

ENCLOSURE

U.S. EPA APPROVAL OF NEW OR REVISED WATER QUALITY STANDARDS FOR THE STATE OF INDIANA AND REVISIONS TO THE STATE OF INDIANA'S APPROVED NPDES PERMITTING PROGRAM

Under section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c), the Administrator of the United States Environmental Protection Agency (U.S. EPA) is charged with reviewing and approving or disapproving state-adopted new and revised water quality standards (WQS). Under 40 CFR § 123.62, the Administrator reviews and may approve revisions to approved state National Pollutant Discharge Elimination System (NPDES) permitting programs. The authority to approve new and revised water quality standards under section 303(c) of the CWA, and to approve revisions to approved state NPDES permitting programs in accordance with 40 CFR §123.62, has been delegated to the ten U.S. EPA Regional Administrators. For the reasons described below, U.S. EPA:

- (1) approves, under section 303(c) of the CWA, 33 U.S.C. § 1313(c), the following provisions establishing the CSO Wet Weather Limited Use Subcategory in Indiana: 327 IAC 2-1-3(a)(1) and (c), and 327 IAC 2-1.5-5(a)(1) and (c);
- (2) approves, under section 303(c) of the CWA, 33 U.S.C. § 1313(c), the following provisions that place limitations on the applicability of the CSO Wet Weather Limited Use Subcategory: 327 IAC 2-1-3.1(a)-(c), (f) and (h)(2)-(3);
- (3) takes no action on the following state procedural provisions: 327 IAC 2-1-3.1(d)-(e) and (h)(1); 327 IAC 2-1-10(a) and (c); and 327 IAC 2-1.5-18(a) and (f);
- (4) approves, as a minor modification to the State of Indiana's approved NPDES permit program in accordance with 40 CFR § 122.62, 327 IAC 2-1-3.1(g) pertaining to the need to modify certain NPDES permits;
- (5) approves, under section 303(c) of the CWA, 33 U.S.C. § 1313(c), and subject to the completion of consultation under section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), the compliance schedule authorizing provisions set forth in 327 IAC 5-2-10(b) and (c); and
- (6) takes no action on the nonsubstantive, nonprocedural changes that were made to the following provisions: 327 IAC 2-1-3(a)(2)-(6) and (b); 327 IAC 2-1-10(b); 327 IAC 2-1.5-5(a)(2)-(8) and (b); 327 IAC 2-1.5-18(b)-(e); and 327 IAC 5-2-10(a).

I. ANALYSIS

Indiana's new and revised regulations: (a) adopt a new designated recreational use subcategory (the "CSO Wet Weather Limited Use Subcategory") that certain communities with combined sewer overflows may request be applied to specific CSO-

impacted water bodies in the future; (b) place limitations on the applicability of the new use subcategory; (c) establish state law procedures pertaining to the Indiana Department of Environmental Management's (IDEM) consideration of communities' future requests that the subcategory be applied to specific water bodies; (d) direct IDEM to modify NPDES permits if IDEM grants such future requests; (e) authorize IDEM to include compliance schedules in future NPDES permits, where appropriate, for communities that have developed approved long term control plans (LTCPs) that are consistent with U.S. EPA's 1994 Combined Sewer Overflow (CSO) Control Policy; and (f) make a number of minor, nonsubstantive, nonprocedural grammatical or stylistic changes to existing regulations.

The CSO Wet Weather Limited Use Subcategory adopted by Indiana will not apply to any specific water bodies until after Indiana goes through future site-specific water quality standard revision processes and any resultant decisions to make the subcategory applicable to specific water bodies are submitted to, and approved by, U.S. EPA, on a case-by-case basis, as new or revised water quality standards under section 303(c) of the Clean Water Act. If adopted at some future date for a specific water body, the subcategory would only apply with respect to the water body's recreational uses; it would not affect the water body's aquatic life, drinking water, agricultural and industrial use designations. Those other designated uses and their associated water quality criteria would continue to apply to any water body that may be designated for the CSO Wet Weather Limited Use Subcategory at some point in the future. It is also important to note that the subcategory designation will only remain in effect during the time and to the physical extent that the recreational use designation that applied to the waters immediately before the application of the wet weather limited use subcategory are not attained, but for no more than four (4) days after the date the wet weather event ends. Therefore, as IDEM explained in the letter transmitting the regulations to U.S. EPA, the existing recreational use designation and associated bacteria criteria will remain in effect at all times except during an "allowed" CSO overflow that results from a wet weather event after implementation of a LTCP.

