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Indiana Perspective

Environmental Law Newsletter Special Legislative Edition

SUMMARY OF 2000 ENVIRONMENTAL LEGISLATION

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AIR

AIR PERMIT EXEMPTIONS

The legislature declared void and unenforceable as of March 16, 2000, Air Pollution Control Board Rule 326 IAC 2-1.1-3(b), which conditioned the exemption of specifically listed activities from the permitting requirements upon making a further analysis of potential emissions. The Air Pollution Control Board revised its permitting rules in December of 1998. In those rules it listed more than 150 activities that were exempt from any registration or permitting requirement. However the rules then required those same activities to analyze the potential emission assuming operation 24 hours a day and 365 days a year. That additional analysis resulted in most of those exempt activities being subject to the permit or registration requirement, even though they were the type of activities that would never operate 24 hours a day 365 days a year. This law provides that the additional analysis of potential emissions under the unreasonable assumption that they will operate 24 hours a day 365 days a year cannot be applied to those specifically listed activities. This provision does not apply to sources (1) subject to PSD, (2) subject to nonattainment New Source Review, (3) that is a modification to Title V source that is a Title I modification, or (4) where the addition of such an activity would result in a source needing to make a transition to an operating permit under the minor source operating permit program, the Title V permit program or the Federally Enforceable Source Operating Permit Program. The Air Pollution Control Board is required to amend its rules to become consistent with this legislation before January 1, 2002. HEA 1343, PL 112-2000, Section 8 and 9, effective March 16, 2000.

DEPARTMENT OF NATURAL RESOURCES

FRESH WATER LAKE STUDY GROUP

The 26 member Freshwater Lake Management Work Group that was created in 1997 and given the assignment of establishing solutions for problems affecting the fresh water lakes of Indiana has been re-established for the purpose of (a) monitoring, (b) reviewing, and (c) coordinating implementation of the recommendations it made under

that 1997 law, which recommendations were issued as a final report in 1999. In addition to those duties this Work Group is to:

- — facilitate collaborative efforts among commonly affected state, county and local governmental entities in cooperation with lake residents and related organizations;
- — conduct public meetings to hear testimony and receive written comments concerning implementation of its recommendations;
- – develop proposed solutions to problems concerning implementation of the Work Group's recommendations;
- – review all funding currently being used for Indiana's waterways, including potential sources that could be used as a resource for the Indiana General Assembly to correct funding problems;
- – when directed, issue reports to the Natural Resources Study Committee;
- – issue an interim report on its findings by July 1, 2001; and
- – issue a final report before July 1, 2002.

The required reports will be made available to the Natural Resources Study Committee, the DNR and to the public.

The lakes which this Work Group will address are lakes that have been used by the public with the permission or acquiescence of the riparian owner, but do not include (a) Lake Michigan, (b) lakes created by or used in connection with surface coal mining or (c) lakes in the cities of Gary, Hammond or East Chicago. The twenty-six members of the Study group include: four legislators; three DNR employees, at least one of whom must be an officer in the Division of Law Enforcement; the commissioner of IDEM; one representative of the Indiana Lake Management Society or a similar organization of citizens concerned about lakes; one representative of the Natural Resources Conservation Service of the US Department of Agriculture; one representative of a soil and water conservation district; ten members appointed by the Governor, with one from each of the ten Congressional Districts in Indiana, who either participate in lake related recreational activities, are a resident of a lake area, own or operate a lake related business or are a person who is interested in the natural environment of the lakes of Indiana; a representative of the US Army Corps of Engineers; a representative of an agricultural organization; a representative of an environmental organization and two individuals appointed by the governor as members at large.

The Work Group is to work under the direction of the DNR and DNR is to provide staff to the Work Group for purposes of carrying out its duties. SEA 46, PL 65-2000, effective March 15, 2000.

DUE PROCESS PROVISIONS ADDED TO PUBLIC FRESHWATER LAKE LAW

The freshwater lake statute will be amended effective July 1, 2000 to add rulemaking authority and a requirement that the Natural Resources Commission adopt rules establishing objective standards for licensing the placement of temporary or permanent structures or

material or the excavation of material over, along, or within the shoreline or water line of a public freshwater lake. The rules are required to exempt from the licensing requirement any class of activities which the Natural Resources Commission finds unlikely to pose more than a minimal potential for harm to the public's rights. In addition this new legislation requires that the Natural Resources Commission to establish a process for mediation of disputes among riparian owners and disputes between riparian owners and the Department of Natural Resources. In the event mediation is not successful, the Department of Natural Resources is to make a determination, which can be appealed to the Natural Resources Commission for a final determination under the Administrative Orders and Procedures Act. SEA 44, PL 64-2000, Ind. Code 14-26-2-23, effective July 1, 2000.

PROTECTION OF CEMETERIES

Three new protections for cemeteries and burial grounds have been added to the law effective July 1, 2000. First the Department of Natural Resources ("DNR"), Division of Historic Preservation and Archaeology ("DHPA") has been given the authority to establish and maintain a Registry of all Indiana Cemeteries and burial grounds. The DHPA can conduct the program alone or by entering into an agreement with one or more entities including the Indiana Historical Society, the Historical Landmarks Foundation of Indiana, a professional archeologist or historian associated with a University, a township trustee, a historical society or any entity the DHPA selects. The DHP may receive gifts and grants to carry out this Cemetery Registry program. A special nonreverting Trust Fund may be established for purposes of the Cemetery Registry Program. HEA 1184, PL 46-2000, Section 8; Ind. Code 14-21-1-13.5, effective July 1, 2000.

