

## Environmental Law — Legislative Developments

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### I. PUBLIC LAW 143-1985

The most important development in Indiana environmental legislation in 1984-85 was the passage of Public Law 143-1985, the new Environmental Management Act (the "Act").<sup>1</sup> The Act reorganizes Indiana's environmental regulation programs<sup>2</sup> and creates the Department of Environmental Management as the state agency specifically charged with protection of the environment.<sup>3</sup>

Impetus for the new Act came from the Indiana Environmental Policy Commission (the "Commission"). The Governor created this Commission in 1983 and charged it with the duty to study Indiana's environmental policies and programs and to recommend comprehensive, long-term policies "to assure the protection of public health as well as a healthy competitive business climate."<sup>4</sup> The seven-member Commission included two representatives of environmental interests, two industrial representatives, and three members at large.<sup>5</sup> The Commission heard testimony over an eight-month period on four topics: organization and

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<sup>1</sup>Pub. L. No. 143-1985 (primarily codified in scattered sections of IND. CODE Tit. 13 (Supp. 1985)).

<sup>2</sup>Indiana's environmental programs regulate air, water, and land pollution. See generally IND. CODE §§ 13-1-1-1 to -11 (1982 & Supp. 1985) concerning air pollution control, IND. CODE §§ 13-1-3-1 to -17 (1982 & Supp. 1985) concerning water pollution control, and IND. CODE §§ 13-7-4-1(c), (d), and (g), and 13-7-10-1 (Supp. 1985) concerning land pollution control. The land pollution control program governs the management of solid (non-hazardous) and hazardous wastes. See 330 IND. ADMIN. CODE 4-1-1 to 4-9-5 (1985) and 320 IND. ADMIN. CODE 4.1-1-1 to 4.1-56-3 (promulgated at 8 Ind. Reg. 1721 (1985)), which govern solid and hazardous waste management respectively.

<sup>3</sup>See Pub. L. No. 143-1985, § 96 (codified at IND. CODE § 13-7-2-11 (Supp. 1985)). See also Pub. L. No. 143-1985, §§ 101-110 (codified at IND. CODE §§ 13-73-3-3 to -13 (Supp. 1985)), which sets forth the Department's authority and duties.

<sup>4</sup>Exec. Order No. 16-83, 7 Ind. Reg. 248-49 (1983).

<sup>5</sup>*Id.* See also INDIANA ENVIRONMENTAL POLICY COMMISSION, FINAL REPORT TO GOVERNOR ROBERT D. ORR AND THE INDIANA GENERAL ASSEMBLY 2-3 (Dec. 1, 1984) [hereinafter cited as FINAL REPORT].

management of state environmental functions, funding, state environmental policy, and public awareness and participation.<sup>6</sup>

### A. Background for the Changes

In 1943, the Stream Pollution Control Board was delegated authority to reduce pollution of Indiana's surface waters.<sup>7</sup> In 1961, the Air Pollution Control Board was created and was assigned the task of regulating air pollution.<sup>8</sup> The General Assembly created the Environmental Management Board in 1972 to oversee the Stream and Air Boards and to administer overall environmental policies in the state.<sup>9</sup> The Environmental Management Board later acquired jurisdiction over solid waste management.<sup>10</sup>

Responsibility for executing the tasks assigned the three boards was placed on the State Board of Health. At present, the Indiana State Board of Health is responsible for providing staff services to the Air Board, the Stream Board, and the Environmental Management Board.<sup>11</sup>

The Commission determined, however, that the growing burden on the existing environmental boards resulting from the increasing technical complexity of environmental issues and the increased national and local concern regarding environmental issues required that a new system of environmental regulation be developed for the mid-eighties and beyond.<sup>12</sup> It found that establishing a separate agency, with its own budget,<sup>13</sup> to manage the state's environmental programs would best redress the deficiencies in the current system.<sup>14</sup>

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<sup>6</sup>*Id.* at 3-4.

<sup>7</sup>1943 Ind. Acts 624.

<sup>8</sup>1961 Ind. Acts 380.

<sup>9</sup>1972 Ind. Acts 555.

<sup>10</sup>In 1972 the legislature transferred responsibility for solid waste regulation from the State Board of Health to the Environmental Management Board. See 1972 Ind. Acts 555, 563-64.

<sup>11</sup>FINAL REPORT at 5.

<sup>12</sup>See *id.* at 10.

<sup>13</sup>*Id.* at 10-11. Funding to carry out the provisions of the new Environmental Management Act, with one exception, is provided through appropriations to the Department of Environmental Management. Pub. L. No. 143-1985, § 178 (codified at IND. CODE § 13-7-18-1(a) (Supp. 1985)). Funding for the purposes of IND. CODE §§ 13-7-14-1 to -5 (Supp. 1985), concerning public water supplies, is provided through appropriations to the State Board of Health. Pub. L. No. 143-1985, § 178 (codified at IND. CODE § 13-7-18-1(b) (Supp. 1985)).