Consistent with the public participation provisions in 40 CFR Part 131, Indiana provided three opportunities for public comment on the new and revised regulations, and two public hearings, before final adoption. Indiana also provided a certification by the Indiana Attorney General's Office that the new and revised regulations were duly adopted pursuant to State law, as required by 40 CFR § 131.6(e). Finally, Indiana provided a summary of the public comments that it received during the course of adopting the new and revised regulations and IDEM's responses to those comments, which U.S. EPA reviewed in the course of reviewing Indiana's new and revised regulations.

A. Adoption of CSO Wet Weather Limited Use Subcategory: 327 IAC 2-1-3(a)(1) and (c) and 327 IAC 2-1.5-5(a)(1) and (c)

1. Legal Background on Designated Uses

A basic principle of the CWA, as set forth in section 101(a)(2) of the Act, is that “it is the national goal that *wherever attainable*, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983” (emphasis supplied). Thus, the statute expressly contemplates that the uses specified in section 101(a)(2) will not always be achievable in every water body under all conditions. This principle is reiterated throughout U.S. EPA’s water quality standards regulations:

40 CFR § 131.2 (“water quality standards should, *wherever attainable*, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water”);

40 CFR § 131.5(a)(4) (U.S. EPA’s review of state-submitted water quality standards includes determining “[w]hether the State standards *which do not include the uses specified in section 101(a)(2) of the Act* are based upon appropriate technical and scientific data and analyses”);

40 CFR § 131.6 (“The following elements must be included in each State’s water quality standards submitted to EPA for review: . . . (f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards *which do not include the uses specified in section 101(a)(2) of the Act*”);

40 CFR § 131.10(g) (allowing states to remove designated uses, including the uses specified in section 101(a)(2), or establish subcategories of uses, where attainment of such uses is not feasible for a variety of specified reasons);

40 CFR § 131.10(j) (“A State must conduct a use attainability analysis as described in § 131.3(g) whenever: (1) The State designates or has designated uses *that do not include the uses specified in section 101(a)(2) of the Act*, or (2) The State wishes to *remove a designated use that is specified in section 101(a)(2) of the Act or to adopt subcategories of uses specified in section 101(a)(2) of the Act* which require less stringent criteria”); and

40 CFR § 131.20(a) (“Any water body segment with water quality standards *that do not include the uses specified in section 101(a)(2) of the Act* shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly”).

Under the CWA and U.S. EPA's water quality standards regulations, therefore, a state must establish use designations for water bodies that are consistent with the uses specified in section 101(a)(2), unless the state can demonstrate that it is not feasible to attain such designated uses in a specific water body, consistent with section 131.10(g). Where the state makes such a water-body specific demonstration, the state may revise water quality standards to remove or create a subcategory of the unattainable use or uses, to reflect the highest attainable use for the specific water body at issue.

2. Indiana's Regulations

Prior to the new and revised regulations that are the subject of this action, 327 IAC 2-1-3(a)(1) provided that "all surface waters of the state are designated for full body contact recreation as provided in Section 6(d) of this rule," and 327 IAC 2-1.5-5(a)(1) provided that "surface waters within the Great Lakes system are designated for full-body contact recreation." Indiana, in its new and revised regulations, has adopted a new subcategory of the "full body contact recreation" designated use set forth in 327 IAC 2-1-3(a) and 327 IAC 2-1.5-5(a). Specifically, in 327 IAC 2-1-3(c) and 327 IAC 2-1.5-5(c), Indiana added the phrase "[e]xcept as provided in subsection (c)" to subsection (a) in each section, and added a new subsection (c) to each of these sections that provides:

A CSO wet weather limited use designation is established as a subcategory of the recreational use designation under subsection (a). This subcategory shall be applied in accordance with [327 IAC 2-1-3.1].

