section 303(d). and appears to suggest that the number of impairments or impaired stream segments reported should be a measure of the success of a state’s NPDES program. This ignores the fact that impairments can be due to a number of pollutants

⁶ “Governmental agency” is defined as “the state or a political subdivision”. IC 13-11-2-90.

sources, not all of which are regulated under the NPDES program. For example, the sale of phosphorus fertilizers is not regulated under NPDES regulations, state or federal.

The petitioners suggest that a lack of IDEM regulation of concentrated animal feeding operations (“CAFOs”) has led to the impairment of Indiana waters, alleging that IDEM does not take enforcement action against CAFOs for illegal discharges. The petitioners do not identify specific instances in which IDEM is alleged not to have taken appropriate enforcement action. IDEM both regulates CAFOs and takes enforcement action against CAFO operators as appropriate. In calendar year 2009, IDEM issued notices of violation to thirteen CAFOs and entered into seven agreed orders resolving enforcement cases with CAFOs.

Indiana’s CAFO NPDES general permit rule requires that CAFOs not discharge pollutants except during specified precipitation events. 327 IAC 15-15-4(d) and (e). CAFOs must be designed not to discharge under ordinary circumstances. Therefore the majority of IDEM’s CAFO enforcement actions have focused on operators’ failures to notify, submit plans, or follow approved plans rather on discharges *per se*.

The Petition does specifically discuss one specific impaired stream segment, Kessinger Ditch in Knox County, Indiana. The petitioners allege that CAFO discharges are causing *E. coli* impacts to this stream but that IDEM has not addressed the impairment because of a lack of enforcement action. Petitioners quote selectively from the TMDL report for the stream to argue that IDEM fails to take enforcement action against discharging CAFOs and that IDEM then uses its lack of enforcement to justify not showing the stream as impaired due to CAFOs.

In fact, the report in question, after noting wildlife and failing septic systems as possible sources of *E. coli* contamination (p. 3), the report states:

The removal and disposal of the manure, litter, or processed wastewater that is generated as the result of confined feeding operations falls under the regulations for confined feeding operations⁷ (CFOs) and confined animal feeding operations (CAFOs). There are seven CFOs in the Kessinger Ditch watershed (Figure 5). Of the seven CFOs, one is considered a CAFO and has a general permits (Table 2). The CFOs and CAFO regulations (327 IAC 16, 327 IAC 15) require operations “not cause or contribute to an impairment of surface waters of the state.” The currently operational animal operations in Kessinger Ditch watershed have no open enforcement actions at this time. Therefore, these operations are not considered a significant source of *E. coli* for the Kessinger Ditch TMDL.

There are many smaller livestock operations in the watershed. These operations, due to their small size, are not regulated under the CFO or CAFO regulations. These operations may still have an impact on the water quality and the *E. coli* impairment. No specific information on these small livestock operations is currently available however; it is believed that these small livestock operations may be a source of the *E. coli* impairment.

IDEM Office of Water Quality, *Total Maximum Daily Load for Escherichia coli (E. coli) for the Kessinger Ditch Watershed, Knox County* (February 16, 2005) p.4 (available at http://www.in.gov/idem/files/tmdl_kessinger_report.doc).⁸

In context, the report is saying that the single CAFO in the affected watershed can be discounted as a source of impairment because of IDEM’s regulation of that facility to prevent impairments,

⁷ CFOs are feeding operations, not meeting the definition for CAFOs, which are regulated under state law.

⁸ This TMDL has been approved by EPA.

but that there are unregulated animal feeding operations in the same watershed that may be contributing to the impairment.

3. Antidegradation Demonstrations in NPDES Permits

The petitioners allege that "IDEM continues to issue NPDES permits that do not comply with the federal antidegradation requirements..." (Petition, Item I.F, p. 11). The Petition gives three examples of allegedly improperly issued permits, all to municipal wastewater treatment systems: the Cities of Jeffersonville and Austin and the Town of McCordsville. Copies of these three permits are attached to this response.

In the case of each of the three permits referenced by the petitioners, an antidegradation demonstration was submitted by the permittee and approved by IDEM. Doubtless the finalization of Indiana's antidegradation implementation rule will facilitate and help insure consistency in the review of antidegradation demonstrations, but the absence of a final rule has not prevented antidegradation analysis from being performed. It should be noted that one or more of the petitioners commented on each of the three permits in question, but did not avail themselves of the opportunity to seek administrative review of IDEM's decisions on the permits.