<sup>14</sup>FINAL REPORT at 10. The Commission concluded that because present environmental staff are located within the structure of the Indiana State Board of Health, the environmental programs must compete with the public health functions of seven other bureaus to secure adequate staff classifications, funding, and resources. *Id.* at 13. It further found that the general assembly does not have adequate opportunity to address the environmental programs as a distinct entity when evaluating budget requests. *Id.*

### B. Changes Effected by the New Act

The new Act removes the existing environmental programs from the Indiana State Board of Health and places them under the supervision of the new Department of Environmental Management (the "Department"), which is intended to have exclusive responsibility for environmental matters.<sup>15</sup> The new Act also makes several changes in the environmental boards. The Environmental Management Board will no longer serve as an umbrella board with responsibility for reviewing and approving the actions of the Air and Stream Pollution Control Boards. The Environmental Management Board will instead become the Solid Waste Management Board and continue, as its sole responsibility, implementation of the solid and hazardous waste management programs.<sup>16</sup>

The Air and Water<sup>17</sup> Pollution Control Boards will maintain authority for their traditional regulatory programs.<sup>18</sup> Under the new Act, however, the functions of all three boards are limited to establishing policy, rulemaking, and considering appeals from certain actions taken by the Department's representatives.<sup>19</sup> The Act makes clear that rulemaking is to be carried out by the boards pursuant to the provisions of Indiana's administrative rulemaking statute, Indiana Code chapter 4-22-2.<sup>20</sup>

The new Act makes some changes in board membership, including the addition of a representative of environmental interests to each of the boards.<sup>21</sup> The Secretary of the Indiana State Board of Health and

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<sup>15</sup>See Pub. L. No. 143-1985, §§ 101-10 (codified at IND. CODE §§ 13-7-3-3 to -13 (Supp. 1985)).

<sup>16</sup>Pub. L. No. 143-1985, § 49 (codified at IND. CODE §§ 13-1-12-1 to -8 (Supp. 1985)).

<sup>17</sup>The Stream Pollution Control Board was renamed the Water Pollution Control Board by the new Act. See Pub. L. No. 143-1985, § 12 (codified at IND. CODE § 13-1-3-1 (Supp. 1985)).

<sup>18</sup>See, e.g., Pub. L. No. 143-1985, § 1 (codified at IND. CODE § 13-1-1-1 (Supp. 1985)) (the Air Pollution Control Board shall safeguard the air resource through prevention, abatement, and control of air pollution); Pub. L. No. 143-1985, § 16 (codified at IND. CODE § 13-1-3-4 (Supp. 1985)) (the Water Pollution Control Board shall adopt rules for the control and prevention of water pollution).

<sup>19</sup>See, e.g., Pub. L. No. 143-1985, §§ 1-11 (codified at IND. CODE §§ 13-1-1-1 to -11 (Supp. 1985)) (setting forth the air pollution regulation duties and powers of the Air Pollution Control Board, Department of Environmental Management, and Commissioner of the Department); Pub. L. No. 143-1985, §§ 15-40 (codified at IND. CODE §§ 13-1-3-3 to -17, 13-1-4-1 to -3, 13-1-5-1 to -2, 13-1-5.5-3 to -6, and 13-1-5.7-1 to -6 (Supp. 1985)) (setting forth the water pollution regulation duties and powers of the Water Pollution Control Board, Department, and Commissioner); Pub. L. No. 143-1985, §§ 49, 129-34 (codified at IND. CODE §§ 13-1-12-1 to -8, 13-7-8.5-1 to -9 (Supp. 1985)) (setting forth the land pollution regulation duties and powers of the Solid Waste Management Board, Department, and Commissioner).

<sup>20</sup>Pub. L. No. 143-1985, § 126 (codified at IND. CODE § 13-7-7-5 (Supp. 1985)).

<sup>21</sup>See Pub. L. No. 143-1985, § 3 (codified at IND. CODE § 13-1-1-3 (Supp. 1985)) (establishing the membership of the Air Pollution Control Board); Pub. L. No. 143-1985, § 14

the Director of the Department of Natural Resources will both maintain their roles as *ex officio* voting members of each board to assure coordination between public health and natural resource objectives.<sup>22</sup>

The Act also creates the new office of Commissioner to assume primary responsibility for carrying out environmental objectives, with the boards being the primary entities for establishing state policy.<sup>23</sup> Now, each board has its own technical secretary.<sup>24</sup> According to the new Act, the Commissioner or his designee will serve as the technical secretary of each board to assure coordination among the different regulatory areas of air, water, and solid waste management.<sup>25</sup> The Commissioner and the Department have the duty and power to carry out the adjudicatory provisions of the Act, including making investigations, issuing enforcement orders, and holding hearings with respect to suspected violations.<sup>26</sup>

The Department begins to function July 1, 1986, but the law allows the Governor to initiate action prior to that date pursuant to executive order.<sup>27</sup> The law requires that the Governor appoint the Commissioner, which he has done.<sup>28</sup> The Commissioner will appoint the directors of the air pollution control, water pollution control, and solid waste management divisions, and the director of public affairs of the Department.<sup>29</sup> The Governor will also appoint six members of the Air Pollution Control Board, six members of the Water Pollution Control Board, and six members of the Solid Waste Management Board, who will all take office on July 1, 1986.<sup>30</sup>

Among items of particular interest are permit issuance procedures, which are clarified in the new Act. Indiana Code section 13-7-10-1 has been

(codified at IND. CODE § 13-1-3-2 (Supp. 1985)) (establishing the membership of the Water Pollution Control Board); Pub. L. No. 143-1985, § 49 (codified at IND. CODE § 13-1-12-6 (Supp. 1985)) (establishing the membership of the Solid Waste Management Board).

<sup>22</sup>See IND. CODE §§ 13-1-1-3, 13-1-3-2, and 13-1-12-6 (Supp. 1985).

<sup>23</sup>Pub. L. No. 143-1985, § 97 (codified at IND. CODE § 13-7-2-12 (Supp. 1985)).

<sup>24</sup>See IND. CODE § 13-1-1-3 (1982) regarding appointment of a technical secretary to the Air Pollution Control Board, IND. CODE § 13-1-3-3 (1982) regarding appointment of a technical secretary to the Stream Pollution Control Board, and IND. CODE § 13-7-2-2(b) (1982) regarding appointment of a technical secretary to the Environmental Management Board.