Second starting on July 1, 2000 whenever any interest in property that contains a burial ground or cemetery is recorded, the person must have printed in capital letters in bold type on the bottom portion of the deed a notation that the property contains a known burial ground or cemetery. The county auditor is required to send a copy of the deed to DNR and the local cemetery board, or if no local cemetery board exists to the County Commissioners, within thirty days of the deed being recorded. Failure to comply with this recording requirement after January 1, 2003 will be punishable as a Class C infraction. This deed notation requirement does not apply to public utilities recording interests in property or to recordings that are required in connection with property that has been subject to bonding or other financial assurance which has been released by a government agency after complying with applicable law, such as surface coal mining operations and solid and hazardous waste disposal facilities. HEA 1184, PL 46-2000, Section 11; Ind. Code 14-21-3, effective July 1, 2000.

Third, a new requirement to secure prior approval of a development plan for building, altering or repairing structures that are located within 100 feet of a recorded burial ground or cemetery has been added to the law. The Natural Resources Commission ("NRC") is required to promulgate rules to establish a standard

of conduct that will preserve and protect the sensitivity of humans for treating human remains with respect and dignity while respecting the rights and taking into account the interests of land owners. The NRC must promulgate rules establishing an application procedure for submittal and approval of development plans for construction, repair and alternation of these structures. Persons may not disturb ground located within 100 feet of a recorded burial ground or cemetery when building, altering or repairing a structure unless they first prepare a development plan to ensure that the disturbance will meet the standard of conduct prescribed by the NRC. The development plan must be approved by DNR if it is new construction or if an existing structure is altered or repaired and it will significantly impact the burial ground or cemetery. DNR has sixty days in which to act on a development plan. If the construction activity is being done by a government entity other than the state, approval is to be given by the executive of a municipality, or the County Commissioners if the activity is outside of a municipality, instead of DNR. A person who recklessly, knowingly or intentionally violates this development plan requirement commits a Class A misdemeanor. If the person disturbs buried human remains or grave markers while committing the offense, the offense is a Class D Felony. The requirement to obtain preapproval of a development plan does not apply to public utilities or to permitted Surface Coal Mining and Reclamation operations. HEA 1184, PL 46-2000, Sections 1-7 and 9-10; Ind. Code 14-8-2-13.5, 14-8-2-30, 14-8-2-37.5, 14-8-2-68.5, 14-8-2-127, 14-8-2-219, 14-21-1-8, 14-21-1-25, 14-21-1-26.5, effective July 1, 2000.

FISHING LICENSES FOR THOSE WITH A DEVELOPMENTAL DISABILITY

An exception to the requirement to have a fishing license has been added to the law this year. Currently none of the following people need to have a fishing license: persons who are over 65 years of age, persons who are under 17 years of age, persons who are legally blind, persons who are a resident patient of a state mental institution or a health facility employee supervising the activity of the health facility. Starting July 1, 2000, a person who is a resident of Indiana, who has a developmental disability and who is fishing with a person who holds a fishing license, will not be required to have a fishing license. SEA 331, PL 84-2000, Ind. Code 14-22-11-8, effective July 1, 2000.

ENFORCEMENT

WHITE RIVER FISH KILL - HIGHER CRIMINAL PENALTIES FOR VIOLATIONS

After considerable political back and forth over its effectiveness in deterring violations, a legislative result of the White River Fish kill, is a doubling of the monetary penalty for criminal convictions. The criminal penalty for an intentional, knowing, or reckless violation of the environmental laws constitutes a Class D felony and may, effective July 1, 2000, be punished in addition to the 1 ½ year term of imprisonment a fine of not less than $5,000 and not more than $50,000 per day of violation for a first offense. A conviction for a violation after the first conviction can be punished with a fine of not more than

$100,000 per day of violation. HEA 1343, PL 112-2000, Sections 4 and 5, Ind. Code 13-30-6-1, 13-30-6-3, effective March 16, 2000.