4. General Permits

The Petition complains that Indiana's eleven general NPDES permits have not been subjected to antidegradation analysis. (Petition, Item I.G, pp. 12-13). As noted above, IC 13-18-3-2(p) will require IDEM to perform an antidegradation review of the rules authorizing general permits. Based on that review, IDEM will recommend to the Water Pollution Control Board any necessary revisions to the general permit rules. The review will be performed once the antidegradation implementation policies rule is in final form.

5. Coal Mine General Permits

The petitioners devote a substantial portion of their Petition to a discussion of Indiana's general NPDES permit for coal mining, coal processing and reclamation activities, 327 IAC 15-7 ("Rule 7"). (Petition, Item II, pp. 14-21). The petitioners assert that coal mining is categorically unsuitable for NPDES general permitting and that EPA's approval of Indiana's NPDES program should be withdrawn because Indiana has (and by statute is required to have) this permit. Of course, Indiana's general NPDES permit program, including the coal mine general permit, was submitted to and approved by EPA when first put in place. 56 FR 21158 (May 7, 1991).

It should be noted at the outset that a number of eastern coal producing states make general NPDES permits available for coal mining.⁹ One reason that coal mining has been widely seen as

⁹ Indiana, Kentucky, Ohio and Pennsylvania. Illinois and West Virginia do not have coal mine general permits.

suitable for general NPDES permitting is a factor entirely overlooked in the Petition: the intensive regulation of the environmental effects of coal mining under the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA")¹⁰ and approved state SMCRA programs such as Indiana's.¹¹ A brief description of SMCRA regulation of coal mining might be helpful in evaluating the characterizations of coal mining and coal mine NPDES permitting made in the Petition.

SMCRA regulates the environmental impacts of surface coal mining and the surface effects of underground coal mining. One of the basic concepts of SMCRA is protection of the hydrologic balance:

Sec. 12. (a) Surface mining activities shall be planned and conducted to minimize changes to the prevailing hydrologic balance in both the permit area and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, in order to prevent long term adverse changes in that balance which could result from those activities.

(b) Changes in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized so that the approved postmining land use of the permit area is not adversely affected.

(c) In no case shall federal and Indiana water quality statutes, regulations, rules, standards, or effluent limitations be violated.

(d) Operations shall be conducted to minimize water pollution. If necessary, treatment methods shall be used to control water pollution.

(e) Each person who conducts surface mining activities shall emphasize mining and reclamation practices that prevent or minimize water pollution. Changes in flow of drainage shall be used in preference to the use of water treatment facilities.

(f) Acceptable practices to control and minimize water pollution include the following:

- (1) Stabilizing disturbed areas through land shaping.
- (2) Diverting run-off.
- (3) Achieving quickly germinating and growing stands of temporary vegetation.
- (4) Regulating channel velocity of water.
- (5) Lining drainage channels with rock or vegetation.
- (6) Mulching.
- (7) Selectively placing and sealing acid-forming and toxic-forming materials.
- (8) Selectively placing waste materials in backfill areas.

(g) If the practices listed in subsection (f) are not adequate to meet the requirements of sections 5 through 11 of this rule, this section, and sections 13 through 68 of this rule, the person who conducts surface mining activities shall operate and maintain the necessary water treatment facilities for as long as treatment is required under sections 5 through 11 of this rule, this section, and sections 13 through 68 of this rule.

312 IAC 25-6-12.¹²

Prior to mining, a coal mine must obtain a SMCRA permit from IDNR. The permit application must contain a detailed description of the pre-mining hydrology, 312 IAC 25-4-31, -32, and a reclamation plan containing a detailed description of measures to be taken during and after mining to "assure the protection of the following:"

¹⁰ 30 USC § 1251 *et seq.* The federal Office of Surface Mining Reclamation and Enforcement ("OSM") of the Department of the Interior administers federal SMCRA.

¹¹ IC 14-34 and 312 IAC 25. The Indiana Department of Natural Resources ("IDNR") administers the Indiana state SMCRA program.

¹² 312 IAC 25-6-76 imposes similar requirements on underground mine operators.

- (1) The quality of surface and ground water systems, within the permit area and adjacent area, from adverse effects of the mining and reclamation process.
- (2) The rights of present users of that water.
- (3) The quantity of surface and ground water systems, within the permit area and adjacent area, from adverse effects of the mining and reclamation process or to provide alternative sources of water under section 33 of this rule and 312 IAC 25-6-25 where the protection of quantity cannot be assured.
- (4) The prevention of material damage outside the permit area.
- (5) Compliance with applicable federal and state water quality laws and regulations.
- (6) The hydrologic balance within the permit and adjacent areas.

312 IAC 25-4-47(a).¹³

The permit application is required to identify other licenses and permits needed for the mining operation. 312 IAC 25-4-23.¹⁴ This would include the applicant's NPDES permit.

