Indiana Environmental Law: An Examination of 1989 Legislation†

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I. Introduction

The 1989 session of the Indiana General Assembly has been called "The Year of the Environment."[1] That appears to be an apt label. More environmental legislation was enacted in 1989 than in any year

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† The 1990 Indiana General Assembly passed a number of significant environmental bills which, due to time constraints imposed by the publication date of this article, cannot be analyzed in detail here. The authors have attempted to footnote important changes made during the 1990 session to legislation discussed in this article; however, indepth discussion of the other 1990 legislation must be deferred until a later issue.

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1. Newland, *House Republicans to Back Death Penalty in Drug Killings*, Indianapolis Star, Jan. 5, 1989, at A-8, col. 1 ("[P]erhaps the most important issue we will address in the next four to five years [is the environment]. If we fail to provide long-term solutions to such critical problems as leaking underground storage tanks, the proper disposal of hazardous waste and the reduction of solid waste, we will seriously jeopardize the quality of life on this planet, not only for our children, but for our children's children." Quoting Indiana House of Representatives Co-Speaker Paul Mannweiler.)

"After years of introducing environmental protection bills that drew skepticism and sometimes outright ridicule from other legislators, State Sen. Vi Simpson finds herself being treated differently this year." Indianapolis Star, Dec. 31, 1988, at A-1, col. 1.

in recent memory.[2] This legislative activity comes on the heels of three national studies ranking Indiana among the least effective states in environmental protection.[3]

This increased legislative attention to the environment comes during a time when environmental issues are being considered nationally[4] and

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2. In 1983 and 1984, approximately two percent of the Public Laws passed by the Indiana General Assembly during its annual sessions could be said to have been laws that affected the environment in some way. In 1985 and 1986, this percentage increased slightly to approximately two and one-half percent. In 1987 and 1988, the percentage continued to increase to approximately three and one-half percent to three and three quarters percent. In 1989, the percentage of environmental laws passed by the Indiana General Assembly increased to almost six percent.

APPROXIMATE NUMBER OF PUBLIC LAWS "AFFECTING THE ENVIRONMENT" PASSED BY THE INDIANA GENERAL ASSEMBLY FROM 1982 THROUGH 1989

YEAR	NUMBER OF ENVIRONMENTAL LAWS	TOTAL NUMBER OF PUBLIC LAWS	PERCENT OF PUBLIC LAWS AFFECTING THE ENVIRONMENT
1982	5	232	2.2%
*1983	7	384	1.8%
1984	4	220	1.8%
*1985	10	375	2.7%
1986	6	251	2.4%
*1987	15	396	3.8%
1988	7	210	3.3%
*1989	21	357	5.9%

* The Indiana General Assembly holds a "long session," consisting of sixty legislative days, and a "short session," consisting of thirty legislative days in alternating years. Those years marked by an asterisk were long sessions; other years were short sessions.

3. *See* FUND FOR RENEWABLE ENERGY AND THE ENVIRONMENT, STATE OF THE STATES 1987, 1988 and 1989 Reports. These reports may be obtained from Fund for Renewable Energy and the Environment, 1001 Connecticut Avenue, N.W., Suite 719, Washington, D.C. The 1987 report showed Indiana tied for 13th with Maine in studies of air pollution reduction, soil conservation, groundwater protection, hazardous waste management, solid waste and recycling, and renewable energy and conservation. Indiana was one of six states found to have the best renewable energy and conservation policies. It should be noted, however, that Indiana's renewable energy tax credit, which was largely responsible for the high ranking, expired January 1, 1988. P.L. 1984-43, § 8. In 1988, Indiana was ranked 29th in surface water protection, reducing pesticide contamination, land use planning, eliminating indoor pollution, highway safety and energy pollution control. In 1989 Indiana was in 41st place in forest management, solid waste recycling, drinking water, food safety, and growth and the environment.