As noted above, the subcategory will not apply to any specific water bodies until Indiana goes through future site-specific water quality standard revision processes and any resultant decisions to make the subcategory applicable to specific water bodies are submitted to, and approved by, U.S. EPA, on a case-by-case basis, as new or revised water quality standards under section 303(c) of the Clean Water Act. When reviewing Indiana's future decisions to apply this subcategory to specific water bodies, U.S. EPA will evaluate the Use Attainability Analysis (UAA) that Indiana submits supporting its decision as to the WQS that would apply for the specific water body at issue. U.S. EPA will not approve a WQS revision for a specific CSO-impacted water body unless, at a minimum, Indiana demonstrates that (1) attaining the currently-applicable full body contact recreation designated use is not feasible for the specific water body at issue (*see* 40 CFR § 131.10(g) and (j)), (2) attaining more periods of full body contact recreational use above the levels contemplated by the approved LTCP and UAA is not feasible for the specific water body at issue, and (3) the requested revision meets all other applicable federal requirements, including the requirements pertaining to existing uses in 40 CFR § 131.10(h)(1). Significantly, Indiana has placed a number of important restrictions on the applicability of the CSO Wet Weather Limited Use Subcategory, which are discussed below in Section I.B of this document.

In determining whether the establishment of a CSO Wet Weather Limited Use Subcategory is consistent with EPA's regulations, U.S. EPA has evaluated whether the subcategory is consistent with 40 CFR § 131.10(a) prohibiting adoption of "waste

transport or waste assimilation as a designated use.” Specifically, 40 CFR § 131.10(a) provides:

Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.

In the response to comments section of the 1983 Federal Register notice announcing final adoption of the waste transport/waste assimilation prohibition, 48 Fed. Reg. 51400, 51410 (Nov. 8, 1983), U.S. EPA explained the prohibition as follows:

A basic policy of the standards program throughout its history has been that the designation of a water body for the purposes of waste transport or waste assimilation is unacceptable. At the public’s suggestion, an explicit statement of this policy has been added to § 131.10(a). The objective is to prevent water bodies from being used as open sewers.

There is no indication in the Federal Register notice for that rulemaking, or anywhere else, that this provision was intended to deviate from the longstanding principle that states are allowed to remove or subcategorize section 101(a)(2) use designations where the state can demonstrate that it is not feasible to attain such uses. In fact, U.S. EPA repeatedly reaffirmed that principle in the context of the 1983 rulemaking, by retaining and clarifying the various provisions in 40 CFR Part 131 summarized above in section I.A.1 of this document pertaining to removal and subcategorization of uses.

When read in conjunction with the other regulatory provisions summarized above, 40 CFR § 131.10(a) simply prohibits states from expressly adopting waste transport or waste assimilation as use designations for specific water bodies, at the expense of uses consistent with those specified in section 101(a)(2) of the CWA. It does not prevent states from removing or creating use subcategories where states can demonstrate that it is not feasible to attain the section 101(a)(2) uses in specific water bodies. In other words, the waste transport/waste assimilation prohibition was intended to prevent a state from designating uses less protective than those specified in section 101(a)(2) of the CWA merely to accommodate a preference for waste assimilation and not because one of the 131.10(g) factors makes attaining the use infeasible.

Indiana’s CSO Wet Weather Limited Use Subcategory is consistent with 40 CFR §131.10(a) because, by reference to section 3.1 of Indiana’s regulations, it only allows for such a future designation where a UAA has been completed demonstrating that it will not be feasible to attain a full body contact recreation use during residual CSO events that would occur following implementation of an approved LTCP. It is also significant that, because this is only a subcategory to recreation uses, any future decision to apply it for a

specific water body will not impact the continued applicability of Indiana’s aquatic life, drinking water, agricultural and industrial use designations and their associated criteria to the particular water body at issue.

U.S. EPA also evaluated whether Indiana’s establishment of a CSO Wet Weather Limited Use Subcategory is consistent with the regulations at 40 CFR §131.10. U.S. EPA has long recognized that, in some cases, it may be appropriate to revise water quality standards to reflect the possibility that, for some CSO communities and CSO-impacted water bodies, it may not be feasible to attain water quality standards that require full body contact recreational use at all times. *See Combined Sewer Overflow (CSO) Control Policy*, 59 Fed. Reg. 18688, 18694 (April 19, 1994); *Guidance: Coordinating Combined Sewer Overflow (CSO) Long-Term Planning with Water Quality Standards Reviews* (EPA-833-R-01-002). U.S. EPA, therefore, believes that it was reasonable for Indiana—a state with 107 CSO communities—to adopt the CSO Wet Weather Limited Use Subcategory to reflect this possibility. Indiana’s establishment of a CSO Wet Weather Limited Use Subcategory is consistent with 40 CFR § 131.10 because the regulation reflects the requirement that states may only remove a designated use or subcategorize a designated use (that is not an existing use) where the state demonstrates that it is not feasible to attain the current designated use and EPA approves such a change.