The techniques used in surface coal mining to protect water quality include the use of sediment basins, 312 IAC 25-6-17, and best management practices such as diverting flow away from disturbed areas and the use of "straw dikes, riprap, check dams, mulches, vegetation sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce run-off volume, or trap sediment..." 312 IAC 25-6-16. Coal mine operators are required by the SMCRA regulations as well as by their NPDES permits to conduct effluent monitoring, and to report any NPDES exceedances to IDNR as well as to IDEM. 312 IAC 25-6-23(b). IDNR can (and routinely does) take independent enforcement action against SMCRA permittees for NPDES violations.¹⁵

During active mining, coal mines are inspected monthly by IDNR inspectors and annually by OSM inspectors. These inspections may include water discharge sampling by the inspectors to determine NPDES compliance.¹⁶ After active mining is completed, inspections continue through bond release at the rate of one per calendar quarter. 312 IAC 25-7-1.

Coal mines are required to post surety bonds or other financial assurance for completion of SMCRA obligations. These bonds cannot be released until all reclamation has been completed and the mined lands are not contributing excess suspended solids to streamflow. 312 IAC 25-5-16(e). Bond release decisions are made after an inspection of the reclaimed area, 312 IAC 25-5-16(d), and are public noticed with opportunity for public comment. 312 IAC 25-5-16(a).

The SMCRA permit application, including the reclamation plan detailing measures to protect the hydrologic balance and water quality, must be public noticed by the applicant for four consecutive weeks in a local newspaper, 312 IAC 25-4-109(a), and must be made available for public inspection at a local library. 312 IAC 25-4-109(b). Interested parties may file written comments or objections on the permit application. 312 IAC 25-4-111, -112. On the request of any interested party, IDNR is required to conduct an informal conference on the proposed permit, at which comments and information can be submitted by the public. 312 IAC 25-4-112. IDNR is required

¹³ 312 IAC 25-4-85(a) imposes similar requirements on underground mine operators.

¹⁴ 312 IAC 25-4-64 imposes similar requirements on underground mine operators.

¹⁵ NPDES exceedances at coal mines violate 312 IAC 25-6-16(a)(2) (surface mines) or 312 IAC 25-6-76(c) (underground mines).

¹⁶ At least one inspection each calendar quarter must be a "complete" inspection in which all areas of compliance, including NPDES, are checked. 312 IAC 25-7-1.

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to consider public comments, objections and informal conference statements in deciding whether to approve the permit. 312 IAC 25-4-114(a).

With this background, we discuss the specific points raised in the Petition concerning the coal mine general permit.

The petitioners state that coal mining is generally unsuitable for general permitting because of variations in mining operations, geological conditions, effluent characteristics and conditions in the receiving waters. (Petition, pp. 15-16). IDEM has consulted with IDNR and based on that agency's extensive experience in coal mine regulation, as well as IDEM's own experience, does not agree that these factors vary to an extent that would render coal mining unsuitable for general permitting. In particular, coal mines in Indiana generally exhibit the category of discharge known as "alkaline mine drainage."¹⁷ Acid mine drainage is much less common in Indiana than in some other eastern mining states.

The petitioners quote from IDEM's 2008 Integrated Water Monitoring and Assessment Report prepared and submitted under section 305(b) of the Clean Water Act to argue that coal mining has "serious potential to have a significant impact" on water quality. (Petition, p. 16). The petitioners may have misunderstood the 305(b) report. The figures they cite for streams and lakes potentially impaired by mining¹⁸ actually include waters potentially impacted by drainage from abandoned mine lands¹⁹ and cannot be used to draw meaningful conclusions about the effects of SMCRA regulated mining on water quality.

The petitioners argue that effluent limitations for coal mines will necessarily vary from source to source, making general permits inappropriate. (Petition, p. 17) However, the effluent limitations specified by Indiana's coal mine general permit rule are generally the same as the effluent limitation guidelines set forth in 40 C.F.R. Part 434, with the difference that Indiana's rule requires some additional parameter monitoring.²⁰ Petitioners' characterization of Rule 7 as imposing only "lax technological requirements" (Petition, p. 18) should be viewed in light of the consistency of Rule 7's effluent limitations with the effluent limitation guidelines of Part 434. This applies in particular to the petitioners' criticism of Rule 7's alternate effluent limitations for discharges caused by precipitation events (Petition, p. 18), which are substantially identical to those in 40 C.F.R. 434.63. Petitioners also complain that Rule 7 does not impose effluent limitations for numerous parameters²¹ which are not subject to effluent limitation guidelines in Part 434. It is not clear why the petitioners believe that Rule 7 would need to be substantially more stringent than EPA's regulations in order to be consistent with the Clean Water Act.