HAZARDOUS WASTE

REPEAL OF INDIANA'S HAZARDOUS WASTE MANIFEST TRACKING PROGRAM

After several years of concerted effort, the legislature agreed this year to repeal Indiana's hazardous waste manifest tracking program. Starting January 1, 2002, generators of hazardous waste will be allowed to use the Uniform Hazardous Waste Manifest. They will no longer have to pay $8 for each Indiana manifest it previously was required to buy. This will result in an annual saving of nearly $800,000 for generators and a loss of revenue of that same amount for IDEM. For the last few years controversy and opposition to what had become viewed simply as a source of funding for other IDEM programs caused the purpose of the manifest tracking program to come under close scrutiny. When the Resource Conservation and Recovery Act ("RCRA") was first passed, Indiana created a special tracking program. Each treatment storage and disposal ("TSD") facility owner/operator was required to send to IDEM (within five days of receipt) a copy of each manifest that accompanied a load of waste to its facility. However that tracking program never seemed to be well developed. Instead of any current, organized listing of manifests, IDEM retained copies of individual manifest that were not organized. The biennial reports that IDEM received from the large quantity generators provided IDEM with much of the same information it was trying to assemble from the individual manifests. The biennial reports submitted by generators was serving the intended purpose of Indiana's tracking program, but were only filed every 2 years. Since the individual manifests were not being kept in any organized way, there was no added value to Indiana's Manifest Tracking Program. The legislature has repealed the requirement to submit a copy of the manifest to IDEM starting January 1, 2001. Also repealed is the Solid Waste Management Board's authority to adopt rules requiring that Indiana's manifest be purchased and that a fee be paid for each manifest. One part of Indiana's special hazardous waste manifest tracking program however, has been retained. Indiana generators using the Uniform Hazardous Waste Manifest, will be required to include the waste codes of each hazardous waste in the shipment on the Uniform Manifest. In addition, TSD owners, operators and generators who generate in any one or more calendar month of a calendar year more than 2,000 kilograms of hazardous waste, or one kilogram of acute hazardous waste must provide an annual report to IDEM which compiles the information that is provided on the Uniform Manifest for the prior years of hazardous waste activity. This annual report is due before March 1 of each year. The biennial report required by the EPA can be submitted in lieu of the special Indiana annual report during those years when the biennial report is due. Generators who monthly generate between 100 kilograms and 1,000 kilograms of hazardous waste, less than one kilogram of acute hazardous waste, less than 100 kilograms of cleanup

spillage of acute hazardous waste or who accumulates 1,000 kilograms or less than one kilogram of acute hazardous waste are also required to provide IDEM an annual report before March 1 of each year, on a form to be provided by IDEM, that compiles the information from Uniform Hazardous Waste Manifests summarizing that person's hazardous waste shipments during the previous calendar year. SEA 511, PL 143-2000, Ind. Code 13-11-2-1.5, Ind. Code 13-14-12-1, Ind. Code 13-22-4-1, Ind. Code 13-22-4-2, Ind. Code 13-22-4-3.1, Ind. Code 13-22-5-6, Ind. Code 13-22-4-3, Ind. Code 13-22-4-4, Ind. Code 13-22-4-5 and Ind. Code 13-22-12-4, effective March 17, 2000, January 1, 2001 and January 1, 2002.

SOLID WASTE

SPECIAL WASTE PROGRAM REPLACED WITH A RELAXED INDUSTRIAL WASTE PROGRAM

Effective July 1, 2000, the legislature will do away with Indiana's special waste program. In its place a much less burdensome industrial waste program will exist. Indiana's special waste program predated RCRA. The final demise of the special waste program was a result both of RCRA's increased regulation of both hazardous waste and municipal waste disposal facilities and IDEM's refusal to make the testing and typing of special waste consistent with the hazardous waste program. The biggest problem with Indiana's Special Waste Program had been the testing required by IDEM. Under this new program, the generator of an industrial waste will test it under 40 CFR 240 through 40 CFR 299 and 40 CFR 761. Before the first time a generator disposes of industrial waste at a disposal facility, it must provide the facility with a notification that the waste has been tested and is not a hazardous waste. The generator must provide the disposal facility with notice of any special handing requirements that apply. Landfill cells or units that have been designed to meet or exceed Subtitle D may dispose of industrial waste. In addition, IDEM may approve some non subtitle D facilities to accept some industrial waste streams. A transfer station may not process industrial waste unless authorized by its permit to handle that industrial waste. Industrial waste is still subject to the same ten cent per ton disposal fee that applied to special waste. The only exemptions from the industrial waste requirements are waste which are disposed of on-site by the generator that generated the waste, and industrial waste that is generated in quantities of no more than 220 pounds per month. The Solid Waste Management Board has until July 1, 2001 to amend the solid waste rules to delete references to special waste and to make the rules consistent with this legislative change, but these new statutory provisions take effect on July 1, 2000.

Two problems created by this legislation are the uncertainty that exists between the regulations now existing, which may not be clarified until July 1, 2001 and the fact the legislature amended a provision of the law on back haul bans, which had previously been declared to be unconstitutional. It is unclear if IDEM will attempt to again enforce the back haul ban, until this new law also is declared unconstitutional, or if IDEM will

acknowledge that the substance of that law has already been declared unconstitutional. SEA 372, PL 138-2000, Ind. Code 13-11-2-109.5, 13-11-2-133, 13-11-2-208, 13-11-2-253, 13-15-4-1, 13-20-1-1, 13-20-4-8, 13-20-7.5, 13-20-21-6, 13-11-2-215, 13-11-2-215.1, 13-20-7, 13-20-21-5, effective July 1, 2000.

WATER

WHITE WATER RIVER FISH KILL - IDEM TO REPORT AND DEVELOP RESPONSE PLANS

Three new requirements were put into law as a result of the much publicized White River fish kill that occurred during the 1999 Christmas Holiday season and resulted in more than 100 tons of dead fish. One of those is the higher penalty for criminal violations. A second requires that IDEM report on what happened and to make plans to respond better to any future matters like this. In what became a political football, a very interesting report will be required to be made by IDEM. This report will have many future uses in placing blame and even in leading to additional legislation and possibly higher sanctions for water violations. Before November 2000 IDEM must deliver a report to the Executive Director of the Legislative Services Agency, the Environmental Quality Service Commission, the Governor and the Lieutenant Governor. The report is to include the following:

(1) A comprehensive and detailed plan to restore the White River;
(2) Recommendations for changes in statutes, rules or procedures and practices of IDEM to reduce the probability of contamination events and improve the timeliness and efficiency of protocols and procedures for giving notice to affected entities if such an event occurs in the future; and
(3) A complete list of all events of contamination of waters of the state that occurred during calendar years 1995, 1996, 1997, 1998, 1999 and 2000 in which fish or other aquatic species were killed and civil penalties were imposed. That list must include a description of the event, the date it occurred, the entity who was fined and the total amount of the civil fine imposed.