For the reasons described above, U.S. EPA approves Indiana’s establishment of the CSO Wet Weather Limited Use Subcategory in 327 IAC 2-1-3(a) and (c), and 327 IAC 2-1.5-5(a) and (c) under Section 303(c) of the CWA.

B. Provisions Limiting the Applicability of the CSO Wet Weather Limited Use Subcategory: 327 IAC 2-1-3.1(a)-(c), (f) and (h)(2)-(3)

40 CFR § 131.13 provides that, in addition to designated uses and criteria,

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to U.S. EPA review and approval.

Indiana has adopted a number of provisions that limit the applicability of the CSO Wet Weather Limited Use Subcategory. Specifically, as noted above, Indiana’s new and revised regulations specify that the CSO Wet Weather Limited Use Subcategory shall be applied in accordance with [327 IAC 2-1-3.1].” 327 IAC 2-1-3(c); 327 IAC 2-1.5-5(c). 327 IAC 2-1-3.1, in turn, contains a number of limitations on the applicability of the subcategory:

327 IAC 2-1-3.1(a) provides that the subcategory “shall be applied only to waters receiving wet weather discharges from [CSOs];”

327 IAC 2-1-3.1(b)-(c) provide that, a water body may not be considered for the subcategory designation unless a CSO community (1) performs a UAA and

submits it to IDEM for approval and (2) submits a long term control plan (LTCP) meeting certain specified requirements to IDEM for approval;

327 IAC 2-1-3.1(f) provides that, upon completion of the state rulemaking to apply CSO Wet Weather Limited Use Subcategory designation to a specific water body, IDEM shall submit the revised recreational use designation and supporting UAA to U.S. EPA for review and approval; and

327 IAC 2-1-3.1(h)(2)-(3) provide that the water quality-based requirements that will ultimately apply when a specific water body is afforded subcategory designation shall:

“be consistent with the Clean Water Act;” and

“remain in effect during the time and to the physical extent that the recreational use designation that applied to the waters immediately before the application to the waters of the CSO wet weather limited use subcategory is not attained but for not more than four (4) days after the date the overflow discharge ends.”

These are reasonable provisions that will help ensure that (1) the CSO Wet Weather Limited Use Subcategory is only applied in circumstances where a CSO community has generated sufficient information in the context of developing a LTCP and UAA to demonstrate that it is not feasible to attain current water quality standards during a certain number of CSO events; and (2) the state meets the requirements of section 303(c)(2) and 40 CFR § 131.20(c) to submit new and revised water quality standards with supporting UAAs to U.S. EPA for review and approval. It is important to note that, under 327 IAC 2-1-3.1(h)(3), the requirements associated with the CSO Wet Weather Limited Use Subcategory apply “during the time . . . that the recreational use . . . is not attained but for *not more than* four (4) days after the date the overflow discharge ends” (emphasis supplied). 327 IAC 2-1-3.1(h)(3), therefore, establishes a maximum timeframe of four days for applicability of requirements associated with the CSO Wet Weather Limited Use Subcategory. It is also worth noting that, under the terms of 327 IAC 2-1-3.1(h)(3), a shorter timeframe than four days would apply to the extent that it is feasible to attain a full body contact recreation use in an impacted water body less than four days after the date an overflow discharge ends.

In sum, U.S. EPA has reviewed the limitations that Indiana has placed on the applicability of the CSO Wet Weather Limited Use Subcategory and approves them in accordance with section 303(c) of the CWA. Specifically, U.S. EPA approves 327 IAC 2-1-3.1(a)-(c), (f) and (h)(2)-(3).