4. *See, e.g.*, Sancton, *Planet of the Year, What on Earth Are We Doing?*, TIME, Jan. 2, 1989, at 24 ("Time analyzes the looming ecological crisis and provides an agenda for urgent action"); *Managing Planet Earth*, Special Issue, 261 SCI. AM. (Sept., 1989); *As We Begin Our Second Century, The Geographic Asks: Can Man Save This Fragile*

internationally[5] as among the foremost issues of our time. Because of this increased legislative activity and increased environmental concern, this review of environmental laws passed by the 1989 General Assembly was undertaken. First, however, the authors provide an overview of Indiana's administrative structure for environmental protection.[6] The new legislation cannot be understood in isolation. It will be implemented within the existing administrative system.

II. Administration of Indiana's Environmental Laws

A. Introduction

The Indiana agency[7] charged with administering what are commonly thought of as the "environmental laws"[8] of the state is the Indiana Department of Environmental Management ("IDEM"). Created by the 1985 Indiana General Assembly,[9] IDEM came into existence on April

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Earth?, 174 Nat'l Geographic 766-914 (1989); Easterbrook, *Cleaning Up Our Mess: What Works, What Doesn't and What We Must Do To Reclaim our Air, Land and Water*, Newsweek, July 24, 1989, at 26. As anyone who has surveyed recent popular magazines and newspapers knows, the preceding citations are only a small representation of the media's deluge of coverage of the issue of the environment in 1989.

5. "Apart from the fear of nuclear war, easily the most unifying force around the world is the desire of 9 in 10 people polled in 16 countries to take stronger action nationally and internationally to curb pollution and to reverse the serious decay of the environment. Over 2 in 3 feel their own health is endangered by environmental damage right in their own country." *Morning Edition* (National Public Radio broadcast by pollster Lou Harris) (Aug. 22, 1989).

6. *See infra* notes 8-42 and accompanying text.

7. The state of Indiana has been authorized by the United States Environmental Protection Agency ("EPA") to act as the primary enforcer of the most important federal environmental laws. *See, e.g.*, Clean Air Act State Implementation Plan Conditional Approval, 40 C.F.R. 52.773 (1989), *amended by* 53 Fed. Reg. 33,808, 38,719, 46,608, 50,521 (1988), and 54 Fed. Reg. 2,112, 33,894 (1989). This primary enforcement authority, or "primacy," allows Indiana to receive federal funds to implement the federal program in Indiana. Primacy also obliges the state to implement and enforce a regulatory program that is equivalent to and consistent with the federal program. *See, e.g.*, 42 U.S.C. § 6926(b) (1982). If a state with primacy fails to implement an adequate program, the EPA administrator is required to withdraw the state program and replace it with a federal program. Even in states with primary enforcement authority, the EPA maintains concurrent authority to enforce the federal statutes. *See, e.g.*, 42 U.S.C. § 6928 (Supp. V 1987).

8. IDEM implements regulatory programs to protect the air, land, and water of the state from harmful pollutants. Other laws, equally important for the protection of Indiana's environment, regulate the use of Indiana's natural resources and are administered by the Indiana Department of Natural Resources (IDNR). *See* Ind. Code §§ 13-2, 13-3, 13-4, 13-4.1, 14-2, 14-4, 14-5 (1988).

9. IDEM was created by a reorganization of the state environmental programs, and took responsibility for the day-to-day enforcement and implementation of the state's

1, 1986.[10] IDEM was intended to be a separate state agency devoted entirely to the protection of the environment.[11] The Indiana General Assembly recognized that "the problem of pollution in our modern society is serious and complex, and can be adequately addressed at the state level only through an arm of state government provided with adequate funding, staff, and other resources."[12]

Programs built into the regulatory structure of IDEM[13] include the water pollution control division,[14] the air pollution control division,[15] and the solid and hazardous waste management division.[16] Each of these divisions regulates its respective "media" (that is, the water, the air, or the land) through a system of permits[17] and rules[18] that define the limits of environmentally acceptable behavior in the state.

