

The Indiana Environmental Protection Agencies: A Survey and Critique

Since the inception of the environmental movement in the late 1960's, environmental law has undergone an expansion roughly paralleling the expansion of labor law in the 1930's. The resulting legislative explosion has reached all levels of government—federal, state, and local—giving rise to concurrent and sometimes conflicting regulation.

The advent of the Environmental Protection Agency (EPA) and its various enabling statutes¹ provided the states with regulatory models for their own environmental protection efforts. However, the concept of an efficient nationwide pollution abatement program demanded a maximization of state-federal cooperation. The most favorable alternative lay in persuading the individual states to initiate their own enforcement programs under federal guidelines without offending the bounds of the tenth amendment.²

This goal became a reality under the strategies of the Clean Air Act Amendments of 1970³ and the Federal Water Pollution Control Act Amendments of 1972,⁴ which authorized the EPA to set pollution limitations sufficient to protect the public health and welfare⁵ and to establish a federal environmental enforcement or permit system in each state pursuant to those standards.⁶ Each state was encouraged to draft a state regulatory scheme which would uphold the federal standards, taking into account special state problem areas.⁷ Upon the EPA's approval of this state implementation plan,⁸ the state's pollution abatement system would operate in lieu of the federal program, but would remain partially funded by the EPA.⁹

¹For a brief history of recent federal environmental legislation, see 1 A. REITZE, ENVIRONMENTAL LAW three-27, -30 to -32, four-34 to -35 (2d ed. 1972).

²U.S. CONST. amend. X.

³42 U.S.C. §§ 1857a-1858 (1970). The Clean Air Act, which was formerly classified to 42 U.S.C. §§ 1957-1858, has been transferred and will now be classified to 42 U.S.C. §§ 7401 *et seq.*, pursuant to the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. All citations appearing herein to the Clean Air Act as amended prior to 1977, however, will be to the former classification.

³33 U.S.C. §§ 1251-1376 (Supp. V 1975).

³33 U.S.C. § 1314(a) (Supp. V 1975); 42 U.S.C. § 1857c-4 (1970).

³33 U.S.C. § 1342(a) (Supp. V 1975); 42 U.S.C. § 1857c-8 (1970).

³33 U.S.C. § 1313(e)(2) (Supp. V 1975); 42 U.S.C. § 1857c-5(a)(1) (1970). For the interpretive EPA guidelines, see 40 C.F.R. §§ 50.1-11, 124.1-94 (1976).

³33 U.S.C. § 1313(e)(3) (Supp. V 1975); 42 U.S.C. § 1857c-5(a)(2) (1970).

⁹"[A]lthough approval of a state permit program is often referred to as a 'delegation' of the federal program to the states, an approved state program operates under state statutes and the federal program is merely 'suspended' in that state." Robie, *The*

The states' reliance on federal pollution control models and guidelines has fostered similarities in terminology and enforcement methods between the federal and state environmental protection agencies; a similar relationship exists between the state and local environmental protection agencies.

This Note will familiarize the Indiana attorney with the organization, statutory requirements, and regulations of the Indiana environmental protection agencies, as well as their ties to the Environmental Division of the Attorney General's office and the local environmental protection agencies. Each state agency will be examined in light of the impact of the EPA's policies and federal environmental protection legislation. The reader should be especially alert to the following problems in Indiana environmental practice: overlapping jurisdictions, areas of agency ineffectiveness, statutory biases, expected regulatory changes, and prosecutorial weaknesses. These issues permeate the field of environmental protection at every level of enforcement.

I. THE INDIANA ENVIRONMENTAL PROTECTION AGENCIES

The responsibility for environmental protection at the state level is divided between the Indiana Department of Natural Resources, the Indiana Attorney General's Environmental Division, and the Environmental Management Board of the Indiana State Board of Health. The Attorney General's Office handles the courtroom phase of the enforcement effort, while the day-to-day responsibilities of pollution control are vested primarily in the Environmental Management Board. The Board exercises jurisdiction over waters and wildlife areas concurrently with the Department of Natural Resources.

A. *The Environmental Management Board*

The Indiana Environmental Management Act¹⁰ vests the eleven-member Environmental Management Board (EMB)¹¹ with full respon-

Federal Water Pollution Control Act and the States: Love in Bloom or Marriage on the Rocks, 7 NAT. RESOURCES LAW. 231, 233 n.9 (1974). For the most part, the Indiana agencies have assumed full enforcement responsibility from the EPA, pursuant to the state statutes, and receive approximately equal federal and state funding. Interview with Mark S. Maxwell, Attorney for the Indiana Air Pollution Control Board, in Indianapolis (Jan. 27, 1977).

¹⁰IND. CODE §§ 13-7-1-1 to 13-7-18-1 (Burns 1973 & Supp. 1976).

¹¹The Environmental Management Board (EMB) includes five ex officio members: the Secretary of the State Board of Health, the Director of the Department of Natural Resources, the respective chairmen of the Air Pollution and Stream Pollution Control Divisions, and the Director of the Division of Planning for the state. The six remaining

sibility to develop and update a long-term plan which will "ensure . . . the best possible air, water and land quality" for the state, to promulgate standards and regulations consistently with its long-range goals, to supervise the surveillance of all pollution sources, and to assist local governmental units in developing the programs and facilities needed to reduce the environmental pollution generated within their jurisdictions.¹² The EMB's statutory scope also embraces the power to grant permits for the installation, construction, or modification of equipment relating to air or water pollution, garbage or refuse disposal, and atomic or noise radiation.¹³

The EMB superintends the activities of the Air Pollution Control Board and the Stream Pollution Control Board. These two divisions of the EMB now exercise many of the enforcement powers formerly exercised by the federal EPA subsequent to the EPA's approval of the Indiana State Implementation Plan.¹⁴ In reality, the two boards grant and enforce Indiana's air, water, and solid waste permits, relying on the EMB only in its advisory and liaison capacity with the State Board of Health, the parent agency.¹⁵

1. The Air Pollution Control Board

a. The Statutory Requirements

The Indiana Air Pollution Control Act directs the Air Pollution Control Board (APCB)¹⁶ to "safeguard the air resource through the prevention, abatement and control of air pollution by all practical and economically feasible methods."¹⁷ However, the Act distributes

members, two of which must represent the public at large, are appointed by the Governor for four-year terms. Representatives of municipal government, agriculture, labor, and industrial management are each entitled to one board position. IND. CODE §§ 13-7-2-2 to -3 (Burns 1973).

The Assistant State Health Commissioner serves as the EMB Technical Secretary, *id.* § 13-7-2-2, and is responsible for administering the Board's operations, recording all EMB proceedings, coordinating the divisional activities, drafting the Governor's annual EMB report, *id.* § 13-7-2-6, and preparing the proposed budget for the EMB and its divisions, *id.* § 13-7-2-7. In short, the Technical Secretary directs the day-to-day operations of the various state environmental protection agencies.

¹²*Id.* § 13-7-3-1 (Burns Supp. 1976). Other EMB divisions include Sanitary Engineering, Radiological Health, and Industrial Health. Interview with Robert G. Grant, Attorney for the Indiana Stream Pollution Control Board, in Indianapolis (Nov. 18, 1976).

¹³IND. CODE § 13-7-10-1 (Burns 1973).

¹⁴See note 9 *supra* and accompanying text.

¹⁵Interview with Robert G. Grant, *supra* note 12.

¹⁶IND. CODE §§ 13-1-1-1 to -10 (Burns 1973).

