

**Indiana Senate Bill "620 would encourage local officials to launch projects to fix their sewer systems without fear that they might wind up being sued for an occasional discharge during heavy rains."
"Today's Editorial," Indianapolis Star (2/25/05)**

On April 21, 2005, Indiana Governor Mitch Daniels signed into law Senate Bill 620 (Public Law 54-2005), establishing a comprehensive state program to address the combined sewer overflow (CSO) long term control planning (LTCP) process. Broadly supported by CSO communities, the Indiana Department of Environmental Management (IDEM), and activist groups, the legislation adopts a common sense approach that will allow CSO communities to make demonstrable progress in water quality protection, while minimizing liability during the period of time that it will take to implement reasonable and affordable controls.

Indiana is faced with significant issues regarding CSOs. There are approximately 104 communities in Indiana with combined sewer systems, which together represent roughly 13 percent of the total number of CSO communities in the country. In addition, all waters in the state are currently designated for full body contact recreation, with associated *E. coli* criteria of 235 ct/100 ml as a daily maximum and 135 ct/100 ml as a monthly average. *E. coli* impairments represent over 40 percent of the total listings on Indiana's 303(d) list. There is much work to be done, and SB 620 charts the path to accomplish this undertaking.

Background

In fact, this is Indiana's second round of legislation addressing CSOs. In 2000, the Indiana General Assembly enacted SB 431. Widely recognized as the one of the first legislative attempts by a state concerning CSOs, the bill established the framework for development and

implementation of long term control plans. It provided a format for coordinating LTCPs with any necessary water quality standards reviews, and established a process for temporarily suspending the full body contact recreation designated use. It also allowed compliance schedules to be used during the period when municipalities are developing LTCPs.

Despite efforts to develop a constructive approach for CSO controls, implementation issues arose regarding the language of SB 431. There were serious disagreements between IDEM, CSO communities, and environmental organizations regarding various aspects of the bill. Furthermore, CSO communities felt that the legislation – particularly as it was being interpreted by IDEM – did not provide necessary protection from liability during the period of LTCP implementation. As a result, progress on LTCP approvals stalled, leading to increased scrutiny by EPA.

To rectify the impasse, interested parties came together in summer 2004 to identify deficiencies in SB 431, and sought compromise concerning necessary legislative clarifications. Draft legislation was prepared for the 2005 session of the Indiana General Assembly. Senator Beverly Gard – the author of SB 431 – sponsored the new legislation, which became known as SB 620.

The consensus approach used to develop the bill language resulted in broad-based support. During a legislative session dominated by budget woes, debate on daylight saving time, and

partisan sniping, SB 620 was the only bill to pass out of the Senate and one of only three environmental bills to become law.

Key Elements of SB 620

To address CSO discharges that remain after LTCP implementation, the bill establishes a *CSO wet weather limited use subcategory* of the recreational designated use. The water quality based requirements associated with subcategory will be determined by the approved LTCP. The subcategory applies during and for a period of up to four days following the end of the CSO discharge. At all other times, the criteria associated with the full body contact recreation designated use apply, unless a use attainability analysis (UAA) is conducted to justify a change in the use designation.

If a change in a use designation is needed, the legislation allows for *integrated review of a LTCP and UAA*.

SB 431 stated that control alternatives must be cost effective, and adopted a knee-of-the-curve approach. This approach has created problems for many communities, because the “knee” may be beyond the reasonable ability of the community to finance. Therefore, SB 620 provides that CSO controls must be *cost effective and affordable*.

The key component of the legislation is to establish *effective state-based enforceable mechanisms* to protect communities during the period of time before LTCPs are fully implemented. The federal CSO Control Policy requires LTCP implementation to be incorporated into an enforceable mechanism. It typically is assumed that if implementation will take longer than a single permit term (*i.e.*, five years), an enforcement order is needed. It is clear that it will take more than five years for many Indiana communities to implement cost effective and affordable CSO

controls. SB 620 sets forth a process by which the *permit can serve as the enforceable mechanism*.

The primary tool is a *compliance schedule for meeting water quality based requirements* associated with CSOs during LTCP development, approval, and implementation. If the compliance schedule will exceed a permit term, it will be continuously implemented during each successive permit term until the LTCP is fully implemented.

SB 620 also revised the *variance* statute, so that the duration of a variance is tied to the permit term (*i.e.*, can be administratively extended), and it can be renewed to cover the entire LTCP implementation period. Environmental organizations requested that the legislation require dischargers to develop and implement pollutant minimization plans (PMP) as a condition for obtaining a variance; for CSOs, the PMP requirement is satisfied as long as the community has prepared a LTCP and is implementing the nine minimum controls.

The compliance schedule and variance provisions are intended to keep federal enforcement at bay. SB 620 also provides for use of a state enforcement order as appropriate.

Next Steps

IDEM is engaged in discussions with CSO communities and other stakeholders regarding implementation of SB 620. IDEM also is addressing some general concerns raised by U.S. Environmental Protection Agency Region 5 regarding the compliance schedule and variance provisions, and it appears that these concerns likely can be resolved by providing clarification regarding implementation of the law.

For additional information or to receive a copy of the legislation, please contact Fred Andes or Kari Evans, with NACWA affiliate law firm Barnes & Thornburg, LLP. Mr. Andes may be reached at (312) 214-8310 or at fandes@btlaw.com. Ms. Evans

may be reached at (312) 214-8812 or at kevans@btlaw.com.

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Legal Perspectives is a publication of the National Association of Clean Water Agencies (NACWA). NACWA thanks Fred Andes and Kari Evans for their work on this issue.

Founded in 1970, NACWA represents over 300 of the nation's POTWs. NACWA members are environmental stewards, serving the majority of the U.S. sewered population, and collectively treating and reclaiming over 18 billion gallons of wastewater every day.

We welcome your comments on *Legal Perspectives*. Please contact Alexandra Dapolito Dunn, General Counsel, NACWA at adunn@nacwa.org or 202/533-1803.