<sup>25</sup>Pub. L. No. 143-1985, § 3 (codified at IND. CODE § 13-1-1-3(e) (Supp. 1985)); Pub. L. No. 143-1985, § 15 (codified at IND. CODE § 13-1-3-3(b) (Supp. 1985)); Pub. L. No. 143-1985, § 49 (codified at IND. CODE § 13-1-12-7(b) (Supp. 1985)).

<sup>26</sup>See, e.g., Pub. L. No. 143-1985, §§ 4 and 8 (codified at IND. CODE §§ 13-1-1-4 and 13-1-1-8 (Supp. 1985)) (concerning air pollution control).

<sup>27</sup>Pub. L. No. 143-1985, § 208 (a non-code section).

<sup>28</sup>The governor appointed Nancy A. Maloley to that position on July 19, 1985. Indianapolis Star, July 20, 1985, at 35, col. 3.

<sup>29</sup>See Pub. L. No. 143-1985, § 97 (codified at IND. CODE § 13-7-2-12 (Supp. 1985)) authorizing the Commissioner to make appointments to other positions in the Department.

<sup>30</sup>Pub. L. No. 143-1985, § 210 (a non-code section).

amended to provide that each board establish requirements and procedures for the issuance of permits.<sup>31</sup> While the rules the boards must follow in the issuance of permits must be adopted under Indiana's administrative rulemaking statute,<sup>32</sup> the permit issuance procedures do not, with one exception,<sup>33</sup> require adherence to Indiana's Administrative Adjudication Act (the "AAA").<sup>34</sup> Rather, consistent with the Indiana Supreme Court's holding in *State ex rel. Calumet National Bank v. McCord*<sup>35</sup> and the Indiana Court of Appeals' holding in *Indiana Environmental Management Board v. Town of Bremen*,<sup>36</sup> Indiana Code section 13-7-10-2.5, a new provision, prescribes permit issuance procedure.<sup>37</sup>

In response to applications for original or renewal permits, the Commissioner must, if required by statute, or may, if not so required, publish a notice requesting comments concerning the issuance or denial of the permit.<sup>38</sup> If requested by a member of the public, the Commissioner may hold a public hearing in the geographical area affected by the permit. After the comment period, or if a public hearing is held, after the public hearing, the Commissioner will issue the permit or deny the permit application.<sup>39</sup> Ordinarily, the Commissioner's action is effective immediately.<sup>40</sup>

Notice of the Commissioner's action on the permit application must be served upon the permit applicant, each person who submitted written comments with respect to the permit, and each person who requested notice of the permit determination.<sup>41</sup> Under some circumstances, the Commissioner may publish notice of the action on the permit in a newspaper of general circulation in the county affected by the proposed permit.<sup>42</sup>

Within fifteen days after receiving the notice of the permit issuance or denial, the permit applicant or "any other person aggrieved by the

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<sup>31</sup>Pub. L. No. 143-1985, § 147 (codified at IND. CODE § 13-7-10-1 (Supp. 1985)).

<sup>32</sup>*Id.*

<sup>33</sup>See *infra* text accompanying notes 50-51.

<sup>34</sup>Pub. L. No. 143-1985, § 147 (codified at IND. CODE § 13-7-10-1 (Supp. 1985)).

The new Act also clarifies the procedure for obtaining variances from rules adopted by a board by declaring that all proceedings under IND. CODE § 13-7-7-6, the variance provision, "are governed by IC 4-22-1," the Indiana Administrative Adjudication Act. Pub. L. No. 143-1985, § 127 (codified at IND. CODE § 13-7-7-6 (Supp. 1985)).

<sup>35</sup>243 Ind. 626, 189 N.E.2d 583 (1963).

<sup>36</sup>458 N.E.2d 672 (Ind. Ct. App. 1984), *transfer denied*, May 3, 1984.

<sup>37</sup>Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(a) (Supp. 1985)).

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* (codified at IND. CODE § 13-7-10-2.5(b) (Supp. 1985)).

<sup>40</sup>The Commissioner's action is effective immediately unless he or she states otherwise in writing. Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(b) (Supp. 1985)).

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

commissioner's action" may appeal the Commissioner's action to the appropriate board and request that the board hold an adjudicatory hearing concerning that action.<sup>43</sup> Thus, all pre-issuance procedures are carried out under the law relating to the particular board and not under the AAA. Following the issuance or denial of the permit, the appeal of that issuance or denial is carried out under the AAA.<sup>44</sup>

Any written request for an adjudicatory hearing must, among other things, state with particularity the reason for the request and the issues proposed for consideration at the requested hearing. The written request must further identify the permit terms and conditions which, in the judgment of the person making the request, would be appropriate to satisfy the requirements of the law governing permits of the type granted or denied by the Commissioner.<sup>45</sup> In addition, "any person aggrieved by the revocation or modification of a permit [as opposed to the issuance or denial of a permit] may appeal the revocation or modification" under the AAA.<sup>46</sup> Pending the decision on the appeal, the permit remains in force.<sup>47</sup> However, the new Act empowers the commissioner to seek injunctive relief with regard to the activity authorized in the permit while the decision on the revocation or modification appeal is pending.<sup>48</sup>

One exception to the general permitting provision of the new Act is the issuance of permits for public water supplies.<sup>49</sup> Indiana Code section 13-7-14-1 provides that in determining whether to issue a permit for a public water supply, the State Board of Health, not the Department, will proceed under the AAA, not under the rules of the Board.<sup>50</sup> Revocation and modification of permits for public water supplies are also handled by the State Board of Health.<sup>51</sup>

Other changes in the new Act include section 159, which amends Code section 13-7-13-1 to make it a Class C infraction for a person "to obstruct, delay, resist, prevent or interfere" with the Department and its personnel or "designated agent" in the performance of an inspection or investigation conducted pursuant to a Indiana Code section 13-7-5-3.<sup>52</sup> Section 13-7-5-3 is a new provision which allows the Department's designated agent to enter upon private or public property to investigate "possible violations" of the Act or of any of the boards' rules.<sup>53</sup>

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<sup>43</sup>*Id.* (codified at IND. CODE § 13-7-10-2.5(c) (Supp. 1985)).