¹⁷*Id.* § 13-1-1-1. For definitions of "air pollution" and "air contaminant," see *id.* § 13-1-1-2(c) to (d).

the necessary powers and duties between the APCB and its parent agency, the Indiana State Board of Health. The latter agency is empowered to interact with state, local, and federal units of government; administer budgetary expenditures to the APCB and local units of government; and generally encourage cooperation between the parties involved in the overall enforcement effort.¹⁸ The APCB is vested with the power to investigate violations, hold hearings, enter orders, and promulgate "regulations consistent with the general intent and purposes of [the Indiana Air Pollution Control Act]."¹⁹

In formulating such orders and the determinations therein, the Board must engage in a nuisance-type balancing process,²⁰ considering:

- (a) The character and degree of injury to, or interference with, comfort, safety, health, or the reasonable use and enjoyment of property;
- (b) The social and economic value of the activity causing the emissions;
- and (c) The practicability, both scientific and economic, of reducing or eliminating the emissions resulting from such activity.²¹

¹⁸*Id.* § 13-1-1-4(B).

¹⁹*Id.* (A). The directives of the APCB are carried out by the Air Pollution Control Division (APCD), which is divided into four major branches: standards and planning, monitoring, program support, and enforcement. The Monitoring Branch includes ambient and emissions sampling, quality assurance, and the laboratory. The Program Support Branch encompasses staff services, computer and data management, and local agency coordination. The Enforcement Branch is comprised of sections on compliance tracking, surveillance and investigations, and permits. Two other branches, administrative and legal, are directly under the supervision of the APCB's director. Interview with Mark S. Maxwell, Attorney for the Indiana Air Pollution Control Board, in Indianapolis (Nov. 23, 1976).

All regulations, permits, variances, final orders, and related actions of the APCD must be approved by its governing body, the seven-member APCB. IND. CODE § 13-1-1-4 (Burns 1973). The Indiana Secretary of State is an *ex officio* member of the Board and the Governor appoints the remaining six members. These appointments must include a doctor, an engineer, and representatives from agriculture, industry, municipal government, and the general public. The Governor may remove any member for cause. *Id.* § 13-1-1-3. However, the Clean Air Act Amendments of 1977 require this section to be amended to include in the APCB "a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Act." Pub. L. No. 95-95, § 128, 91 Stat. 685 (1977) (to be codified at 42 U.S.C. § 7428).

²⁰*E.g.*, *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); *Northern Ind. Pub. Serv. Co. v. W. J. & M. S. Vesey*, 210 Ind. 338, 200 N.E. 620 (1936). The Indiana Air Pollution Control Act also declares that "[t]he discharge into the outdoor atmosphere of air contaminants so as to cause air pollution and create a public nuisance is contrary to the public policy of the state of Indiana and the provisions of this act." IND. CODE § 13-1-1-7 (Burns 1973).

²¹IND. CODE § 13-1-1-4(A)(2)(a) to (c) (Burns 1973).

This statutory orientation toward nuisance theory is compatible with the stated purpose of the Act: "to maintain the purity of the air resource of the state, which shall be consistent with protection of the public health and welfare and the public enjoyment thereof, physical property and other resources, flora and fauna, maximum employment and full industrial development of the state."²² The above wording raises doubts as to whether the Indiana legislature sought only to "maintain" the current air quality at a level sufficient to prevent harm to persons and property or whether it sought to generally improve the state's air quality to a point of undefined purity.²³ However, the Act's nuisance approach is more consistent with the former interpretation. In balancing the above interests, the APCB must consider the economic well-being of the state in establishing pollution abatement programs by limiting pollution control methods to those which are "practical and economically feasible."²⁴ The agency's promulgation power is further confined to those "codes, rules and regulations" which are "clearly premised upon scientific knowledge of causes as well as of effects."²⁵

In addition to these literal state statutory directives, the APCB looks to the federal Clean Air Act Amendments of 1970 and the EPA guidelines implementing the Amendments for considerable guidance. This federal input reduces the influence of economic and technological considerations on the formulation of state enforcement measures and brings the APCB's enforcement more into line with the policies of the Amendments and Congressional intent than it would have been under state law alone.²⁶ The Clean Air Act Amendments of 1970 compel the EPA to consider only the listed factors in section 110(a)(2)(A) through (H),²⁷ implicitly excluding economic and technological considerations from the EPA's review of a state implementation plan for approval.²⁸ This exclusion also enters into EPA's formulation of federal enforcement measures where the state implementation plan or the state enforcement has been ineffective in meeting the federal standards.

²²*Id.* § 13-1-1-1.

²³Based on *id.* § 13-1-1-4(A)(2), the Newton Circuit Court recently set aside an APCB enforcement order against an open burning violation because of the Board's failure to base the required findings of fact on substantial evidence. *Karlock v. Indiana Pollution Control Bd.*, No. C76-87 (Ind., Newton Cir. Ct. Feb. 17, 1977).

²⁴IND. CODE § 13-1-1-1 (Burns 1973).

²⁵*Id.*

²⁶Interview with Mark S. Maxwell, Attorney for the Indiana Air Pollution Control Board, in Indianapolis (June 15, 1977).

²⁷42 U.S.C. § 1857c-5(a)(2)(A) to (H) (1970).

²⁸*Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976).

Thus, although the EPA is precluded from unevenly distributing the burden of pollution abatement on the basis of economic cost and technological feasibility, the APCB is obliged to consider economics and technology in formulating its regulatory measures,²⁹ giving rise to special interest provisions and exemptions. This state flexibility continues to provide great incentives to the states to obtain EPA approval of their state implementation plans, so as to eliminate federal enforcement.³⁰

b. The Regulatory Scheme

Although initially promulgated by the APCB, the current regulations effectuating the directives of the Indiana Air Pollution Control Act were in part shaped by EPA's disapproval and suggested revision of certain provisions³¹ according to EPA guidelines.³² These regulations allow the APCB to alleviate the pollution abatement burden on certain pollution sources, while imposing more stringent standards on sources more able to comply with the requisite standards. For example, sources discharging smoke-like emissions may fall within the purview of several APCB regulations or their exceptions. Open burning is prohibited, but backyard incineration, recreational campfires, agricultural open burning, and incineration to dispose of explosives are expressly exempted from the regulation's scope.³³ The enforcement of this regulation depends principally on local citizens' reports and is seemingly proportional to the outrage of the community.³⁴

Smoke may also violate the visible emissions standard, which limits the opaqueness of all air emissions, making it "the most powerful regulation on the books, because it is so easy to use."³⁵ The APCB merely presents the opaqueness observations of its trained "smoke readers" as prima facie evidence of a violation; industry must then assume the burden of proof to refute the agency's evidence by means of its own monitoring results.³⁶ Some smoke may contain "particulate emissions" large enough to be affected by

²⁹Compare 42 U.S.C. § 1857c-5(a)(2) (1970) with IND. CODE § 13-1-1-1 (Burns 1973).

³⁰Interview with Mark S. Maxwell, *supra* note 26.

³¹See 40 Fed. Reg. 50,032 (1975); 41 Fed. Reg. 7450; 18,654; 32,304; 35,676 (1976).

³²For EPA guidelines on the states' preparation, adoption, and submittal of state implementation plans, see 40 C.F.R. §§ 52.01-.23 (1976).

³³In emergency circumstances, any permit applicant may apply to APCB for a special exemption. IND. ADMIN. RULES & REG. § (13-1-1-4)-1 (Burns 1976).

³⁴Mannweiler, *All Fired Up About Smoke*, *The Indianapolis News*, Nov. 17, 1976, at 11, col. 1.

³⁵Williams, *Indiana Air and Water Laws*, in FIFTH ANNUAL ENVIRONMENTAL SYMPOSIUM, CENTRAL INDIANA TECHNICAL SOCIETIES 21, 22 (1976).