Once that report is delivered, the Environmental Quality Service Council is to study its contents and make recommendations to the General Assembly for corrective legislation. That report is due to the General Assembly before January 1, 2002. HEA 1343, PL 112-2000 Section 6, effective March 16, 2000.

WHITE RIVER FISH KILL - POTWS TO GIVE TIMELY REPORTS OF UPSETS AND THREATS TO HUMAN OR ANIMAL LIFE

The third requirement that results from the White River Fish kill is a reporting obligation placed on Publicly Owned Treatment Works ("POTWs"). Effective March 16, 2000, POTWs must notify emergency response personnel of IDEM not more than 2 hours after making a determination that an upset which is likely to pose a threat to human or animal life has occurred. In addition POTWs must notify emergency response personnel of IDEM within 2 hours of acquiring knowledge that an

imminent threat from a chemical or other release to the collection system is likely to cause an upset that is likely pose a threat to human or animal life. An upset for this purpose is defined as an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations due to factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance or careless or improper operation. Upon receiving such notice from the POTW, IDEM has 48 hours in which to notify all appropriate state and local government agencies, and affected media. In addition IDEM may provide technical assistance to the POTW, if IDEM determines that is necessary. HEA 1343, PL 112-2000 Sections 1-3, Ind. Code 13-11-2-177.5, 13-11-2-242.3, 13-18-12-8, effective March 16, 2000.

PUBLIC WATER TO BE MADE AVAILABLE IN LOWER INCOME AREAS IN THE EVENT PRIVATE WELLS ARE CONTAMINATED

The legislature has added provisions to provide public water supply to low income areas which rely on water from private wells that have become contaminated. This new law applies only to areas located within cities and within Marion County. If a local health agency finds that an area being served by private wells suffers from a health hazard due to a contaminant or contaminants in the well water, and this area contains within it at least one census tract with income 200% lower than the federal income poverty level (the legislature likely meant 25% of the poverty level), then the health agency and the Utility Regulatory Commission can order the nearest public utility to provide a public water supply. The health agency must first require the public utility to determine the cost of installing mains and connecting service lines, abandoning private wells, restoring disturbed areas and other reasonable costs for extending the service to the area. If the cost to cover the local utility's depreciated expenses and after tax return on the undepreciated expenses at the same rate as the utility receives will not result in a rate adjustment of more than 1%, then at the request of the health agency, the Utility Regulatory Commission will direct the local public utility to undertake and complete the project. The local health agency can require owners of property in the area to connect to the mains and to abandon and plug existing wells. Upon completion of the project, the local public utility is responsible for operating and maintaining the mains that are installed and any portion of the connecting service lines that is located in the public right of way. Each property owner is responsible for maintaining, repairing and replacing, if necessary, the portion of the service line on the property being served. SEA 490, PL 94-1000, Section 2; Ind. Code 8-1-32, effective July 1, 2000.

OPERATOR CERTIFICATION PROGRAM FOR WASTEWATER AND WATER TREATMENT FACILITIES REVISED

The legislature is requiring IDEM to adopt rules to establish the standards for operator certification for water treat-

ment plants and water distribution systems. The rules are to implement a certification program that classifies operators according to the complexity, size, and source of water for the treatment system, and the complexity and size for the distribution system. The current law's provisions for being exempt from the certified operator program have been modified. IDEM may only choose to exempt transient noncommunity water systems from the certification program. Those noncommunity water systems do not regularly serve at least twenty-five of the same persons over a six month per year period. Previously water supply systems used by fewer than one hundred persons a day during a period of customary usage, or systems serving fewer than twenty-five separate lots or properties, were allowed to be exempt from the certification program.

In addition the operator certification program for water treatment systems has been changed to allow a certification to last for three years, instead of the prior two year period. IDEM's commissioner is authorized to issue a two-year certificate to the operator of a water treatment plant or water distribution system who was in responsible charge of an operation before September 2, 2000, who has become required to have become a certified operator for the first time under the USEPA's requirements found at 64 Fed. Reg. 5916, if the owner of the water treatment plant or water distribution system applies for a certification for the operation before September 1, 2002. To be certified, the person must meet all requirements for renewal of a certification. The certificate is valid only for the specific site and may not be transferred. If a certified person commences to work for a different water treatment plant or water distribution system he or she must meet the initial certification requirements for that plant or system. Wastewater treatment plant operator certifications continue to be good for only two years.