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* (codified at IND. CODE § 13-7-10-2.5(d) (Supp. 1985)).

<sup>46</sup>Pub. L. No. 143-1985, § 150 (codified at IND. CODE § 13-7-10-5(b) (Supp. 1985)).

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>Pub. L. No. 143-1985, § 162 (codified at IND. CODE § 13-7-14-1 (Supp. 1985)).

<sup>50</sup>*Id.* (codified at IND. CODE § 13-7-14-1(b) (Supp. 1985)).

<sup>51</sup>*Id.* (codified at IND. CODE § 13-7-14-1(c) (Supp. 1985)).

<sup>52</sup>Pub. L. No. 143-1985, § 159 (codified at IND. CODE § 13-7-13-1 (Supp. 1985)).

<sup>53</sup>Pub. L. No. 143-1985, § 114 (codified at IND. CODE § 13-7-5-3 (Supp. 1985)). War-

Code section 2-5-4-6 is added by the new Act to create a permanent Indiana Environmental Policy Commission.<sup>54</sup> The twelve-member policy commission is charged with the duty to consider long-term environmental policy matters and to undertake an ongoing evaluation of the total environmental program of the state of Indiana.<sup>55</sup> The Commission's members will be divided among political parties and between representation of environmental and economic interests.<sup>56</sup>

Because the new Act was considered an emergency provision, section 212 provides that two other sections,<sup>57</sup> which concern the designation of air quality standard attainment and non-attainment areas,<sup>58</sup> take effect upon the Act's passage.<sup>59</sup> All other sections of the new Act, with the exception of section 179, which creates the Indiana Environmental Policy Commission,<sup>60</sup> are effective on July 1, 1986.<sup>61</sup> Section 208 provides for implementation of the provisions of the Act that transfer functions from the Environmental Management Board and the staff of the State Board of Health to the Department of Environmental Management, State Board of Health, and the Solid Waste Management Board.<sup>62</sup> The transfer of

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rantless searches, however, are generally unreasonable under the fourth amendment. *See, e.g.,* *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). This rule applies to commercial premises as well as homes, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-13 (1978), and to searches by agents of the state, *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>54</sup>Pub. L. No. 143-1985, § 179 (codified at IND. CODE § 2-5-4-6 (Supp. 1985) (effective July 1, 1987)).

<sup>55</sup>*Id.* (codified at IND. CODE § 2-5-4-6(b) (Supp. 1985)).

<sup>56</sup>*Id.* (codified at IND. CODE § 2-5-4-6(a) (Supp. 1985)).

<sup>57</sup>Pub. L. No. 143-1985, § 5 (codified at IND. CODE § 13-1-1-5 (Supp. 1985)); Pub. L. No. 143-1985, § 211 (a non-code section).

<sup>58</sup>The Air Pollution Control Board can classify certain geographic regions within the state as having attained or not attained ambient air quality standards for regulated pollutants. *See* IND. CODE § 13-1-1-5 (Supp. 1985).

<sup>59</sup>Pub. L. No. 143-1985, § 212 (a non-code section).

In *Indiana Air Pollution Control Board v. City of Richmond*, 457 N.E.2d 204 (Ind. 1983), the Indiana Supreme Court held void the Air Pollution Control Board's designation of counties and sub-county areas as having attained or not attained ambient air quality standards. The court so held because the Board had improperly followed state rulemaking procedures rather than proceeding under the adjudicatory procedures of the AAA in arriving at the designations. *See id.* at 206-07. Pub. L. No. 143-1985, § 5, specifies that a rulemaking under the state's general rulemaking statute (IND. CODE §§ 4-22-2-3 and 4-22-2-13 to -44 (Supp. 1985)) is the procedure by which the Air Pollution Control Board should make such attainment/non-attainment designations, rather than by adjudication under the AAA as the Indiana Supreme Court held. Pub. L. No. 143-1985, § 211 (a non-code section), in turn validates the administrative rule invalidated by the court in *City of Richmond*, 325 IND. ADMIN. CODE 1.1-3-1 to -6 (1984). The new law states that the Air Pollution Control Board may enforce this regulation as if it had been adopted under IND. CODE § 13-1-1-5 as amended in 1985. Pub. L. No. 143-1985, § 211(a).

<sup>60</sup>Pub. L. No. 143-1985, § 179 (codified at IND. CODE § 2-5-4-6 (Supp. 1985) (effective July 1, 1987)).

<sup>61</sup>Pub. L. No. 143-1985, § 212 (a non-code section).

<sup>62</sup>Pub. L. No. 143-1985, § 208 (a non-code section).

functions effected under the new Act is delayed until October 1, 1986, or the date on which the Governor, by executive order, finds that the Department of Environmental Management and the Solid Waste Management Board are capable of assuming the functions transferred to them under the new Act, whichever date occurs first.<sup>63</sup>

## II. PUBLIC LAW 120-1985

Public Law 120-1985 repeals two Indiana Code sections that established air pollution control requirements and maximum noise limits for the exhaust systems of motor vehicles.<sup>64</sup> In place of these provisions, new Indiana Code section 9-8-6-36.6 establishes a general requirement that all motor vehicles be equipped with a muffler free from "visually discernible" leaks, alterations, or deterioration of muffler elements.<sup>65</sup> Motor vehicles, except antique motor vehicles registered under code section 9-7-6-2, must be equipped with a muffler or "other noise dissipating device" in good working order and in constant operation to prevent excessive noise.<sup>66</sup> Omitted from the new law are the specific maximum noise limits, measured in decibels as a function of vehicle size and traveling speed, set forth in repealed section 9-8-6-36.5.<sup>67</sup> In the same manner as prohibited by the repealed code section 9-8-6-36, the new law specifically outlaws muffler cutouts, bypass pipes, and similar devices.<sup>68</sup> The new law continues the prior law's requirement that engines and power mechanisms be equipped and adjusted to prevent excessive fumes or smoke.<sup>69</sup>