³⁶IND. ADMIN. RULES & REG. § (13-1-1-4)-2 (Burns 1976). The regulation allows a maximum fifteen minutes of noncompliance per day per source, but this provision will

gravity. Each source's particulate emission limitation, measured in pounds emitted per hour, is proportional to its production capacity, as computed by its combustion capacity³⁷ or its process weight rate.³⁸

Major stationary pollution sources must continuously monitor their emissions and forward the results to the APCB, to be supplemented by APCB spot checks and stack tests.³⁹ In the state implementation plan, pursuant to federal guidelines,⁴⁰ APCB states that all stationary sources⁴¹ will be inspected on a routine and periodic basis by the staff. "The purpose of the inspections shall be to insure compliance with the air pollution regulations, check on maintenance of air pollution control equipment, verification of compliance with permit conditions, and to forestall the development of air pollution problems."⁴² These routine APCB inspections supplement the self-monitoring data required of major point sources⁴³ and the regional samples jointly collected by the APCB and the EPA.⁴⁴ In order to escape detection, a point source violating its permit would have to avoid the scrutiny of this three-pronged inspection routine.

Excessive particulate matter which escapes beyond the property on which the source is located may violate the APCB regulation on "fugitive dust."⁴⁵ Those dust particles that are within a specified diameter range possess the potential for causing respiratory damage⁴⁶ and are subject to the strictest regulation. However, the

soon be stricken to comply with EPA directives. Another provision in the regulation causing EPA concern allows no greater than 60% opaqueness for a stated period when lighting or cleaning a boiler. If a malfunction occurs, the source must remain within 90% compliance in order to continue operating. See Williams, *Indiana Air and Water Laws*, *supra* note 35, at 24.

³⁷IND. ADMIN. RULES & REG. §§ (13-1-1-4)-3, -6 (Burns 1976).

³⁸*Id.* § (13-1-1-4)-4, -5.

³⁹*Id.* § (13-1-1-4)-23.

⁴⁰Indiana Air Pollution Control Board, Draft—State Implementation Plan—Rewrite §§ 6, 10-2 (October 1975) (unpublished plan available at Indiana State Board of Health, Air Pollution Control Board, 1330 W. Michigan St., Indianapolis, Ind. 46206), follows the federal mandate of 42 U.S.C. § 1857c-5(a)(2)(C), (F) (1970).

⁴¹A stationary source is "any machine, device, apparatus, equipment, installation, building, or other physical facility which emits or has the potential to emit any air contaminant." IND. ADMIN. RULES & REG. § (13-7-10-1)-21(a) (Burns 1976).

⁴²Indiana Air Pollution Control Board, Draft—State Implementation Plan—Rewrite § 10-2, *supra* note 40.

⁴³A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft from which pollutants are or may be discharged." IND. ADMIN. RULES & REG. § (13-7-10-1)-1(a)(23) (Burns 1976).

⁴⁴Indiana Air Pollution Control Board, Draft—State Implementation Plan—Rewrite §§ 6, 10-2, *supra* note 40.

⁴⁵IND. ADMIN. RULES & REG. § (13-1-1-4)-30 (Burns 1976).

⁴⁶*Id.* § (13-1-1-4)-30(1)(b).

regulation expressly exempts most steam discharges, dust from some unpaved roads, as well as construction and agricultural operations where every reasonable precaution has been taken, violations caused by adverse weather conditions, and adequately dispersed visible emissions which comply with all other regulations.⁴⁷

The Clean Air Act Amendments of 1970 stipulate that reductions in the atmospheric concentrations of certain pollutants are necessary to protect the public health and welfare. Every approved state implementation plan must include the regulatory means with which to attain and maintain the acceptable atmospheric concentrations,⁴⁸ known as ambient air quality standards.⁴⁹ The 1970 Amendments required compliance by the end of 1975 with the less stringent primary ambient air quality standards, which are intended to protect the public health;⁵⁰ the stricter secondary ambient air quality standards, which are designed to protect public welfare, must be attained within a "reasonable" time period.⁵¹ The designated ambient air quality pollutants—sulfur dioxide, suspended particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide⁵²—comprise the heart of the APCB's regulatory effort. Excessive levels of these pollutants will set into action the state regulation providing for air pollution forecasts, alerts, warnings, and emergencies.⁵³

Out of the six ambient air quality standards, the sulfur dioxide emission standards contained in APC 13⁵⁴ have generated the most controversy. In a successful court battle brought by several Indiana electric power utilities, this regulation was declared invalid because of the APCB's failure to comply with the statutory procedural re-

⁴⁷*Id.* § (13-1-1-4)-30(6).

⁴⁸The federal statute governing the promulgation of state implementation plans is contained in the Clean Air Act Amendments of 1970, § 110, 42 U.S.C. § 1857c-5 (1970) and clarified in 40 C.F.R. §§ 51.1-.23, 52.1-.23 (1976).

⁴⁹The specific ambient air quality standards are set out in 40 C.F.R. §§ 50.4-.11 (1976).

⁵⁰42 U.S.C. § 1857(a)(2)(A)(i) (1970). Indiana failed to meet the 1975 deadline imposed by the Clean Air Act Amendments of 1970. Interview with Mark S. Maxwell, Attorney for the Indiana Air Pollution Control Board, in Indianapolis (Jan. 27, 1977). See also text accompanying note 69 *infra*.

⁵¹42 U.S.C. § 1857c-5(a)(2)(A)(ii) (1970).

⁵²40 C.F.R. §§ 50.4-.11 (1976); IND. ADMIN. RULES & REG. § (13-1-1-4)-31 (Burns 1976).

⁵³IND. CODE § 13-1-1-7 (Burns 1973).

⁵⁴IND. ADMIN. RULES & REG. § (13-1-1-4)-25 (Burns 1976). The air and stream pollution regulations are denoted by the initials APC or SPC, followed by the agency's regulation number. This notation is independent of the Burns regulation citation system.

quirements for adoption of rules and regulations.⁵⁵ Because these power plants generate approximately three-quarters of the state's sulfur dioxide pollution,⁵⁶ they will eventually face three alternatives in cutting their sulfur dioxide output: remove the sulfur from the coal, remove the sulfur dioxide from the exhaust, or convert to low-sulfur coal.⁵⁷ None of these alternatives will be cheap or popular, especially as the energy crisis intensifies.

As now written, Regulation APC 13 computes each source's allowable sulfur dioxide emissions on the basis of the average smokestack heights, the number of smokestacks, and the heat-producing capacity of the source.⁵⁸ Because of this reliance on dispersion tactics instead of reduced emissions, the areas downwind of sulfur dioxide sources acquire an increased "background" concentration of sulfur dioxide pollution, which may go undetected and unaccounted for in rural air quality regions. Unvarying wind patterns, a factor not taken into account by Regulation APC 13, can result in increased downwind concentration of sulfur dioxide, which could virtually destroy plant life.

The smokestack heights and emission limits for Regulation APC 13 and other emission standards were recommended by the American Society for Mechanical Engineers but their study omitted research on adverse health and vegetation effects and was "silent . . . in the selection of the maximum allowable ground level concentration."⁵⁹ Thus, several of the APCB's gaseous emission standards are based on an engineering model which fails to take into effect the local meteorological conditions and the health of organisms living within range of the smokestacks.

⁵⁵Indiana-Kentucky Elec. Corp. v. Indiana Envir. Management Bd., No. C73-675 (Ind., Marion Cir. Ct. Nov. 10, 1975), *appeal docketed*, No. 2-576A-180 (Ind. Ct. App. May 10, 1976). The circuit court ruling also declared APC 14, APC 19, and APC 22 invalid, but stayed execution of the requested injunction against the APCB, pending appeal. Meanwhile, the Board continues to enforce all four regulations.

⁵⁶Indiana Air Pollution Control Board, *The Background and Philosophy of Regulation APC 13 on Maximum Allowable Sulfur Dioxide Emissions 2* (Sept. 2, 1970) (unpublished report available at Indiana State Board of Health, Air Pollution Control Board, 1330 W. Michigan St., Indianapolis, Ind. 46206).

⁵⁷D. CURRIE, *POLLUTION, CASES AND MATERIALS 10* (1975).