The Commissioner also has been given the authority to suspend a certified operator's certification, not just to revoke it. Suspension or revocation can result if IDEM finds fraud or deception, if the operator does not exercise reasonable care or judgment or the operator's knowledge or ability in performing its duties, or if the operator is found to be incompetent or unable to properly perform the operators's duties. Actions to suspend or revoke certificates must be done in accordance with Ind. Code 13-15-7-3 and the Administrative Orders and Procedures Act. SEA 317, PL 132-2000; Ind. Code 13-11-2-237.5, 13-18-11-1, 13-18-11-1.5, 13-18-11-6, 13-18-11-6.5, 13-18-11-7, 13-18-11-7.5, 13-18-11-8, 13-18-11-10, 13-18-11-10.5, effective September 1, 2000.

TEMPORARY SUSPENSION OF WATER QUALITY CRITERIA AND USE DESIGNATION FOR CSOS

When the Governor did not veto SEA 431, more than 100 communities, containing 2.5 million residents and 143,000 businesses, received some relief from water violations that occur during wet weather events due to combined sewer overflows ("CSO"). To understand this law, first it is necessary to define specific terms. CSOs are sewers used to receive and transport wastewater that includes domestic, commer-

cial or industrial wastewater and storm water. A combined sewer system ("CSS") is a system of combined sewers, designed, constructed and used to receive and transport combined sewage to a publically owned treatment works ("POTW"), but which contains one or more overflow points discharging untreated combined sewage when the hydraulic capacity of the system or part of the system is exceeded during wet weather events. Effective March 17, 2000, *to the extent authorized by federal law*, during wet weather events, NPDES permittees may obtain a temporary suspension (not to exceed 4 days) of the water quality criteria and use designations that apply, for combined sewer overflow points that have been listed in their NPDES permit, if six specific conditions are met. Those conditions are that: (1) IDEM has approved a Long Term Control Plan for that permittee's CSS; (2) the approved Long Term Control Plan is incorporated into the NPDES permit; (3) the approved Long Term Control Plan meets four minimum statutory requirements and the plan specifies those water quality criteria and use designations as being eligible for suspension; (4) the permittee has implemented or is implementing its Long Term Control Plan in accordance with the schedule approved in the plan; (5) the permittee is in compliance with applicable operation and maintenance requirements; and (6) the provisions of 40 CFR 131.10, 40 CFR 131.20 and 40 CFR 131.21 are satisfied.

The four minimum statutory requirements for a Long Term Control Plan, which must be met as a condition of the temporary suspension are: (a) the plan must provide for implementation of cost effective control alternatives (including source controls, collection system controls, storage technologies or treatment technologies) that will attain water quality standards or maximize the extent to which the water quality standards will be attained if they are not otherwise attainable; (b) the plan must provide, at a minimum, for the capture of first flush (the solids in a CSS that settle in pipes during periods between wet weather events and those that have washed off of impermeable surfaces such as streets and parking lots during the beginning of a wet weather event); (c) the plan must be reviewed periodically; and (d) additional controls must be implemented when feasible, based on a periodic review at least every five years after the plan is approved to determine if additional or new control alternatives are cost effective. In determining whether a control is cost effective a "knee of the curve" analysis may be used. That analysis makes the determination of cost effectiveness based on evaluating the point where the incremental change in the cost of the control alternative compared to the change in performance of the control alternative changes the most rapidly.

The provisions of 40 CFR 131 which are required to be met in order for an NPDES permittee to be eligible for the suspension require that IDEM has made use designations and has conducted the required triennial reviews, and that U.S. EPA has approved Indiana's water quality standards.

A Long Term Control Plan has six elements. First, it must be consistent with the federal CSO Control Policy found at 59 Fed. Reg. 18688. Second, it must be

developed in accordance with the recommendations in the CSO Guidance of Long Term Control Plans (EPA 832B95002). Third, it must describe changes and improvements to be made to a CSS or a POTW for purposes of meeting the requirements of the Federal Clean Water Act and state water law. Fourth, it must be developed with public participation using a process designed to promote active involvement of the affected public. Fifth it must be submitted to IDEM for approval. Sixth it must:

- use characterization, monitoring and modeling of the CSS to determine the response of the system to various precipitation events, the characteristics of overflows from the system and the water quality impacts that result from overflows from the system;
- consider the impact of combined sewer overflows on sensitive areas and give highest priority to controlling overflows in those areas;
- contain an evaluation of a reasonable range of control alternatives, taking into account expected and projected future growth;
- contain cost and performance analyses of the control alternatives evaluation;
- maximize treatment of wet weather flows at a POTW plant;
- contain a practicable implementation schedule for the selected control alternatives; and
- contain a post-construction compliance monitoring program adequate to ascertain the effectiveness of the selected control alternative and the extent to which water quality standards have been attained.

As part of this new law for temporary suspension during wet weather events, permittees also must monitor their discharges and the water quality in the affected receiving streams at least every three years and provide that information to IDEM. If at any time IDEM determines that use designations being suspended are attainable, IDEM is to promptly notify the permittee of that determination. Subject to the right to appeal, that determination becomes final. A final determination of attainability will result in a modification of the Long Term Control Plan, the compliance schedule and the NPDES permit. If IDEM requires that a use attainability analysis be done before suspending a designated use under this law, IDEM must, to the maximum extent permitted under state and federal law, review the use attainability analysis concurrently with the Long Term Control Plan and use the Long Term Control Plan to satisfy the requirement of the use attainability analysis.