It is important to reiterate that, in addition to the limitations that Indiana has already placed on the applicability of the subcategory, any future action that Indiana proposes to take to designate a specific water body for the CSO Wet Weather Limited Use Subcategory must meet all applicable federal requirements before it can be approved

by U.S. EPA, including the requirements pertaining to existing uses in 40 CFR § 131.10(h)(1). Moreover, nothing in these regulations impacts the continued applicability of Indiana's aquatic life, drinking water, agricultural and industrial use designations and their associated criteria to water bodies that may be designated for the CSO Wet Weather Limited Use Subcategory at some point in the future. Finally, to be approvable, any future proposed water quality standard revision to make the subcategory applicable to a specific water body will need to include appropriate restrictions, including some type of limit on the number of overflow events that reflects the limits of feasibility as reflected in the LTCP and UAA. Such restrictions will be necessary to ensure that the revised standards reflect the highest level of CSO control that can be feasibly attained and therefore reflect the highest attainable recreational use for the waterbody at issue. Such restrictions should be based upon the engineering and modeling analyses and assumptions that were used in developing the LTCP and UAA, and could be expressed in a number of different ways.

For example, the WQS could specify the number of overflows per typical-year that are expected to occur following implementation of all feasible CSO control measures, a percentage capture that is expected to be achieved through implementation of all feasible CSO control measures, or a design-storm event (*e.g.*, the 5-year storm event) that reflects the limits of feasibility for a particular community. These restrictions should be included in the revised water quality standard for the specific waterbody and would in turn serve as the basis for NPDES permit water quality-based effluent limitations and determinations of what waters are considered impaired. U.S. EPA is committed to working with IDEM on establishing appropriate water-specific requirements on a case-by-case basis.

C. Procedures Pertaining to IDEM's Consideration of Requests for Designating Specific Waters for the CSO Wet Weather Limited Use Subcategory: 327 IAC 2-1-3.1(d)-(e) and (h)(1), 327 IAC 2-1-10(a) and (c), and 327 IAC 2-1.5-18(a) and (f)

Indiana's new and revised regulations include state procedural provisions that have no parallel under federal law pertaining to when and how IDEM will consider future requests communities might make to have specific water bodies designated for the CSO Wet Weather Limited Use Subcategory. Specifically, Indiana's new and revised regulations provide that CSO communities seeking to have this use subcategory designated for their water bodies must "do so in accordance with 327 IAC 2-1-3.1." 327 IAC 2-1-10(a) and (c) and 327 IAC 2-1.5-18(a) and (f).

327 IAC 2-1-3.1(d) provides that, if a CSO community has submitted the UAA and LTCP to IDEM for approval, IDEM will "review the UAA concurrently with the LTCP if they are submitted concurrently and use the LTCP to satisfy the requirements of the UAA to the extent possible." 327 IAC 2-1-3.1(e) provides that, upon IDEM approval of the UAA, IDEM will initiate the formal rulemaking process under Indiana law (*i.e.*, submit the matter to the Indiana Water Pollution Control Board for formal adoption) to amend the designated use to a CSO wet weather limited use designation. Finally, 327

IAC 2-1-3.1(h)(1) provides that the water quality based requirements for the CSO Wet Weather Limited Use Subcategory shall be determined by the approved LTCP for the combined sewer system.

As noted above, these state procedural provisions relate to the timing and manner in which IDEM will evaluate and process requests for CSO Wet Weather Limited Use Subcategory designations. Moreover, unlike 327 IAC 2-1.3.1(f), which U.S. EPA is taking action on to approve because it mirrors the federal requirements of section 303(c)(2) and 40 CFR § 131.20(c), these state procedural provisions have no federal counterparts. Finally, these provisions do not themselves establish designated uses or criteria, or generally affect application or implementation of designated uses or criteria. Consequently, these provisions are not subject to U.S. EPA review and approval under section 303(c) of the CWA or 40 CFR § Part 131, and U.S. EPA is not taking action to either approve or disapprove those provisions.

U.S. EPA commends IDEM for developing carefully circumscribed procedures that, among other things, (1) require CSO communities to develop UAAs and LTCPs as a necessary precondition to IDEM review of requests to designate specific water bodies for the CSO Wet Weather Limited Use Subcategory; and (2) specify that the requirements pertaining to any future water body-specific CSO Wet Weather Limited Use Subcategory designation will be determined by the LTCP developed by the CSO community and shall be consistent with the CWA. U.S. EPA believes that Indiana's inclusion of these provisions in its regulations will increase the likelihood that future proposed water quality standards revisions pertaining to the CSO Wet Weather Limited Use Subcategory for specific water bodies will meet the requirements of section 303(c) of the CWA and 40 CFR § Part 131.