A fourth temporary alternative lies in the discretionary relaxation of air quality standards during energy crises. 42 U.S.C. § 1857c-10(B) (Supp. V 1975). Additionally, the Clean Air Act Amendments of 1977 give the President nondelegable authority to temporarily suspend provisions of a state implementation plan during an energy or economic emergency. Pub. L. No. 95-95, § 107(a), 91 Stat. 685 (1977) (to be codified at 42 U.S.C. § 7410).

⁵⁸IND. ADMIN. RULES & REG. § (13-1-1-4)-25 (Burns 1976).

⁵⁹Indiana Air Pollution Control Board, *The Background and Philosophy of Regulation APC 13 on Maximum Allowable Sulfur Dioxide Emissions 3*, *supra* note 56.

The EPA and several environmental groups have voiced concern over increases in background sulfur dioxide concentrations and have challenged several states' "tall stack" regulations, claiming that the Clean Air Act Amendments of 1970 implicitly contain a legislative policy of pollution reduction, not dispersion.⁶⁰ This view has been adopted by several circuits⁶¹ and the EPA has issued a guideline which cites those circuits' holdings for the proposition that section 110(a)(2)(B) of the Clean Air Act Amendments of 1970 requires constant emissions limitations, not dispersion-dependent technology. However, "where constant emission limitations [are] employed to the maximum extent achievable, it would then be appropriate to permit the use of dispersion techniques where necessary to achieve ambient standards."⁶²

Five of the air quality criteria pollutants—nitrogen dioxide, carbon monoxide, hydrocarbons, suspended particulate matter, and photochemical oxidants—interact in the presence of sunlight⁶³ to form what is commonly known as "smog."⁶⁴ As the humidity rises, suspended particulate matter and sulfuric acid droplets scatter and absorb the light, decreasing visibility. Nitrogen dioxide is responsible for the "whiskey-brown" color common to smog.⁶⁵

Carbon monoxide is the only air quality criteria pollutant which is colorless and odorless. It is a product of the gasoline engine's incomplete combustion and adversely affects health by impairing vision, slowing reaction timing, and aggravating heart disease.⁶⁶ At-

⁶⁰Stack Height Increases Guideline—Air Quality Standards, 41 Fed. Reg. 7450 (1976).

⁶¹NRDC v. EPA, 489 F.2d 39 (5th Cir. 1974); Big Rivers v. EPA, 523 F.2d 16 (6th Cir. 1975); Kennecott Copper Corp. v. Train, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

⁶²41 Fed. Reg. 7450 (1976).

⁶³Pollutants which require the sun's energy as a catalyst in order to form smog are known as photochemically active pollutants.

⁶⁴Although smog was initially thought to be caused by the combination of smoke and fog, scientists now theorize that branched chain hydrocarbons and nitrogen oxides react to form ozone in the presence of sunlight, resulting in the onset of smog. J. ROBERTS, R. STEWART, & M. CASERIO, ORGANIC CHEMISTRY, METHANE TO MACROMOLECULES 58 (1971) [hereinafter cited as ORGANIC CHEMISTRY]. Ozone is a highly reactive substance which cracks rubber, etches stone, damages plants, aggravates respiratory diseases, discolors dyes, and contributes to the intensity of smog. Sulfur dioxide may also add to the haze by reacting with water present in the air to form tiny droplets of sulfuric acid. Indiana Air Pollution Control Board, Background for Proposed Ambient Air Quality Standards for Carbon Monoxide, Ozone and Photochemical Oxidants, and Hydrocarbons, Table 2 (Dec. 17, 1970) (unpublished report available at Indiana State Board of Health, Air Pollution Control Board, 1330 W. Michigan St., Indianapolis, Ind. 46206); D. CURRIE, POLLUTION, CASES AND MATERIALS 15 (1975).

⁶⁵D. CURRIE, POLLUTION, CASES AND MATERIALS 15 (1975).

⁶⁶Indiana Air Pollution Control Board, Background for Proposed Ambient Air

mospheric concentrations of carbon monoxide are already so high in heavy downtown traffic in large cities that they pose immediate health problems.⁶⁷

The EPA has estimated that the federal vehicle emissions control programs will eventually result in an eighty-percent nationwide decrease from the 1967 carbon monoxide automobile emission levels, and predicts similar reductions for other air quality criteria pollutants.⁶⁸ Relying on the supposed effectiveness of the federal program in abating mobile source pollution,⁶⁹ the APCB drafted its air quality criteria pollutant control regulations to apply to stationary sources only.⁷⁰ After delays in the federal program the APCB discovered that the abatement of stationary source pollution alone in the Indianapolis area would not be sufficient to meet the 1975 EPA-imposed deadline for attaining the primary ambient air standards.⁷¹ The EPA then proposed a plan to restrict automobile use, to encourage mass transit, and to control traffic in the downtown area. The city administration was appalled; such a plan would cripple the rebirth of the inner city and give rise to more urban sprawl. After a city study raised doubts as to the effectiveness of the EPA's transportation control plan, the APCB and the EPA reached a compromise by instituting motor vehicle inspections and a hydrocarbon vapor recovery recycling program at local gas stations. The latter measure was designed to abate a sizable cause of

Quality Standards for Carbon Monoxide, Ozone and Photochemical Oxidants, and Hydrocarbons, Table 1, *supra* note 64.

⁶⁷ORGANIC CHEMISTRY, *supra* note 64, at 58.

⁶⁸Indiana Air Pollution Control Board, Draft—State Implementation Plan—Rewrite 3-75, *supra* note 40. Originally the EPA attempted to wage a two-pronged attack against motor vehicle pollution, but recent court challenges have thwarted proposed EPA transportation control plans. *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated*, 97 S. Ct. 1635 (1977); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 97 S. Ct. 1635 (1977). In addition, Congress is contemplating another year's extension for compliance with the vehicle emissions control standards. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 201, 91 Stat. 685 (to be codified at 42 U.S.C. § 7521). See the provision of the 1977 Amendments which forbids the approval of certain federal grants to specified areas not utilizing transportation control plans. *Id.* § 176(a) (to be codified at 42 U.S.C. § 7506).

⁶⁹42 U.S.C. §§ 1857f-5(a) to -12 (1970 & Supp. V 1975).

⁷⁰Stationary sources, especially petroleum refineries, ferrous metal smelters, and refuse incinerators emitting carbon monoxide are required to burn the stream of waste gases in a direct flame afterburner or control the emission "by other means approved by the Board." IND. ADMIN. RULES & REG. § (13-1-1-4)-28 (Burns 1976). Nitrogen oxide emission limits for stationary sources are specified in pounds of nitrogen dioxide emissions per unit of heat input, based on whether the source is gas, oil, or coal fired. *Id.* § (13-1-1-4)-29.

⁷¹Indiana Air Pollution Control Board, Draft—State Implementation Plan—Rewrite 3-75, *supra* note 40.

hydrocarbon pollution: the evaporation and spillage of gasoline.⁷² This hydrocarbon emission regulation also controls the storage, loading, processing, and disposition of volatile organic materials and solvents.⁷³ The APCB possesses the power to evolve stricter standards for sources whose hydrocarbon emissions may pose a health hazard.⁷⁴ Patterned after a federal model regulation that was based on Los Angeles smog chamber tests,⁷⁵ this regulation exempts some hydrocarbons according to their lack of chemical reactivity and their inability to form smog.⁷⁶

Any stationary pollution source that constructs or operates any air pollution control device must obtain an APCB permit.⁷⁷ Regulation APC 19 requires any source constructing, installing, or modifying pollution control equipment to first obtain a construction permit,⁷⁸ while a source already in operation or production must possess an operation permit.⁷⁹ To obtain either permit, the applicant must demonstrate that the source will operate in compliance with federal and state standards and will maintain the current air quality if it is better than the minimum standards.⁸⁰ Local units of government may enforce their own more restrictive regulations or may be given the responsibility of enforcing the state permit program.⁸¹

Permit holders should note that the "issuance and possession of any permit shall not constitute a defense of a violation of any law, regulation or standard."⁸² If a pollution source is in violation of a given regulation or the terms of its permit, the APCB first revokes or denies the operating permit. At a meeting with the violator the agency attempts to arrange a provisional permit, a compliance timetable, or an agreed order. If the parties cannot reach an agreement, a hearing is called before an officer appointed by the APCB,

⁷²Interview with James Elam, Administrative Assistant for the Indianapolis Air Pollution Control Division, in Indianapolis (Nov. 24, 1976).