IDEM may, but is not required to, adopt rules in order to implement these statutory provisions for temporary suspension of the water quality standards. SEA 431, PL 140-2000, Sections 1-5, 8-10, 13-15, 18-20, 23 and 24; Ind. Code 13-11-2-31.3, 13-11-2-31.4, 13-11-2-31.5, 13-11-2-31.6, 13-11-2-43.5, 13-11-2-85.7, 13-11-2-113.5, 13-11-2-120.5, 13-11-2-242.5, 13-11-2-265.5, 13-11-2-265.3, 13-18-3-2.3, 13-18-3-2.4, 13-18-3-2.5, effective March 17, 2000.

CSO GUIDANCE

Before October 1, 2000, IDEM is required to provide guidance to all CSO communities, which explains the requirement of use attainability analysis and Long Term Control Plan provisions. This guidance is intended to aid communities in determining how to comply with the requirements of this new law. The guidance must clearly identify all of the appropriate data and information required by IDEM for the permittee's Long Term Control Plan to satisfy the requirement of a use attainability analysis. This guidance must also include information regarding minimizing industrial discharges in wet weather events. At each meeting of the Environmental Quality Service Council, IDEM is required to report on its progress in developing this Guidance. SEA 431, PL 140-2000, Section 24, effective March 17, 2000.

CSO NOTIFICATION OF HEALTH IMPACTS

Before September 1, 2001, the Water Pollution Control Board is required to adopt a rule that will require NPDES permittees to give notice to the community of potential health impacts resulting from two situations. The first situation is when a discharge from a combined sewer overflow point occurs. The second situation is when there is a reasonable likelihood that within twenty-four hours an overflow will occur. SEA 431, PL 140-2000, Section 23, effective March 17, 2000.

BROADENED NPDES PERMITTING AUTHORITY

IDEM's NPDES permitting authority has been broadened in two ways. First, IDEM has been given authority to issue NPDES permits containing conditions that include alternate water quality based effluent limits based on receiving water flows associated with wet weather events or low flow stream conditions. The wet weather or low flow conditions that serve as the basis for alternate conditions can be ones that occur monthly, quarterly or annually. Second, IDEM also may issue NPDES permits with alternate water quality based effluent limits conditions to POTWs. The alternate conditions can include increased mass limits, increased concentration limits or increased mass and concentration limits if the POTWs is capable of treating wastewater flow exceeding the design flow that was used to calculate normal water quality based effluent limits and as a result can reduce the volume of discharge of wastewater from plant bypasses or combined sewer overflows. To be entitled to these alternate conditions, IDEM may require the permittee to document in a reasonable manner the stream conditions and local controls that are germane before issuing the NPDES permit. SEA 431, PL 140-2000, Section 22; Ind. Code 13-18-19-2, effective March 17, 2000.

MAXIMUM DAILY LOAD FOR IMPAIRED WATERS

A work group of stakeholders is to be formed before July 1, 2000 to consider and make recommendations to IDEM and the Water Pollution Control Board

on issues, policy options, policy adoption and rulemaking that IDEM will use to implement the Total Maximum Daily Load ("TMDL") requirements of Section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d). This Work Group will include public representatives from seven areas: (1) the general public; (2) municipalities; (3) industry; (4) business; (5) agriculture; (6) environmental advocacy groups; and (7) others with a high level of expertise in the subject that the group will study. Also on the Work Group will be one member of the Water Pollution Control Board and one member of the Environmental Quality Service Council.

The Water Board must have its policies and rules governing implementation of TMDL in place by October 1, 2003. The Clean Water Act requires each state to identify those waters within its boundaries where the effluent limitations required by 33 U.S.C. 1311(b)(1)(A) and 1311(b)(1)(B) are not stringent enough to implement a water quality standard applicable to such waters. States are to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. States also must identify those waters or parts thereof within its boundaries for which controls on thermal discharges under 33 U.S.C. 1311 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish and wildlife. States must then establish for those waters the TMDL of pollutants necessary to implement the applicable water quality standards, with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitation and water quality. SEA 431, PL 140-2000, Section 28, effective March 17, 2000.

OUTSTANDING WATER RESOURCES

In legislation that the Chamber of Commerce and the Indiana Manufacturers Association have hailed as good for business and that environmentalists have labeled a dirty water bill, IDEM's free rein to designate water bodies as an Outstanding Resources has been modified. Under this new law, Outstanding Water Resources are divided into two categories, with different requirements for who can make that designation and different standards applicable to discharges into those water bodies. Effective July 1, 2000, Indiana will have "Outstanding National Resources Waters" and "Outstanding State Resource Waters". SEA 431, PL 140-2000, Section 6-7, 11, 17, 21, 25; Ind. Code 13-11-2-50.5, 13-11-2-72.5, 13-11-2-149.5, 13-18-3-2, and 13-18-3-14, , effective March 17, 2000 or July 1, 2000.