The petitioners state that Rule 7 does not insure that water quality standards will be met. (Petition, p. 17) Actually, 327 IAC 15-2-9(b)(1), which applies to all categories of general NPDES permits,

¹⁷ IDEM's general permit rules define this term consistent with 40 C.F.R. 434.11(c). See 327 IAC 15-7-2(5).

¹⁸ Pages 48 and 54 of the 2008 305(b) report list stream miles and lake acreage, respectively, potentially impacted by "resource extraction (mining)".

¹⁹ "Abandoned mine lands" or "AML" refers to areas disturbed by mining prior to SMCRA and not reclaimed to SMCRA standards. SMCRA contains a program for AML reclamation by state and federal SMCRA regulatory agencies with funds derived from a fee assessed on current coal production.

²⁰ 327 IAC 15-7-7(a)(3) imposes monitoring requirements for aluminum, copper, zinc and nickel for the acid mine drainage category.

²¹ Chloride, sulfate, phosphorus, selenium (Petition, p. 18), arsenic, cadmium, chromium, copper, lead, mercury, nickel and zinc (Petition, p. 19).

allows IDEM to require a source to obtain an individual permit where necessary to assure compliance with water quality standards.

The petitioners complain that Rule 7 does not require baseline monitoring of receiving streams. (Petition, p. 17) Nothing in 40 C.F.R. Part 122 appears to require such monitoring for individual NPDES permits, either,²² but IDNR's rules do require baseline stream monitoring for SMCRA permits for coal mines. 312 IAC 25-4-32(b)(1) (surface mines), 25-4-73(b)(2) (underground mines). As with other information in the SMCRA permit application, this information is publicly available.

The petitioners claim that Rule 7 does not allow public input on a Rule 7 notice of intent. (Petition, pp. 19-20) Actually 327 IAC 15-7-5(b) does require publication of notice of a Rule 7 Notice of Intent ("NOI"), which would not be required by EPA's rules.²³ However, the petitioners' complaint about public notice should be read in light of the extensive public notice requirements of SMCRA discussed above. SMCRA permit applications are required to contain extensive information on pre-mining geology and hydrology, mining practices, and proposed measures to protect water quality and meet effluent limitations. It is difficult to think of any category of NPDES discharger for which more pertinent information is publicly available.

The petitioners question the adequacy of IDEM's inspection of coal mining operations under the NPDES program. (Petition, pp. 20-21) Note that 40 C.F.R. 123.46(e)(5) requires at least one inspection annually for major NPDES dischargers. EPA's NPDES rules do not specify inspection frequencies for other sources, such as coal mines. However, as noted above, active coal mining operations are inspected monthly by IDNR, with at least one of these inspections per calendar quarter being a complete inspection in which all aspects of compliance, including NPDES, would be checked. 312 IAC 25-7-1(a)(1)(A). Additionally OSM inspectors conduct inspections of Indiana coal mining operations as part of OSM's oversight of IDNR's SMCRA program. 30 C.F.R. 842.11(a). Probably no category of NPDES discharger is more frequently inspected for NPDES compliance than coal mines.

6. Permits by Rule

Petitioners question the validity of Indiana having established general NPDES permits by rule. (Petition, Item III, p. 21) This is an issue that IDEM has been discussing with EPA's Region 5. IDEM is working to address Region 5's concerns with general permitting by rule and expects to resolve the issue.

Conclusion

The foregoing is intended as background information to assist EPA in evaluating the Petition, rather than as a formal legal response. IDEM would be happy to provide any further information

²² Petitioners cite 40 C.F.R. 122.46, which must be a misprint, since that section specifies permit duration.

²³ See 40 C.F.R. 124.10, which encourages but does not require public notice of the issuance of general permits, note following 40 C.F.R. 124.10(c)(2)(i). Indiana gave notice of the adoption of the general coal mine permit through the rulemaking process for the adoption of Rule 7. See note 2 above.

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on its approved NPDES program that would be helpful to EPA, or to discuss the issues raised in the Petition with EPA staff. In the event EPA should decide to commence proceedings under 40 C.F.R. 123.64(b) to withdraw approval of Indiana's NPDES program, IDEM will make a formal response under section 123.64(b)(1), and reserves the right to raise any facts and issues in that response.

Sincerely,



Thomas W. Easterly
Commissioner

Enclosures (on CD-ROM)

NPDES Permit (City of Jeffersonville)
NPDES Permit (City of Austin)
NPDES Permit (Town of McCordsville)

cc: (with enclosures)

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