⁷³IND. ADMIN. RULES & REG. § (13-1-1-4)-27 (Burns 1976).

⁷⁴*Id.* § (13-1-1-4)-27 (8)(d).

⁷⁵Interview with William Schoonmaker, Chief of Standards Section, Indiana Air Pollution Control Division, in Indianapolis (Feb. 24, 1977).

⁷⁶IND. ADMIN. RULES & REG. § (13-1-1-4)-27(8)(b) (Burns 1976).

⁷⁷*Id.* §§ (13-7-10-1)-22 to -27.

⁷⁸*Id.* § (13-7-10-1)-22.

⁷⁹*Id.* § (13-7-10-1)-23.

⁸⁰*Id.* §§ (13-7-10-1)-22(b), -23(e). See Significant Deterioration of Air Quality, 40 C.F.R. § 52.21 (1976), and the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 160-169, 91 Stat. 685 (1977) (to be codified at 42 U.S.C. §§ 7470-7479), which require state implementation plans to meet even more stringent requirements for the prevention of significant deterioration.

⁸¹*Id.* § (13-7-10-1)-27. See text accompanying notes 155-165 *infra*.

⁸²*Id.* § (13-7-10-1)-26.

whose findings of fact may be revised, rejected, or accepted by the Board.⁸³ Any further appeal moves into the appropriate state circuit court, where civil and criminal penalties, as well as cease and desist orders, may be imposed on the violator.⁸⁴

A source may obtain a one-year variance under the state Environmental Management Act, exempting it from certain regulations, but the variance applicant must demonstrate that it would sustain an undue burden if it were immediately required to comply with the applicable standards.⁸⁵ In practice, variances are granted for financial hardship or pending research aimed at correcting the problem for which the source was cited, but they are rarely granted consecutively. The agencies prefer to grant compliance schedules⁸⁶ because they require the source to take certain steps toward compliance during the compliance schedule period. Of course, a violator can immediately comply with emissions standards by terminating its operation, but both the source and the agency generally seek to avoid this alternative.⁸⁷

2. Stream Pollution Control Board

a. Statutory Requirements

The Stream Pollution Control Board's (SPCB) organization, statutory provisions, and relationship with the EPA parallel that of its sister board, the Air Pollution Control Board.⁸⁸ The Indiana Water Pollution Control Act designates the SPCB as the state's "water pollution agency" for the purposes of the Federal Water Pollution Control Act.⁸⁹ The 1972 Amendments to the latter Act define the "state water pollution control agency" to be that state agency which enforces state laws on water pollution control and solid waste disposal.⁹⁰

⁸³IND. CODE §§ 13-7-11-1 to -5 (Burns 1973); interview with Mark S. Maxwell, *supra* note 19; interview with Robert G. Grant, *supra* note 12.

⁸⁴IND. CODE §§ 13-7-13-1, -3 (Burns 1973).

⁸⁵*Id.* § 13-7-7-6.

⁸⁶IND. ADMIN. RULES & REG. §§ (13-7-10-1)-1(27), (13-7-10-3)-19 (Burns 1976). The Clean Air Act Amendments of 1977 now forbid the issuance of compliance orders without public notice and hearing, the inclusion of scheduled interim requirements, EPA approval as to major sources, and noncompliance penalties. Pub. L. No. 95-95, §§ 111-112, 91 Stat. 685 (1977) (to be codified at 42 U.S.C. § 7413).

⁸⁷Interview with Mark S. Maxwell, *supra* note 19.

⁸⁸*See* notes 16-19 *supra* and accompanying text. The SPCB is comprised of four gubernatorial appointees and three ex officio members: the Director of the Department of Conservation, the Secretary of the State Board of Health, and the Lieutenant Governor. IND. CODE § 13-1-3-2 (Burns 1973).

⁸⁹IND. CODE § 13-1-4-2 (Burns 1973).

⁹⁰33 U.S.C. § 1362(1) (Supp. V 1975).

As with the APCB, many of the SPCB's regulations were drafted to comply with the concurrent federal legislation.⁹¹ The Federal Water Pollution Control Act Amendments of 1972 replaced the water quality standards of its forerunner with specific effluent limitations on water pollution.⁹² The jurisdiction of the Amendments encompasses all "navigable waters," including oceanic waters within three miles of the American shore, "ground waters," and "surface and underground waters."⁹³ With several exceptions, the effluent limitations must be based on the "best practicable available technology" by July 1, 1977,⁹⁴ and on the "best available technology economically achievable" by July 1, 1983.⁹⁵ In anticipation of a controversy paralleling the litigation over the use of dispersion methods in complying with the Clean Air Act Amendments of 1970,⁹⁶ the Federal Water Pollution Control Act Amendments of 1972 expressly forbade the use of dilution methods "as a substitute for adequate treatment . . . at the [pollution] source."⁹⁷

The 1972 Amendments instituted a National Pollutant Discharge Elimination System (NPDES),⁹⁸ whereby all point source pollutant discharges are unlawful unless they comply with the terms of the source's NPDES permit.⁹⁹ In a statutory approach reflecting that of the Clean Air Act Amendments of 1970, the NPDES program encourages each state to draft a state implementation plan sufficient to enforce the effluent limitations and goals of the Federal Water Pollution Control Act Amendments of 1972.¹⁰⁰ Upon the EPA's approval,¹⁰¹ the state's NPDES permit program would operate in lieu of the federal program under the auspices of the federally designated state water pollution agency.¹⁰²

b. The Regulatory Scheme

The NPDES regulatory guidelines¹⁰⁸ were adopted in entirety in the Indiana Water Pollution Control Act and its accompanying

⁹¹See notes 4, 31, & 32 *supra* and accompanying text.

⁹²33 U.S.C. § 1311 (Supp. V 1975) (originally enacted as Water Pollution Control Act, Pub. L. No. 845, 62 Stat. 1155 (1948)).

⁹³33 U.S.C. §§ 1252(a); 1362(7),(8) (Supp. V 1975).

⁹⁴*Id.* § 1311(b)(1)(A).

⁹⁵*Id.* § 1311(b)(2)(A).

⁹⁶See notes 58, 60-62 *supra* and accompanying text.

⁹⁷33 U.S.C. § 1252(b)(1) (Supp. V 1975).

⁹⁸*Id.* § 1342.

⁹⁹*Id.* § 1311(a).

¹⁰⁰See text accompanying notes 6-9 *supra*.

¹⁰¹33 U.S.C. §§ 1314(h)(2), 1342(b) (Supp. V 1975).

¹⁰²*Id.* § 1342(c)(1).

¹⁰⁸*Id.* § 1342(b); 40 C.F.R. §§ 124.1-.94 (1976).

regulations. Each permit holder must monitor the discharges which are not considered "minor," or which are specifically required to be monitored, or which contain some toxicity. Monitoring results must be reported to the SPCB,¹⁰⁴ which forwards them to the EPA. The SPCB field crew constantly performs spot checks on assigned sources in order to check the accuracy of these sources.¹⁰⁵

A separate system of permits effectuates the SPCB's solid waste regulatory program, which requires special permits for industrial waste haulers,¹⁰⁶ sanitary landfill facilities,¹⁰⁷ and refuse processing facilities,¹⁰⁸ while municipal sewage treatment plants operate under both the NPDES and local permits.¹⁰⁹ Most cities operate a dual storm and sanitary sewer system, which generally meets SPCB standards; however, a heavy rainfall or an intentional sewer overflow may result in fresh sewage with a high ammonia content spilling into the streams, usually resulting in a violation of the source's permit and high fish mortality.¹¹⁰ Due to the high cost of constructing new waste treatment facilities equipped to meet the federal effluent limitations, Congress provided for seventy-five percent federal funding of the cost of approved projects in the Federal Water Pollution Control Act Amendments of 1972.¹¹¹

Regulation SPC 1R3 sets the water quality standards for most bodies of water in Indiana,¹¹² depending on their type of use, such as whole or partial body contact recreation, warm or cold water fish maintenance, public or industrial water supply, or agricultural purposes.¹¹³ For each type of water use, the regulation specifies a variety of criteria, including pH and temperature ranges; taste and odor;

¹⁰⁴IND. ADMIN. RULES & REG. § (13-7-10-3)-24 (Burns 1976).