Outstanding National Resource Waters can be designated only by the General Assembly, after receiving a recommendation from the Water Pollution Control Board and the Environmental Quality Service Council. Before the Water Board can recommend a designation, it must provide an adequate public notice and comment period. IDEM must prepare a summary of the public comment and information received from the public resulting from the Water Board's notice and the Water Board's recommendation and present that to the Environmental Quality Service Council. That summary of public comment and information

received from the public is to be submitted within ninety days of the end of the comment period. The Environmental Quality Service Council will then consider the comments, information and recommendation and convey its recommendation to the General Assembly. The Environmental Quality Service Council's recommendation to the General Assembly is to be made within six months of receiving IDEM's recommendation. Outstanding National Resource Waters will be waters where the water quality is to be maintained and protected. No new or increased discharges of a pollutant or pollutant parameters will be allowed into those water bodies, except for short term temporary increases. To be designated as an Outstanding National Resource Water, the water body will have to fall within one of five different categories: (1) it is important because of protection through official action of federal or state law, presidential or secretarial action, international treaty or interstate compact; (2) it has exceptional recreational significance; (3) it has exceptional ecological significance; (4) it has other special environmental, recreational or ecological attributes; or (5) it is reasonably in need of protection in order to protect other Outstanding National Water Resource Waters. SEA 431, PL 140-2000 Section 17; Ind. Code 13-18-3-2, effective July 1, 2000.

The Outstanding State Resource Water designation will be reserved for those waters already designated by the Water Pollution Control Board as Outstanding Water Resources, and waters to be designated by the Water Pollution Control Board due to their unique or special ecological, recreational or aesthetic significance. The Water Board must make future designations of Outstanding State Resources Waters only by a rulemaking. Before the Board may adopt a rule designating a water body as an Outstanding State Resource Water, the Board must make available to the public a written summary of the information considered by the Board, including the Board's conclusions concerning that information. The factors the Board must consider include: (1) economic impact analyses presented by any interested person, taking into account future population and economic development growth; (2) the biological criteria scores of the water body, using factors that consider fish communities, macro invertebrate communities, and chemical quality criteria using representative biological data from the water body under consideration; (3) the level of current urban and agricultural development in the watershed; (4) for water bodies in a watershed that has more than three percent of its land in urban land uses or serves a city with a population greater than 4,000, whether the designation of the water body as an Outstanding State Resources will have a significant adverse effects on future population, development, and economic growth in the watershed; and (5) whether the designation of the water body as an Outstanding State Resource Water is necessary to protect the unique or special ecological, recreational or aesthetic significance of the water body. IDEM must present a summary of the public comments received on a designation and its information in support of its designation to the Environmental Quality Service Council no later than 120 days after the rule regarding the designation is finally adopted by the Water Board.

SEA 431, PL 140-2000, Section 17; Ind. Code 13-18-3-2, effective July 1, 2000.

New or additional discharges into Outstanding State Resource Waters will be allowed under two circumstances. First, new or additional discharges can occur even if it will result in a significant lowering of water quality for a pollutant or pollutant parameters, if the activity causing the increased discharge causes an overall improvement to water quality and it meets the requirements of 327 IAC 2-1-2(1) and (2) and 327 IAC 2-1.5-4(a) and (b). Second new or additional discharges can occur if the person proposing the increased discharge undertakes or funds a water quality improvement project that results in an overall improvement in water quality in the Outstanding State Resource Water. The Water Pollution Control Board is required to adopt antidegradation implementation rules to implement these permitted discharges. The rules must allow increases and additions of pollutant loading from an existing or new discharge into Outstanding State Resource Waters. The rules must include a definition of "significant lowering of water quality" that recognizes a de minimis quantity of additional pollutant load that is not a significant lowering of water quality. The rules must allow permittees to choose between implementing a water quality project that causes an overall improvement of the water quality in the watershed of the Outstanding State Resource Water, or payment of a fee not to exceed $500,000. The fee amount is to be based on the type and quantity of increased pollutant loadings. Fees which are paid will be deposited in the "Outstanding State Resource Improvement Fund." SEA 431, PL 140-2000, Section 17; Ind. Code 13-18-3-2, effective July 1, 2000.

Any designation of an Outstanding State Resources Water that is made after June 30, 2000, cannot be done until these rules for antidegradation implementation are in place. The Water Pollution Control Board also is required to amend its existing rules for the maintenance of surface water quality standards, minimum surface water quality standards and anti-degradation standards, to ensure those rules are consistent with this new legislation which allows no new discharges to Outstanding National Resource Waters, but allows new discharges that do not result in a significant lowering of water quality into Outstanding State Resource Waters. The Water Pollution Control Board must amend 327 IAC 2-1-2, 327 IAC 2-1-6 and 327 IAC 2-1.5-4 before January 2, 2001 to be consistent with this new law. SEA 431, PL 140-2000, Section 25, effective March 17, 2000.

CURRENT OUTSTANDING STATE RESOURCE WATERS WITHIN THE GREAT LAKES SYSTEM

All waters designed under 327 IAC 2-1.5-19(b) as Outstanding State Resource Waters within the Great Lakes System, which include: (1) Cedar Creek in Allen and DeKalb counties from river mile 13.7 to its confluence with the St. Joseph River; (2) the Indiana portion of the open waters of Lake Michigan; and (3) all waters incorporated in the Indiana Dune National Lakeshore; shall be maintained and protected in their present quality in accordance with the antidegradation implementation procedures for Outstanding State Resource

Waters, established by the Water Pollution Control Board for waters in the Great Lakes System. Any rule adopted by the Water Pollution Control Board contrary to that standard is void. SEA 431, PL 140-2000, Section 25, effective March 17, 2000.