U.S. EPA notes that Indiana's revised regulations use the term "approved LTCP" in a number of places. *See* 327 IAC 2-1-3.1(h)(1); 327 IAC 5-2-10(b)(4). An "approved LTCP" under Indiana law is a LTCP that IDEM has deemed to be adequate. Except in the context of federal consent decrees, U.S. EPA does not formally approve or disapprove LTCPs, and does not formally review state decisions to "approve" LTCPs. U.S. EPA may consider the information in a LTCP and the state's views on the acceptability of the LTCP in reviewing NPDES permits, reviewing proposed revisions to water quality standards under section 303(c) of the CWA, or in the context of an enforcement action under section 309 of the CWA. Ultimately, however, U.S. EPA's review of any proposed revision to water quality standards or an NPDES permit, or decision in the context of an enforcement action, will be based upon the CWA, U.S. EPA's implementing regulations and the facts involved in each case; and IDEM's approval of a specific LTCP under state law would not constrain U.S. EPA in exercising its authority in reviewing permits, reviewing revisions to water quality standards, or pursuing enforcement action.

Finally, U.S. EPA notes that fate and transport analysis will be important in considering the spatial applicability of the CSO wet weather limited use designation in specific situations, as well as to evaluate the extent to which future WQS revisions

provide for the attainment and maintenance of downstream water quality standards in accordance with 40 CFR § 131.10(b). This will be especially true in situations involving multiple cities having multiple CSOs. U.S. EPA will evaluate such information on a case-by-case basis.

D. Directive That IDEM Modify NPDES Permits: 327 IAC 2-1-3.1(g)

Section 402(b) of the CWA provides that U.S. EPA may approve state requests to administer the NPDES permitting program. U.S. EPA approved Indiana's request to do so in 1975. 40 CFR § 123.62(a) provides that approved NPDES programs may need to be revised "when the controlling Federal or State or statutory or regulatory authority is modified or supplemented." 40 CFR § 123.62(b)(4) provides that a program revision shall become effective upon approval by U.S. EPA, and that notice of approval of non-substantial program revisions may be given by a letter from U.S. EPA to the state.

327 IAC 2-1-3.1(g), as revised, specifies that, upon U.S. EPA approval of a use designation change for a specific water body, IDEM shall modify the NPDES permit of the CSO community that sought the change to incorporate the CSO Wet Weather Limited Use Subcategory designation and the approved LTCP. This provision, which addresses IDEM's NPDES permitting obligations, actually pertains to Indiana's approved NPDES permitting program, rather than its water quality standards, and so U.S. EPA is reviewing it under 40 CFR § 123.62.

This provision is consistent with section 301(b)(1)(C) of the CWA and 40 CFR § 122.44(d), which require that NPDES permits contain limitations necessary to achieve water quality standards and that derive from, and comply with, all applicable water quality standards. Once U.S. EPA approves a CSO Wet Weather Limited Use Subcategory designation for a particular water body under section 303(c), that changed use designation becomes a part of the water body's applicable water quality standards. As a result, it is appropriate for the state to require modification of NPDES permits for discharges to that water body so they are consistent with the new use designation. U.S. EPA, therefore, is approving 327 IAC 2-1-3.1(g) as a revision to Indiana's approved NPDES program in accordance with 40 CFR § 123.62.

At most, this single provision will only impact future permits issued to the approximately 107 CSO communities that exist in Indiana; it will have no impact on the permits issued to the more than 1250 other permittees in Indiana. In addition, it is likely that only a fraction of those approximately 107 Indiana CSO communities will seek and obtain a CSO Wet Weather Limited Use Subcategory designation (and therefore only a fraction of those CSO communities may need to have their permits modified to reflect the new designation), and so the number of permittees impacted by this provision will likely be far fewer than 107. Finally, even in the small number of permits that may be impacted by this provision, the impact will be slight, because the provision merely directs IDEM to do what the law already requires: *i.e.*, to issue permits based on the water quality standards that are in effect at the time of permit issuance. For these reasons, U.S. EPA has determined that Indiana's adoption of this single provision constitutes a non-

substantial revision to Indiana's overall NPDES program. Consequently, in accordance with 40 CFR § 123.62(b)(4), U.S. EPA is providing notice of this approval via letter, rather than via the Federal Register.