¹⁰⁵Interview with Robert G. Grant, *supra* note 12.

¹⁰⁶IND. ADMIN. RULES & REG. § (13-7-10-1)-38 (Burns 1976).

¹⁰⁷*Id.* §§ (13-7-10-1)-55, -62.

¹⁰⁸*Id.* §§ (13-7-10-1)-59, -76.

¹⁰⁹33 U.S.C. §§ 1342, 1345 (Supp. V 1975); interview with James Elam, *supra* note 72.

¹¹⁰Interview with Robert S. Morse, Administrator of the Department of General Sanitation, Bureau of Environmental Health, Health and Hospital Corporation of Marion County, Indiana, in Indianapolis (Nov. 19, 1976).

¹¹¹33 U.S.C. §§ 1281, 1282 (Supp. V 1975). For federal criteria for approval of funds, see *id.* § 1284(a).

¹¹²IND. ADMIN. RULES & REG. § (13-1-3-7)-1 (Burns 1976). Regulation SPC 1R3 does not apply to Lake Michigan, Wolf Lake, the Grand Calumet River, the Indiana Harbor Ship Canal, and privately owned ponds. Sections (13-1-3-7)-4 to -8 specify less stringent water quality criteria for all of the above except the private ponds. *Id.* §§ (13-1-3-7)-4 to -8. The Gary vicinity's water pollution regulations are now jointly administered by the SPCD and the EPA, due to the immensity of the local pollution problems and the political pressures. Interview with Robert G. Grant, *supra* note 12.

¹¹³IND. ADMIN. RULES & REG. § (13-1-3-7)-1(3)(a) (Burns 1976).

toxicity; dissolved solid and oxygen concentrations; and bacterial, chemical, and radioactive content.¹¹⁴ Where multiple uses are designated, the most protective criteria will determine the standards¹¹⁵ and where the existing waters are currently of higher quality than the applicable standards, such quality may not be degraded.¹¹⁶ The designated use standards do not apply within the dispersion area of each pollution source's waste effluent and the receiving body of water, the latter's use designation, the dilution ratio, and the synergistic and aggregate effects of nearby discharges.¹¹⁷ However, all waters, including the mixing zone, must be free of substances which are putrescent, unsightly, harmful, or toxic, or which constitute a nuisance.¹¹⁸

Drainage of cyanide or related compounds into sewer systems or waterways is forbidden, except with prior SPCB approval.¹¹⁹ Coal mine owners are required to dispose of their mining refuse so as to minimize acid mine drainage into state waters,¹²⁰ while spills¹²¹ of oil and other hazardous or objectionable substances must immediately be contained and reported to the SPCB Technical Secretary, followed by a clean-up procedure which minimizes damage to public health, various biological entities, and the surrounding waters.¹²²

A 1971 state statute limited and later banned the sale and use of phosphorus-containing detergents with certain exceptions.¹²³ Those sources falling within those exceptions must apply for a SPCB permit, wherein they must demonstrate that their use of the detergent is necessary and has no adequate substitute and that the phosphate will be removed from the effluent.¹²⁴ This detergent ban has been dramatically effective in reducing phosphate contamination in

¹¹⁴*Id.* § (13-1-3-7)-1(6). Salmon spawning and migration waters are subject to more stringent standards. *Id.* § (13-1-3-7)-10.

¹¹⁵*Id.* § (13-1-3-7)-1(3)(b).

¹¹⁶*Id.* § (13-1-3-7)-1(1).

¹¹⁷*Id.* § (13-1-3-7)-1(4).

¹¹⁸*Id.* § (13-1-3-7)-1(6)(a).

¹¹⁹*Id.* § (13-1-3-7)-2.

¹²⁰*Id.* § (13-1-3-7)-3. Hills of coal mine refuse, called "gob piles," generate large quantities of sulfuric acid due to the oxidation of the pyrites in coal particles by rain water seepage. King, *'Gob Pile' Bulldozed After 50-Year Growth*, *The Indianapolis News*, Nov. 29, 1976, at 18, col. 5.

¹²¹IND. ADMIN. RULES & REG. § (13-1-3-7)-12 (Burns 1976). This section defines a "spill" as "any unexpected, unintended, abnormal, or unapproved dumping, leaking, drainage, seepage, discharge or other loss . . . which enters or threatens to enter the waters of the state."

¹²²*Id.* § (13-1-3-7)-13.

¹²³IND. CODE § 13-1-5.5-3 (Burns 1973).

¹²⁴IND. ADMIN. RULES & REG. § (13-1-3-7)-11 (Burns 1976).

various bodies of water and its accompanying side effects.¹²⁵ A federal study of twenty-seven Indiana lakes revealed a "marked improvement in phosphate concentration in the two years following the ban" in twenty-six of those lakes. However, the agency does concede that the increased additives in the newer non-phosphate detergents could create more exotic pollution problems.¹²⁶

The SPCB's enforcement methods parallel those of the APCB,¹²⁷ initially relying on permits, compliance timetables, and agreed orders to bring sources into compliance with the state effluent limitations.¹²⁸ The Act specifies the procedures to be followed for notice to the violator, hearing and final order by the SPCB,¹²⁹ and subsequent court actions.¹³⁰

B. Department of Natural Resources

The role of the Department of Natural Resources (DNR) in pollution control is peripheral to the primary efforts of the Air and Stream Pollution Control Boards. Although the DNR rarely deals with pollution sources, its state jurisdiction is concurrent with that of the SPCB with regard to all bodies of water stocked with fish, all bodies of water not enclosed by a single owner's land, and all waters facilitating the passage of fish.¹³¹ The DNR's 167 conservation officers are vested with the power to arrest any person witnessed dumping "refuse" into the waters of the state.¹³² The term "refuse" as defined in the statute includes many of the substances regulated by the SPCB, particularly "all putrescible and nonputrescible solid and semisolid wastes, including garbage, rubbish, ashes, street cleanings, dead animals, offal and solid commercial industrial and institutional wastes."¹³³

A polluter causing a fish kill or other wildlife deaths within the bounds of DNR jurisdiction could face concurrent suits by the DNR

¹²⁵The phosphates in detergents and fertilizers inevitably seep into water supplies, stimulating algae growth while extinguishing other marine life and causing an accelerated aging of the lakes, called eutrophication. ORGANIC CHEMISTRY, *supra* note 58, at 528.

¹²⁶*More Additives in Wash*, The Indianapolis News, Dec. 17, 1976, at 15, col. 4.

¹²⁷See notes 83-84 *supra* and accompanying text.

¹²⁸Interview with Robert G. Grant, *supra* note 12.

¹²⁹IND. CODE § 13-1-3-9 (Burns 1973).

¹³⁰*Id.* §§ 13-1-3-11, -12, -14, -15.

¹³¹*Id.* § 14-2-2-1 (Burns 1973); interview with Major John Henricks, Conservation Law Enforcement Officer for the Department of Natural Resources, in Indianapolis (Nov. 18, 1976).

¹³²IND. CODE § 14-3-11-1 (Burns 1973).