CURRENT OUTSTANDING STATE RESOURCE WATERS

All waters designated as Outstanding State Resource Waters under 327 IAC 2-1-2(3), which includes: (1) the Blue River in Washington, Crawford and Harrison Counties, from river mile 57 to river mile 11.5; (2) the North Fork of Wildcat Creek in Carroll and Tippecanoe Counties from river mile 43.11 to river mile 4.82; and (3) the South Fork of Wildcat Creek in Tippecanoe County, from river mile 10.21 to river mile 0.00 and waters designated as exceptional use waters in 327 IAC 2-1-6(i) shall be maintained and protected by not allowing degradation which will interfere with or become injurious to existing and potential uses and by maintaining the present high quality unless it is affirmatively demonstrated that limited degradation is justifiable on the basis of necessary economic or social factors and will not interfere with or become injurious to any beneficial uses made of or presently possible in those waters. IDEM may not require protection of these waters beyond that set forth in this new legislation for Outstanding State Resource Waters rule that is inconsistent or requires additional protection is void. SEA 431, PL 140-2000, Section 25, effective March 17, 2000.

CURRENT EXCEPTIONAL USE WATERS

Water bodies that IDEM has designated as Exceptional Use Waters will be subject to the overall water quality improvement provisions of this new law for Outstanding State Resource Waters until October 1, 2002. These water bodies are not subject to a standard of having their water quality maintained and protected without degradation. The Water Pollution Control Board must consider whether to make those water bodies Outstanding State Resource Waters and must complete rulemaking to make those designations before October 1, 2002. SEA 431, PL 140-2000, Section 27, effective March 17, 2000.

WATER DATA QUALITY ASSURANCE PROGRAM PLAN AND INFORMATION MANAGEMENT SYSTEM

IDEM is to develop a Quality Assurance Program Plan and Information Management System by July 1, 2001. This Information System will be used as the data for purposes of listing impaired waters and for making special designations of waters. The data must be available to the public upon request. IDEM may charge a reasonable fee to persons who wish to obtain that data. SEA 431, PL 140-2000 Section 26, effective March 17, 2000.

WATER DATA TASK FORCE

Before July 1, 2000, the Environmental Quality Service Council is to appoint a Water Data Task Force. That Task Force will assess the resources needed by IDEM to collect adequate physical,

chemical and biological data to be used by IDEM to list impaired waters and to designate Outstanding Water Resources. The Water Data Task Force will include four members of the General Assembly, the chairperson of the Environmental Quality Service Council and representatives of twelve different interests groups. Those interest groups include: (1) the academic community in disciplines of biology, chemistry, and hydrology; (2) IDEM; (3) the Indiana Department of Natural Resources; (4) the United States Geological Survey; (5) private chemical water testing laboratories; (6) industry; (7) agriculture; (8) environmental advocacy organizations; (9) general citizens; (10) municipalities; (11) the Water Pollution Control Board; (12) local public health officials; (13) the State Department of Health; and (14) the US Fish and Wildlife Service. SEA 431, PL 140-2000, Section 26, effective March 17, 2000.

IDENTIFICATION OF IMPAIRED WATERS

Under legislation passed this session, IDEM will be required to seek and consider public input when designating waters as impaired. Before IDEM may submit its list of impaired waters to the United States Environmental Protection Agency ("EPA") pursuant to Section 303(d) of the Clean Water Act, IDEM is required to first publish the list in the Indiana Register. IDEM must also make the list available for public comment for a ninety day period. The proposed list must then be presented to the Water Pollution Control Board. If EPA changes the list, the Water Pollution Control Board must publish the changes in the Indiana Register and conduct a public hearing within ninety days after receipt of EPA's changes.

The Water Pollution Control Board is required to adopt a rule to establish the methodology to be used to identify waters as impaired. In addition those rules must set forth the criteria for including and removing waters from the list of impaired waters. SEA 431, PL 140-2000, Section 16; Ind. Code 13-18-2-3, effective March 17, 2000.

UNDERGROUND STORAGE TANKS

ENFORCEMENT ACTIONS FOR OFFSITE CONTAMINATION FROM USTS

Legislation was passed this year requiring IDEM to adopt a nonrule policy that will address circumstances in which a spill or release from an underground storage tank ("UST") may have migrated to real property not owned by the person who owns or operates the site where the UST is located. As a result of IDEM filing an enforcement action against a UST owner and operator for failure to have taken corrective action on property which it did not own and for which it could not obtain access, a bill was introduced this session that would have prohibited IDEM from taking such actions, unless IDEM assisted the owner/operator in obtaining access. In a compromise that was reached, this noncode section to the law was put into effect giving IDEM until September 1, 2000 to develop guidance for addressing:

- what constitutes a reasonable, good faith effort on the part of a responsible party to obtain access to offsite property impacted by a petroleum release or spill;
- when IDEM may issue an order granting a responsible party off-site access;
- when IDEM must exercise discretion to not pursue an enforcement action against a responsible party when access cannot be obtained; and
- when excess liability fund money can be obtained for a responsible party's investigation and remediation efforts, including the initial site characterization and corrective action, even though offsite contamination has not been fully delineated because it is not possible to obtain offsite access.

IDEM must work with interested stakeholders to develop the contents of this nonrule policy and must keep the Environmental Quality Service Council appraised of its efforts. SEA 262, PL 129-2000, effective March 17, 2000.

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