E. Compliance Schedule Authorizing Provisions: 327 IAC 5-2-10(b) and (c)

Indiana revised 327 IAC 5-2-10 to add the following two new subsections:

(b) Notwithstanding the requirements of this section, where appropriate, NPDES permits for communities with approved LTCPs that are consistent with the federal CSO policy shall contain schedules of compliance for meeting final water quality-based effluent limitations for CSOs, provided any such permit:

(1) requires compliance with applicable standards and water quality-based effluent limitations as soon as possible in accordance with 40 CFR 122.47(a)(1) and in no event beyond the period specified in the approved LTCP for implementation of the LTCP;

(2) contains interim requirements, milestones, and final water quality-based effluent limitations and dates certain by which those requirements, milestones, and limitations will be met, even if those dates are beyond the term of the permit;

(3) complies in all other respects with the requirements of 40 CFR 122.47; and

(4) requires implementation of the approved LTCP.

(c) The department shall, where appropriate, and upon the request of the permittee, incorporate into the NPDES permit that contains water quality-based effluent limitations associated with CSOs a schedule of compliance provided that all the conditions in subsection (b) are met.

The Administrator of U.S. EPA has stated that authorizing provisions for compliance schedules such as those set forth at 327 IAC 5-2-10(b)-(c) fall within the category of implementing policies and procedures subject to U.S. EPA review under 40 CFR § 131.13. *In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 182-83 n.16 (Adm'r 1990), *modification denied* 4 E.A.D. 33 (EAB 1992); *In re City of Ames*, 6 E.A.D. 374 (EAB 1996). As such, authorizing provisions for compliance schedules are subject to U.S. EPA review and approval under section 303(c) of the CWA and 40 CFR § 131.13.

1. Consistency with 40 CFR § 122.47

40 CFR § 122.47 sets forth requirements pertaining to NPDES permit compliance schedules, including the requirement that NPDES permits may only contain compliance schedules "when appropriate." 40 CFR § 122.47(a). 40 CFR § 122.47(a)(1) provides that, when the permitting authority chooses to include a compliance schedule in an NPDES permit, the permit "shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA." Finally, 40 CFR § 122.47(a)(3)

provides that the permit must set forth interim requirements when the schedule of compliance exceeds 1 year from the date of permit issuance, and that the time between such dates shall not exceed 1 year.

Indiana's compliance schedule regulations are consistent with the requirements of 40 CFR § 122.47. Specifically, those regulations provide that schedules of compliance shall be included in NPDES permits only "where appropriate" (327 IAC 5-2-10(b)). Those regulations also provide that a schedule of compliance can only be included where the permit requires compliance "as soon as possible in accordance with 40 CFR § 122.47(a)(1)" (327 IAC 5-2-10(b)(1)); "contains interim requirements, milestones, and final water quality based effluent limitations and dates certain by which [they] will be met" (327 IAC 5-2-10(b)(2)); and "complies in all other respects with the requirements of 40 CFR 122.47" (327 IAC 5-2-10(b)(3)).

In the *Star-Kist Caribe* decision cited above, the Administrator interpreted section 301(b)(1)(C) of the CWA to mean that, after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977. *Star-Kist Caribe*, 3 E.A.D. at 175 and 177. As noted above, Indiana's regulations at 327 IAC 5-2-10(b)(3) provide that compliance schedules are only authorized where, among other things, the permit containing the schedule complies in "all other . . . respects with the requirements of 40 CFR § 122.47." 40 CFR § 122.47(a)(1) provides that schedules of compliance "shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA." Consequently, 40 CFR § 122.47(a)(1) would prohibit compliance schedules for effluent limitations based on water quality standards adopted before July 1, 1977 (and not revised or re-interpreted after that date), to the extent that section 301(b)(1)(C) requires immediate compliance with such effluent limitations; which, in turn, would mean that compliance schedules for such limitations would be prohibited under 327 IAC 5-2-10(b)(3). These limitations may include many of Indiana's longstanding narrative effluent limitations that implement Indiana's longstanding narrative criteria pertaining to, among other things, unsightly debris, objectionable deposits, color, sheen and odor.