¹³³*Id.*

in the form of misdemeanor charges,¹³⁴ a civil action for damages sustained from the fish kill,¹³⁵ and even a suit in equity to enjoin further pollution.¹³⁶ The DNR fish kill figures may also be incorporated into an SPCB complaint in the form of three counts against the offender: violation of the Indiana Water Pollution Control Act,¹³⁷ breach of the NPDES permit,¹³⁸ and damages for the fish kill.¹³⁹ As an SPCB attorney noted, a complaint with that much "ammunition" usually restrains the appellate judge from reducing the violator's fine.¹⁴⁰

II. THE ATTORNEY GENERAL OF INDIANA

The Indiana Attorney General possesses the statutory authority to initiate all court actions on behalf of the EMB and its various agencies, including the APCB and the SPCB.¹⁴¹ This arrangement bears a close resemblance to the federal enforcement scheme, wherein the EPA takes full responsibility for monitoring, drafting compliance orders, and even investigating violations,¹⁴² but the Justice Department shoulders the burden of prosecution and litigation.¹⁴³

At both the state and federal levels, this split enforcement scheme fosters common advantages and disadvantages. Although this detachment of the investigative staff from the litigative staff increases the possibility of errors by the Attorney General's staff at the hearing or trial stage, it encourages an objective review and evaluation process by the Attorney General's specialized Environmental Division as to whether the evidence compiled by the agency will support the proposed cause of action.¹⁴⁴

In order to facilitate communication between the Environmental Division and the environmental agencies, a member of the Division

¹³⁴*Id.* § 14-2-3-8.

¹³⁵*Id.* § 14-2-6-7.

¹³⁶*Id.* § 14-3-1-14(8).

¹³⁷*Id.* §§ 13-1-3-1 to 13-1-3-18.

¹³⁸33 U.S.C. § 1342 (Supp. V 1975); IND. ADMIN. RULES & REG. § (13-7-10-3)-27 (Burns 1976).

¹³⁹IND. CODE § 14-2-6-7 (Burns 1973).

¹⁴⁰Interview with Robert G. Grant, *supra* note 12.

¹⁴¹IND. CODE §§ 4-6-3-1, 4-6-5-3 (Burns 1974); *id.* §§ 13-1-1-7, 13-1-3-15, 14-2-6-7(2) (Burns 1973).

¹⁴²*See* 33 U.S.C. §§ 1251-1376 (Supp. V 1975); 42 U.S.C. §§ 1857-1858 (1970 & Supp. V 1975).

¹⁴³28 U.S.C. §§ 515-516 (1970 & Supp. V 1975); 42 U.S.C. § 1857h-3 (1970).

¹⁴⁴Interview with Michael Schaefer, Chief of the Environmental Division, Assistant Attorney General to Indiana Attorney General Theodore L. Sendak, in Indianapolis (June 15, 1977).

regularly attends meetings of the APCB and the SPCB.¹⁴⁵ Formal requests for legal action by the Attorney General may originate from the EMB, the APCB, the SPCB, or even from the EPA on referral.¹⁴⁶ In addition to environmental litigation, the Environmental Division also represents the Department of Mental Health, other State Board of Health agencies, and the Department of Natural Resources, resulting in a diverse spectrum of concurrent lawsuits.¹⁴⁷

Although this arrangement maintains a semblance of amicability, Indiana Attorney General Theodore L. Sendak has sparked a controversy over the statutory power of the EMB, the APCB, and the SPCB to employ their own attorneys.¹⁴⁸ Much of this confusion can be traced to statutory ambiguities in the Environmental Management Act which states that the EMB, the APCB, and the SPCB may "conduct . . . or participate in conferences or hearings . . . concerning any matter within the scope of the power and duties of the board or the appropriate agency"¹⁴⁹ Furthermore, they may "[p]roceed in . . . court . . . by appropriate action, to enforce any order of the . . . agency; to collect any penalties . . . ; or to procure . . . compliance with . . . any regulation or standard of the board or agencies."¹⁵⁰ In order to carry out the above duties, they may "[e]mploy or contract for such legal, professional, and other personnel . . . as may be necessary for efficient performance of duties imposed by this article."¹⁵¹

On first reading, these statutory excerpts would seem to give the aforementioned agencies power to employ their own legal counsel, except when read in the context of another statute which requires any agency hiring an attorney to first obtain the written consent of the Attorney General.¹⁵² Although the wording of this lat-

¹⁴⁵*Id.*

¹⁴⁶*Id.* The Division may also file an amicus curiae brief in an ongoing lawsuit where the state has an interest in the outcome of the suit, but is not a party thereto for jurisdictional reasons or lack of standing. In *U.S. Steel Corp. v. Train*, Nos. 73H-190 & 77H-212 (N.D. Ind. June 16, 1977) (consent decree entered), Indiana filed an amicus curiae brief in a suit involving a Gary plant where EPA had taken over enforcement and permit responsibilities for the Gary area.

¹⁴⁷Interview with Michael Schaefer, *supra* note 144.

¹⁴⁸Hoffman, *Water Control Program May Prove Illegal*, *The Indianapolis Star*, Sept. 16, 1975, at 7, col. 1.

¹⁴⁹IND. CODE § 13-7-5-1(f) (Burns 1973).

¹⁵⁰*Id.* § 13-7-5-1(l).

¹⁵¹*Id.* § 13-7-5-1(k).

¹⁵²"No agency . . . shall have any right to name, appoint, employ or hire any attorney, or special or general counsel to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney-general." *Id.* § 4-6-5-3 (Burns 1974).

ter statute could admittedly be interpreted as not covering the hiring of advisory or "in-house" attorneys, a 1953 Attorney General's Opinion invalidated an employment contract and forbade payment for services of such an attorney for another state agency.¹⁵³

Since the onset of the controversy in September 1975, no further action has been taken toward resolution,¹⁵⁴ perhaps indicating a softening of the Attorney General's stand on the issue to allow the hiring of agency attorneys as hearing officers and as legal advisors to review contracts, to draft regulations, and to advise the agency.

III. LOCAL ENVIRONMENTAL AGENCIES

A. *Indianapolis Air Pollution Control Division*

The Indianapolis Air Pollution Control Division (IAPCD) exemplifies the full range of responsibilities which can be assumed by a local agency from the state APCD, although other local air pollution control agencies may differ in their regulatory powers and unique pollution problems.

Although the IAPCD's parent agency is the Indianapolis Department of Public Works, the Division's budget is supplemented by EPA grants amounting to almost fifty percent of its total funding, and its personnel are trained in part at EPA seminars. The state APCB has delegated its enforcement power for the Indianapolis area to the IAPCD in a written contract which stipulates that the EPA can mandate changes in the local regulations.¹⁵⁵ The Division may also promulgate and enforce its own regulations, as long as they are more stringent than state and federal regulations.¹⁵⁶ Currently it has issued installation permits or operating certificates to approximately one thousand sources. The local laboratory and monitoring results are transmitted to an EPA computer in Texas which stores them for EPA use.¹⁵⁷

Local enforcement proceeds on one of three alternatives: (1) a court appearance to impose a fine for each violation; (2) an agreed order signed by the agency and the offender, providing for the installation of pollution abatement equipment and the offender's continued good faith; or (3) a default on an agreed order, resulting in a breach of contract suit. The agency feels considerable local pressure from the mayor, the media, neighborhood associations, and citizens'

¹⁵³[1953] IND. ATT'Y GEN. OP. 284.

¹⁵⁴Interview with Michael Schaefer, *supra* note 144.

¹⁵⁵Interview with James Elam, *supra* note 72.

¹⁵⁶IND. ADMIN. RULES & REG. § (13-7-10-1)-27 (Burns 1976).