## III. PUBLIC LAW 144-1985

Public Law 144-1985 extensively revises and expands the emergency regulation of the underground water rights established by Indiana Code chapter 13-2-2.5.<sup>70</sup> While the original provisions of the law were applicable only to Jasper and Newton Counties,<sup>71</sup> the new law expands the scope of chapter 2.5 to all counties in the state.<sup>72</sup> The new law also repeals

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<sup>63</sup>*Id.*

<sup>64</sup>Pub. L. No. 120-1985, § 2, repealed IND. CODE §§ 9-8-6-36 and 9-8-6-36.5 (1982).

<sup>65</sup>Pub. L. No. 120-1985, § 1 (codified at IND. CODE § 9-8-6-36.6(b) (Supp. 1985)).

<sup>66</sup>*Id.* (codified at IND. CODE § 9-8-6-36.6(c) (Supp. 1985)).

<sup>67</sup>IND. CODE § 9-8-6-36.5 (1982). For example, the maximum noise limit for a 7,000 pound vehicle traveling over 35 miles per hour was 90 decibels on the A scale. *Id.*

<sup>68</sup>Pub. L. No. 120-1985, § 1 (codified at IND. CODE § 9-8-6-36.6(d) (Supp. 1985)).

<sup>69</sup>*Id.* (codified at IND. CODE § 9-8-6-36.6(e) (Supp. 1985)).

<sup>70</sup>IND. CODE §§ 13-2-2.5-1 to -9 (1982), amended by Pub. L. No. 144-1985, §§ 1-7 (codified at IND. CODE §§ 13-2-2.5-2, -3, -6, and -9 to -12 (Supp. 1985)).

<sup>71</sup>See IND. CODE § 13-2-2.5-3 (1982).

<sup>72</sup>See Pub. L. No. 144-1985, § 2 (codified at IND. CODE § 13-2-2.5-3 (Supp. 1985)).

the exception contained in Indiana Code section 13-2-2.5-7,<sup>73</sup> thereby making chapter 2.5 applicable to the state and its political subdivisions.<sup>74</sup>

The definitions in Indiana Code section 13-2-2.5-2 are expanded, including the definition of "nonsignificant" and "significant" groundwater withdrawal facilities.<sup>75</sup> A "nonsignificant groundwater withdrawal facility" has a withdrawal capacity of less than 100,000 gallons of water in one day.<sup>76</sup> The Director of the Department of Natural Resources is given the power to investigate the impairment of nonsignificant groundwater withdrawal facilities by the activities of significant groundwater withdrawal facilities.<sup>77</sup> Under the new law, the Director of the Department of Natural Resources may, by temporary order, declare a groundwater emergency and restrict the quantity of water that may be extracted from a significant groundwater withdrawal facility.<sup>78</sup> The temporary order will be in effect until a hearing conducted pursuant to Indiana Code section 4-22-1-5<sup>79</sup> can be held.<sup>80</sup> The sanction for violation of chapter 2.5 is increased from a Class B to a Class A infraction, and the new law provides that the Commission may, without proof of irreparable injury, maintain an action to enjoin violations.<sup>81</sup>

The new law also requires that the owner of a significant groundwater withdrawal facility provide timely and reasonable compensation to the owners of nonsignificant groundwater withdrawal facilities in the event of a failure or substantial impairment of those facilities caused by groundwater withdrawals from the significant groundwater withdrawal facility, provided that the nonsignificant groundwater withdrawal facility, if constructed after December 31, 1985, conforms to the recommended guidelines of the Department of Natural Resources issued pursuant to Indiana Code section 13-2-2.5.<sup>82</sup> Timely and reasonable compensation has two components: first, the immediate temporary provision of an adequate supply of potable water at the prior point of use, and second, one of three alternative measures intended either to restore the capacity of the nonsignificant withdrawal facility or to provide a permanent alternative

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<sup>73</sup>This exception provided that IND. CODE §§ 13-2-2.5-1 to -9 (1982) did not apply to the state or its political subdivisions. IND. CODE § 13-2-2.5-7 (1982).

<sup>74</sup>See Pub. L. No. 144-1985, § 8 (a non-code section), *repealing* IND. CODE § 13-2-2.5-7 (1982).

<sup>75</sup>Pub. L. No. 144-1985, § 1 (codified at IND. CODE § 13-2-2.5-2 (Supp. 1985)).

<sup>76</sup>*Id.*

<sup>77</sup>Pub. L. No. 144-1985, § 2 (codified at IND. CODE § 13-2-2.5-3(a) (Supp. 1985)).

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* The statute under which the hearing must be held is one provision in the AAA. IND. CODE § 4-22-1-5 (Supp. 1985).

<sup>80</sup>Pub. L. No. 144-1985, § 2 (codified at IND. CODE § 13-2-2.5-3(a) (Supp. 1985)).

<sup>81</sup>Pub. L. No. 144-1985, § 4 (codified at IND. CODE § 13-2-2.5-9 (Supp. 1985)).