2. Compliance Schedules Beyond a Permit Term

327 IAC 5-2-10(b)(2) would allow compliance schedules that extend beyond the term of the permit. U.S. EPA has previously approved authorizing provisions that allow compliance schedules to extend beyond the term of a five-year NPDES permit. *See* Letter from Alexis Strauss, U.S. EPA Region 9, to Tom Howard, California State Water Resources Board, November 29, 2006. In that letter, U.S. EPA explained that schedules of compliance may extend beyond the term of the permit where, among other things, the permitting authority includes the entire compliance schedule, including all interim requirements and final effluent limitations, as enforceable terms of the permit. *Id.* at 6. U.S. EPA explained that:

Inclusion of all the actions necessary under the compliance schedule, including the interim requirements and the final effluent limitation, as terms of the permit will ensure that the permit will be consistent with the definition of compliance schedule in [section 502(17) of] the CWA, and will also ensure consistency with the regulatory definition of compliance schedule as a “schedule of remedial measures included in a ‘permit’” 40 CFR § 122.2. Additionally, inclusion of the entire compliance schedule will ensure that the permit contains “requirements . . . necessary . . . to [a]chieve WQS,” as required by 40 CFR § 122.44(d)(1), and limits “derived from, and [that comply] with” water quality standards (40 CFR § 122.44(d)(1)(vii)) – requirements implementing the CWA’s requirement in section 301(b)(1)(C) to include “any more stringent limitation, including those necessary to meet water quality standards.” By including the entire compliance schedule as an enforceable provision of the permit, the [permitting authority] will ensure that the permittee must meet the compliance schedule milestones that occur after the term of the permit regardless of whether the permit is . . . administratively extended pending reissuance.

Id. at 6-7. Indiana’s regulations at 327 IAC 5-2-10(b)(2) adequately address these issues by explicitly requiring that permits containing compliance schedules contain “interim requirements, milestones, and final water quality-based effluent limitations and dates certain by which those . . . will be met, *even if these dates are beyond the term of the permit*” (emphasis added).

It is important to note that, although U.S. EPA is approving Indiana’s regulation that authorizes the use of compliance schedules and that these compliance schedules may go beyond the term of the permit, neither U.S. EPA’s approval nor Indiana’s regulation grants a compliance schedule to any permittee. Such compliance schedules will be evaluated on a case-by-case basis, and will be granted only when appropriate and consistent with all federal requirements.

In summary, as described above, Indiana’s compliance schedule regulations are consistent with the CWA and requirements of 40 CFR § 122.47. Consequently, U.S. EPA approves Indiana’s compliance schedule authorizing regulations at 327 IAC 5-2-10(b) under section 303(c) of the CWA. As described below in Section II of this document, this approval is subject to completion of U.S. EPA’s consultation with the United States Fish and Wildlife Service (USFWS) under section 7(a)(2) of the Endangered Species Act.

F. Minor, Nonsubstantive, Procedural Changes: 327 IAC 2-1-3(a)(2)-(6) and (b); 327 IAC 2-1-10(b); 327 IAC 2-1.5-5(a)(2)-(8) and (b); 327 IAC 2-1.5-18(b)-(e); and 327 IAC 5-2-10(a)

Indiana made a number of minor, nonsubstantive, nonprocedural grammatical or stylistic changes to the following provisions in its regulations: 327 IAC 2-1-3(a)(2)-(6) and (b); 327 IAC 2-1-10(b); 327 IAC 2-1.5.5(a)(2)-(8) and (b); 327 IAC 2-1.5-18(b)-(e); and 327 IAC 5-2-10(a). These changes eliminated redundant words, replaced the word

“which” with the word “that,” and replaced the phrase “prior to” with the word “before.” These nonsubstantive, nonprocedural changes do not constitute new or revised water quality standards or revisions to Indiana’s approved state NPDES program necessitating U.S. EPA review and approval. Therefore, U.S. EPA is taking no action on any of these changes.

II. ENDANGERED SPECIES ACT SECTION 7(a)(2) CONSULTATION REGARDING COMPLIANCE SCHEDULE AUTHORIZING PROVISIONS

U.S. EPA believes that its action approving the State’s compliance schedule authorizing provisions in 327 IAC 5-2-10(b) and (c), may affect federally-listed endangered or threatened species or the designated critical habitat of such species and that consultation with the U.S. Fish and Wildlife Service (USFWS) is appropriate under section 7(a)(2) of the Endangered Species Act (ESA) and relevant regulations at 50 C.F.R. Part 402. U.S. EPA has initiated consultation under Section 7(a)(2) of the ESA with the USFWS with respect to the compliance schedule authorizing provisions. U.S. EPA’s approval of those provisions is subject to completion of that consultation.