¹⁵⁷Interview with James Elam, *supra* note 72.

groups. The latter two types of organizations can, if necessary, sue the IAPCD in a class action for nonenforcement of an agreed order if they can prove the occurrence of an illegal emission and an injury to the neighborhood or class members.¹⁵⁸

B. Marion County Health and Hospital Corporation

The Marion County Health and Hospital Corporation was established pursuant to the "Unigov" reorganization of the Indianapolis and Marion County governmental agencies in 1969.¹⁵⁹ The Corporation has the powers and responsibilities of a local health agency, including disease prevention and control, operation of hospital facilities, and related functions.¹⁶⁰

The Corporation's Bureau of Environmental Health is responsible for local food, housing, and sanitation. In particular, the Sanitation Branch has jurisdiction over sewage, solid waste disposal, and stream pollution control, coinciding with, and, in some cases, conflicting with state SPCB regulations.¹⁶¹ However, the major effort on the part of this agency is the regulation and surveillance of local sewer systems, water treatment plants, and land fill operations,¹⁶² under the mandate of county ordinances and regulations, which incorporate the SPCB's water quality standards by reference.¹⁶³ Although the Health and Hospital Corporation is technically an SPCB subsidiary, it receives no funding or internal directives from the SPCB.¹⁶⁴ The local prosecutor's office represents the Corporation in judicial proceedings, after the Corporation has investigated the violation and handled the hearing.¹⁶⁵

IV. THE DYNAMICS OF ENVIRONMENTAL ENFORCEMENT—CONCLUSION

Since the inception of strong environmental legislation during

¹⁵⁸*Id.*

¹⁵⁹The Unigov reorganization was accomplished pursuant to the Consolidated First-Class Cities and Counties Act, ch. 173, 1969 Ind. Acts 357 (now codified at IND. CODE §§ 18-4-1-1 to 18-4-24-25 (Burns 1974)).

¹⁶⁰IND. CODE §§ 16-12-21-22, -28 (Burns 1973).

¹⁶¹Interview with Robert S. Morse, *supra* note 110. The Indiana Attorney General has ruled that county governments have no power to enact air pollution control ordinances, but that they may enter into the field of local water pollution control. [1967] IND. ATT'Y GEN. OP. 430. Hence, the Indianapolis Air Pollution Control Division is under the auspices of the municipal government, while the Marion County Health & Hospital Corporation is a separate county-based corporation.

¹⁶²Interview with Robert S. Morse, *supra* note 110.

¹⁶³Marion County, Ind., Ordinance 6-1960, § 3 (Sept. 12, 1960) (incorporating by reference SPC 1R3, IND. ADMIN. RULES & REG. § (13-7-10-3)-24 (Burns 1976)). See text accompanying notes 112-118 *supra*.

¹⁶⁴Interview with Robert S. Morse, *supra* note 110.

¹⁶⁵*Id.*

the environmentally-concerned 1960's, the country's environmental conscience has been compromised by a severe recession and an energy crisis. The freewheeling economy of the 1960's has given rise to the tight-fisted 1970's, leaving this nation's populace to ponder whether the price we now pay in dollars and cents to abate pollution is on par with the price we will otherwise pay for environmental damage to person and property. Statistics now estimate that "as much as 8 to 21 percent of major U.S. industry capital expenditures in recent years has been for pollution control."¹⁶⁶ Without much statistical expertise, one realizes that these "capital expenditures" have been passed on to the consumer in the form of price increases, contributing to the inflationary trend.

The current situation leaves the state environmental agencies in a curious balancing predicament. In some instances, the state agency's formulation of its implementation plan and accompanying regulations becomes a tug-of-war between industry representatives and environmentalists, both parties holding their hard-line positions, neither willing to face the real dilemmas of environmental law. One dilemma is painfully clear to consumers who are indignant at industry's asserted right to use the air and water of their community as a convenient waste disposal system. When the cost to abate these practices comes out of the consumers' pockets in higher prices, fewer jobs, and possibly even industry shutdowns, the consumers soon clamor for less stringent regulations.

The other dilemma belongs to the administrator who wishes to follow the dictates of his agency's legislative mandate, but fears that burgeoning industry, labor, and municipal pressure may persuade the legislature to dilute the agency's powers if the agency enforces its mandate too stringently. Thus, the administrator becomes a crusader, not for the environment, but for the survival of his own agency. The legislature's susceptibility to pressure by big business forces the agency to change its "battle plan" from that of an offensive campaign against pollution sources to a defensive justification of its own existence. This further reduction in effectiveness leaves the agency open to valid criticism by environmentalists concerning its inability to devote its undivided attention to pollution abatement. Similarly, some local agencies are reluctant to fly in the face of strong community sentiment, especially in the light of rising unemployment and an energy crisis. The crux of these agencies' dilemma lies not in their organization or statutory mandate, but in the political system under which they were created.

¹⁶⁶Weston, *A Current Evaluation of Environmental Goals in the United States*, in FIFTH ANNUAL ENVIRONMENTAL SYMPOSIUM, CENTRAL INDIANA TECHNICAL SOCIETIES 33, 37 (1976).

The issues pertaining to state and local environmental enforcement are not brought into full focus without considering the federal role in pollution abatement. Numerous sources have criticized Congress' statutory dilution of an effective pollution control scheme, as well as its vacillating commitment on crucial pollution abatement issues. These practices have lent support to industry's reluctance to commit substantial capital resources to the goal of complying with federal pollution standards, some of which may have been eased by the time compliance is achieved. Industry compliance has been further retarded by the contradictions and contortions of a multilevel, overlapping permit system, for which the agencies have only themselves to blame. A little consistency and stability in the overall regulatory scheme would greatly contribute to positive environmental change.

Additional problems arise from the demands of EPA policies in general. Occasionally a state agency expends so much effort meeting EPA standards that it overlooks some local trouble spots. For example, a recent lead oxide contamination in the Indianapolis area took place principally because the EPA had not yet set air quality standards for that pollutant.¹⁶⁷ An agency attorney suggests that the EPA would be more valuable to the states in researching and advising the best method by which to bring specific industries into compliance, rather than mandating the pollution standard to be met without further guidance as to the most feasible method of abatement.¹⁶⁸

Because of their dual dependence on federal as well as state funding,¹⁶⁹ the state environmental protection agencies may find themselves being drawn in diverse directions by state and federal pursestrings. Moreover, the EPA has the power to disapprove a state implementation plan, withdraw federal funding, and reinstate or initiate federal enforcement of the original EPA regulatory scheme.¹⁷⁰ Unlike the state agencies, the enforcement measures instituted by the EPA must be formulated without considering the economic cost and the technological feasibility of the required abatement methods.¹⁷¹ Such a loss of state control in enforcement alternatives and the shift in enforcement responsibility to the EPA are so undesirable that both the state and federal officials strive to avoid the necessity of EPA enforcement, except in problem areas

¹⁶⁷Interview with James Elam, *supra* note 72.

¹⁶⁸Interview with Mark S. Maxwell, *supra* note 19.

¹⁶⁹See note 9 *supra* and accompanying text.

¹⁷⁰33 U.S.C. § 1342(c) (Supp. V 1975); 42 U.S.C. § 1857c-6 (1970).

¹⁷¹See *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) (construing Clean Air Act Amendments of 1970, § 110(a)(2)(A) to (H), 42 U.S.C. § 1857c-5(a)(2)(A) to (H) (1970)).

where federal intervention is the only effective means of control.¹⁷²

Although environmental enforcement has progressed considerably since the days of private civil litigation in nuisance theory, its statutory evolution is not yet complete. Federal, state, and local agencies are faced with the unenviable task of resolving the regulatory inconsistencies which currently hinder enforcement efforts. In particular, Indiana's recent environmental protection legislation has given rise to a segmentation of enforcement responsibilities between several state agencies, as well as a split in the investigative and the litigational powers. As with any newly designed strategy, several aspects of the system still require fine-tuning and revision by the agencies and the legislature in order to bring environmental enforcement into line with the lofty ideals of its conception.

CHRISTINA L. KUNZ

¹⁷²For example, the Gary-East Chicago area is now under the exclusive jurisdiction of the EPA Region V office in Chicago. Interview with Mark S. Maxwell, *supra* note 50.