<sup>82</sup>Pub. L. No. 144-1985, § 5 (codified at IND. CODE § 13-2-2.5-10(a) (Supp. 1985)).

potable supply of an equal quantity at the point of use.<sup>83</sup> If an owner of an affected nonsignificant groundwater withdrawal facility refuses to accept the compensation prescribed in the new law, the Department of Natural Resources may terminate an order imposing any restrictions on the significant groundwater withdrawal facility.<sup>84</sup>

The new law also provides that after December 31, 1985, all owners of new nonsignificant groundwater withdrawal facilities who wish to be protected by the new law must construct their facilities in conformity with the Department of Natural Resources' guidelines.<sup>85</sup> The law also imposes a duty on licensed water-well drilling contractors and plumbing contractors to advise the owner of a new nonsignificant groundwater withdrawal facility of the provisions of chapter 2.5.<sup>86</sup>

#### IV. PUBLIC LAW 88-1985

Public Law 88-1985 provides incentives for Indiana's electric utilities to use Indiana coal to fuel power plants, primarily by assuring that the Public Service Commission will allow timely recovery of air pollution control compliance costs involved in the use of Indiana coal.<sup>87</sup> A new Indiana Code section 8-1-2-6.1 requires the Public Service Commission to recognize costs associated with an electric utility's research and development efforts concerning increased use of Indiana coal.<sup>88</sup> These research and development costs will be an allowable operating expense of the electric utility to be recovered in consumer rates for electric service.<sup>89</sup> Because the major impediments to use of Indiana coal from the Illinois Basin relate to sulfur and ash content, most of this research and development will focus on techniques and technologies for diminishing the adverse environmental consequences of burning such coal.

Perhaps the most noteworthy provision of the new law is Indiana Code section 8-1-2-6.6, which requires the Public Service Commission to allow Construction Works in Progress (CWIP) for "qualified pollution control property" constructed by an electric utility after October 1, 1985.<sup>90</sup> "Qualified pollution control property" is defined as an air pol-

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<sup>83</sup>*Id.* (codified at IND. CODE § 13-2-2.5-10(b) (Supp. 1985)).

<sup>84</sup>*Id.* (codified at IND. CODE § 13-2-2.5-10(c) (Supp. 1985)).

<sup>85</sup>Pub. L. No. 144-1985, § 7 (codified at IND. CODE § 13-2-2.5-12(a) (Supp. 1985)).

<sup>86</sup>*Id.* (codified at IND. CODE § 13-2-2.5-12(b) (Supp. 1985)).

<sup>87</sup>Pub. L. No. 88-1985 (codified at IND. CODE §§ 8-1-2-6.1, -6.6, -29, -42.5, and -61.5, and IND. CODE §§ 8-1-8.5-2 to -6 (Supp. 1985)).

<sup>88</sup>Pub. L. No. 88-1985, § 1 (codified at IND. CODE § 8-1-2-6.1 (Supp. 1985)).

<sup>89</sup>*Id.*

<sup>90</sup>Pub. L. No. 88-1985, § 2 (codified at IND. CODE § 8-1-2-6.6(b) (Supp. 1985)). Normally, an electric utility may only earn a return on equipment that is in service. See IND. CODE § 8-1-2-6 (1982), which states that the Indiana Public Service Commission shall, for ratemaking purposes, value public utility property that is actually used and useful. Therefore,

lution control device on a coal burning electric generating facility that has been approved for use by the Public Service Commission, that meets applicable state or federal requirements, and that is designed to accommodate the burning of coal from the Illinois Basin.<sup>91</sup> To qualify for CWIP treatment of pollution control property, the utility must establish that the subject generating facility will burn only Indiana coal as its primary fuel source once the air pollution control device is operational or "that the utility is justified because of economic considerations or governmental requirements in utilizing some non-Indiana coal."<sup>92</sup> The Public Service Commission is given authority to adopt rules to implement the new section.<sup>93</sup>

Following a recommendation of Governor Orr's study committee on utility issues, section thirteen of the new law adds a non-code provision requiring the Public Service Commission to study and develop proposals concerning the feasibility of implementing a statewide system of electrical power pooling with economic dispatch.<sup>94</sup> One of the specific areas to be studied by the Commission concerns the impact this pooling would have on sulfur dioxide emission levels.<sup>95</sup> The Commission's report was due on or before December 15, 1985.<sup>96</sup>

#### V. PUBLIC LAW 78-1985

Public Law 78-1985 amends Indiana Code chapter 6-6-6.6 to provide substantial increases in the hazardous waste disposal tax and to provide new requirements for the allocation and use of these tax funds.<sup>97</sup> Although the maximum liability of any taxpayer for the disposal of taxable hazardous wastes by underground injection during any calendar year remains \$25,000, the tax rate levied for all methods of hazardous waste land disposal has changed from \$1.50 per ton of taxable hazardous

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electric utilities usually cannot begin recovering the cost of facilities that are under construction because they are not yet in use and useful. These utilities must generally wait until the construction is complete before they can include the cost of constructing new equipment in their rate base. The new law, however, permits certain electric generating utilities to earn a return on qualified pollution control property that is "to be used and useful" because the Indiana Public Service Commission "shall for ratemaking purposes add to the value of that utility's property the value of the qualified pollution control property *under construction*. . . ." Pub. L. No. 88-1985, § 2 (codified at IND. CODE § 8-1-2-6.6(b) (Supp. 1985)) (emphasis added). Thus, these utilities may include in their rate base the cost of construction works in progress (CWIP).

<sup>91</sup>Pub. L. No. 88-1985, § 2 (codified at IND. CODE § 8-1-2-6.6(a) (Supp. 1985)).

<sup>92</sup>*Id.* (codified at IND. CODE § 8-1-2-6.6(b) (Supp. 1985)).

<sup>93</sup>*Id.* (codified at IND. CODE § 8-1-2-6.6(c) (Supp. 1985)).

<sup>94</sup>Pub. L. No. 88-1985, § 13(a) (a non-code section).

<sup>95</sup>*Id.* § 13(a)(4).

<sup>96</sup>*Id.* § 13(b).

<sup>97</sup>Pub. L. No. 78-1985, §§ 1-3 (codified at IND. CODE §§ 6-6-6.6-1 to -3 (Supp. 1985)).

waste to a gradually increasing tax ranging from \$4.50 per ton in September, 1985, to \$8.50 per ton in 1989.<sup>98</sup> Under the new law, seventy-five percent of the revenue produced will be deposited in the state Hazardous Substances Emergency Trust Fund and the remaining twenty-five percent will be paid to the county in which the disposal facility is located.<sup>99</sup> The new law requires that revenue paid over to the county be deposited in a separate county fund which can be drawn on to establish monitoring wells, to analyze samples from monitoring wells, to conduct tests and surveillance of hazardous waste containment, to provide for training of county and local health officials in procedures for dealing with hazardous substance emergencies, to provide equipment needed in dealing with such emergencies, to fund research on alternatives to land disposal, and to pay the costs of hazardous waste removal and remedial action at a site within the county.<sup>100</sup>

#### VI. PUBLIC LAW 152-1985

Public Law 152-1985 requires that, before January 1, 1986, a "solid and hazardous waste materials exchange" be established to provide information regarding solid and hazardous wastes available in Indiana for recycling, treatment, or recovery.<sup>101</sup> The exchange will benefit waste generators seeking recycling and treatment facilities for their waste and will benefit waste treatment and recovery firms seeking new business. The exchange may be established and operated by the Indiana Environmental Management Board or by a private organization.<sup>102</sup>

Public Law 152-1985<sup>103</sup> also amends Indiana's existing statute<sup>104</sup> regarding the manifest form that must accompany shipments of hazardous wastes regulated under the federal Resource Conservation and Recovery Act.<sup>105</sup> The new state law provides that the manifest form used in Indiana must be the same form required by the United States Environmental Protection Agency.<sup>106</sup>

In addition, generators of more than 1,000 kilograms of hazardous waste per month must send to the Land Pollution Control Division of the State Board of Health a copy of each manifest accompanying shipments of hazardous waste within five working days of the transportation

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<sup>98</sup>Pub. L. No. 78-1985, § 2 (codified at IND. CODE § 6-6-6.6-2(a) (Supp. 1985)).

<sup>99</sup>Pub. L. No. 78-1985, § 3 (codified at IND. CODE § 6-6-6.6-3(a) (Supp. 1985)).

<sup>100</sup>*Id.* (codified at IND. CODE § 6-6-6.6-3(b) (Supp. 1985)).

<sup>101</sup>Pub. L. No. 152-1985, § 1 (codified at IND. CODE § 13-7-3-2.5 (Supp. 1985)).

<sup>102</sup>*Id.* (codified at IND. CODE § 13-7-3-2.5(c) (Supp. 1985)).

<sup>103</sup>Pub. L. No. 152-1985, § 2 (codified at IND. CODE § 13-7-8.5-7 (Supp. 1985)).

<sup>104</sup>IND. CODE § 13-7-8.5-7 (1982).

<sup>105</sup>42 U.S.C. §§ 6901-91i (1982 & Supp. 1985).

<sup>106</sup>Pub. L. No. 152-1985, § 2 (codified at IND. CODE § 13-7-8.5-7(a) (Supp. 1985)).

of any waste off the site of generation.<sup>107</sup> This manifest filing requirement also applies to out-of-state generators who send waste to a treatment, storage, or disposal facility in Indiana.<sup>108</sup> Similarly, the owner or operator of a treatment, storage, or disposal facility must send to the Land Pollution Control Division a copy of every manifest received "within five (5) days after receiving the manifest."<sup>109</sup> Although the new law gives generators five "working days" to send the manifest to the state, treatment, storage, or disposal facilities are only given "five days."<sup>110</sup> These manifests will be "public records," as that term is defined in Indiana Code chapter 5-14-3,<sup>111</sup> and thus available to the public.<sup>112</sup> The Environmental Management Board was directed to adopt rules implementing this new law before January 1, 1986.<sup>113</sup>

#### VI. PUBLIC LAW 153-1985

The substantive change made by Public Law 153-1985<sup>114</sup> relates to the permit requirement for a hazardous waste treatment or recovery facility owned by the person who generates the waste being treated or recovered at that facility. Prior law provided that a person did not need a permit for a treatment facility located at the same site where the waste was generated.<sup>115</sup> The new law provides that no permit is required for a treatment *or recovery* facility if waste generated as a residual or secondary material from the manufacturing process is recycled, recovered, or reused by the person who generated the waste.<sup>116</sup> Thus, the generator's treatment or recovery facility need not be located at the point of generation to avoid the permit requirement.

#### VIII. PUBLIC LAW 145-1985

Public Law 145-1985 adds to the Indiana Code a new section prohibiting any person from throwing, depositing, or leaving any "contaminant, garbage or solid waste" in or within fifteen feet of a lake or in or upon a floodway.<sup>117</sup> The scope of this new prohibition is significantly reduced, however, because it does not apply to the "normal" use of

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<sup>107</sup>*Id.* (codified at IND. CODE § 13-7-8.5-7(b) (Supp. 1985)).

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* (codified at IND. CODE § 13-7-8.5-7(c) (Supp. 1985)).

<sup>110</sup>*Id.*

<sup>111</sup>IND. CODE §§ 5-14-3-1 to -10 (Supp. 1985).

<sup>112</sup>Pub. L. No. 152-1985, § 2 (codified at IND. CODE § 13-7-8.5-7(d) (Supp. 1985)).

<sup>113</sup>*Id.* (codified at IND. CODE § 13-7-8.5-7(e) (Supp. 1985)).

<sup>114</sup>Pub. L. No. 153-1985 (codified at IND. CODE § 13-7-8.5-5 (Supp. 1985)).

<sup>115</sup>IND. CODE § 13-7-8.5-5(e) (1982).

<sup>116</sup>Pub. L. No. 153-1985, § 1 (codified at IND. CODE § 13-7-8.5-5(e) (Supp. 1985)).

<sup>117</sup>Pub. L. No. 145-1985, § 1 (codified at IND. CODE § 13-2-22-13.5(a) (Supp. 1985)).

chemicals in agriculture, to a person holding a permit issued by the Natural Resources Commission, or to any activity controlled under the Indiana Water Pollution Control statute<sup>118</sup> or the Indiana Environmental Management Act.<sup>119</sup> Anyone who violates this new law commits a Class B infraction.<sup>120</sup>

#### IX. PUBLIC LAW 353-1985

Sections one and two of Public Law 353-1985 concern the authority of local units of government over the collection and disposal of waste.<sup>121</sup> Section two adds a new chapter, Indiana Code chapter 36-9-33, titled "Collection and Disposal of Waste."<sup>122</sup> This chapter provides that a local unit of government

may by ordinance provide for and exclusively control the collection and disposal of solid waste under this Chapter within the unit. However, a unit may exercise its power only upon the completion of construction or acquisition of a facility for the processing or disposal of solid waste by incineration or similar methods.<sup>123</sup>

The "solid waste" covered by this law is the waste defined in Indiana Code section 36-9-30-2,<sup>124</sup> except that the term does not include sludge, sewage, or gas, materials to be recovered or recycled, hazardous wastes regulated under Indiana Code chapter 13-7-8.5,<sup>125</sup> waste generated by a person if the waste disposed of is the waste generator's own sanitary landfill or recovered in the waste generator's own recovery facility, agricultural wastes, or wastes generated by a new manufacturing or commercial facility or the expansion of such facility.<sup>126</sup> The exemption for new or expanded manufacturing or commercial facilities and the exemption for hazardous waste regulated under code chapter 13-7-8.5 greatly reduce the scope of wastes subject to chapter 33.

<sup>118</sup>IND. CODE §§ 13-1-3-1 to -17 (Supp. 1985).

<sup>119</sup>Pub. L. No. 145-1985, § 1 (codified at IND. CODE § 13-2-22-13.5(b) (Supp. 1985)). The Environmental Management Act is contained in IND. CODE §§ 13-7-1-1 to 13-7-19-3 (1982 & Supp. 1985).

<sup>120</sup>Pub. L. No. 145-1985, § 2 (codified at IND. CODE § 13-2-22-20 (Supp. 1985)).

<sup>121</sup>Pub. L. No. 353-1985, §§ 1-2 (codified at IND. CODE §§ 36-9-30-5.5, 36-9-33-1 to -6 (Supp. 1985)).

<sup>122</sup>Pub. L. No. 353-1985, § 2 (codified at IND. CODE §§ 36-9-33-1 to -6 (Supp. 1985)).

<sup>123</sup>*Id.* (codified at IND. CODE § 36-9-33-3 (Supp. 1985)).

<sup>124</sup>A solid waste is "all putrescible and nonputrescible solid and semisolid wastes, except human excreta, but including garbage, rubbish, ashes, street cleanings, dead animals, offal, and solid commercial, industrial, and institutional wastes." IND. CODE § 36-9-30-2 (1982).

<sup>125</sup>IND. CODE §§ 13-7-8.5-1 to -9 (1982 & Supp. 1985).

<sup>126</sup>Pub. L. No. 353-1985, § 2 (codified at IND. CODE § 36-9-33-2 (Supp. 1985)).

Local units of government thus have authority to provide for, and exclusively control, the collection and disposal of solid waste at a facility constructed or acquired by the unit which employs "incineration or similar methods" — whatever the latter phrase means.<sup>127</sup> Section four of Public Law 353-1985 sets forth geographic limitations basically providing that one local government unit may not exercise the power granted under chapter 33 inside the boundaries of another unit.<sup>128</sup> Units are also empowered to contract for twenty years or less for the incineration of solid waste.<sup>129</sup>

Public Law 353-1985 also establishes the Solid Waste Disposal Study Commission, whose purpose is to study the need for solid waste disposal systems in Indiana.<sup>130</sup> The Commission's study is to include an examination of the feasibility of resource recovery facilities.<sup>131</sup> The Commission is to make recommendations to the General Assembly and the Governor, and these recommendations will be public records.<sup>132</sup>

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<sup>127</sup>Pub. L. No. 353-1985, § 2 (codified at IND. CODE § 36-9-33-3 (Supp. 1985)).

<sup>128</sup>*Id.* (codified at IND. CODE § 36-9-33-4 (Supp. 1985)).

<sup>129</sup>Pub. L. No. 353-1985, § 1 (codified at IND. CODE § 36-9-30-5.5(b) (Supp. 1985)).

The precise impact of Pub. L. No. 353-1985 is not clear. Existing statutes provide that local units of government have authority to establish and operate their own facilities to collect and dispose of solid wastes and those facilities may employ a number of methods, including landfilling and incineration. *See* IND. CODE §§ 36-9-30-3 and -4 (1982 & Supp. 1985). Moreover, units also have authority to contract with persons for the collection or disposal of solid wastes. IND. CODE § 36-9-30-5 (Supp. 1985). Because Pub. L. No. 353-1985 requires that the incineration facility be constructed or acquired by the unit, it appears that this new law and pre-existing statutes substantially overlap.

<sup>130</sup>Pub. L. No. 353-1985, § 3 (a non-code section).

<sup>131</sup>*Id.* § 3(d)(3).

<sup>132</sup>*Id.* § 3(e). The Commission's existence expires on December 31, 1986. *Id.* § 3(i).