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environmental programs. 1985 Ind. Acts 1129. These programs had previously been implemented and enforced by the State Board of Health under the direction and authority of the Environmental Management Board, the Stream Pollution Control Board, and the Air Pollution Control Board. Those preexisting boards maintained their rule-promulgation and policy-making authority, but their names were changed to the Water Pollution Control Board, the Air Pollution Control Board, and the Solid Waste Management Board. *See* 1943 Ind. Acts 625; 1961 Ind. Acts 382; 1972 Ind. Acts 555, and 1985 Ind. Acts 1193.

10. 1986 Ind. Acts 1092.

11. *See* 1985 Ind. Acts 1074 (preamble).

12. One might question the legislature's commitment to "adequately address" this "serious and complex problem of pollution," given the perceived deficiencies in IDEM resources.

13. IND. CODE § 13-7-2-13 (1988) establishes not only the regulatory programs for air, water, and land, but also the office of environmental response for responding to environmental emergencies, the office of external affairs for communicating with the public, the office of hearings, the office of technical assistance to assist municipalities and small business and industry in their efforts to comply and to promote waste reduction and recycling; as well as offices of investigations, laboratory analysis, and administrative services.

14. Under IND. CODE § 13-7-2-15 (1988), the Water Pollution Control Division is the water pollution agency for the purposes of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (Supp. V 1987), and the Federal Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j (1984), except for the Underground Injection Control Program of the SDWA which is to be implemented by the Indiana Department of Natural Resource's Oil and Gas Division under IND. CODE ANN. §§ 13-8-1-1 to -15-7 (Burns Supp. 1989).

15. The Air Pollution Control Division has primacy for purposes of the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. V 1987).

16. IND. CODE § 13-7-2-15 (1988) makes the solid waste management division the state agency for the purposes of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991 (Supp. V 1987).

17. *See* IND. CODE ANN. §§ 13-7-10-1 to -5 (Burns Supp. 1989); IND. ADMIN. CODE tit. 329, r. 3-33-54, 3-33-54 (Supp. 1989); IND. ADMIN. CODE tit. 329, r. 2-5-8 (1988); IND. ADMIN. CODE tit. 326, r. 2 (1988); IND. ADMIN CODE tit. 327, r. 2-4 (1988).

18. These rules, codified in Titles 326, 327 and 329 of the Indiana Administrative Code, are promulgated by the respective boards under the authority of IND. CODE ANN.

While the structure of Indiana's Department of Environmental Management is basically sound, the agency has been found to lack the resources, staff, expertise, and aggressive enforcement to fully effectuate some of the legislative enactments.[19] The report of the 1988 Legislative Sunset Committee regarding IDEM noted that "[n]ew areas of toxics and groundwater increase the complexity of an already complex field. *DEM resources are being spread thin.*"[20] A study conducted by the Council of State Governments shows Indiana ranked near the bottom in two important measures of state expenditures on environmental programs. Indiana was 49th in per capita spending, and 47th in expenditures as a percentage of the total state budget.[21]

B. Enforcement

Behavior that exceeds limits of environmental acceptability can, theoretically, result in one or more of three types of enforcement actions: an action initiated by the commissioner of IDEM, an emergency action, or a citizen initiated action.[22]

1. IDEM Enforcement.—The first, and by far the most common, enforcement action is one initiated by the commissioner of IDEM. The commissioner institutes an enforcement action by notifying the alleged violator in writing that a violation may exist and offering the alleged violator the opportunity to enter into an agreed order.[23] If the alleged

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§§ 13-1-12-8, 13-1-3-4, and 13-1-1-3 (Burns Supp. 1989). The rules prohibit certain sources of pollutants from operating without a permit or from exceeding their permit limits. The rules also forbid everyone from undertaking certain pollution-causing activities, such as open burning. *See* IND. ADMIN. CODE tit. 326, r. 4 (1988).

19. INDIANA LEGISLATIVE SERVICES AGENCY, SUNSET AUDIT OF THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT AND RELATED BOARDS, REPORT TO INDIANA LEGISLATIVE COUNCIL 16-17 (1988).

20. *Id.* (Executive Overview) (emphasis added).

21. *See* R. BROWN & L. GARNER, RESOURCE GUIDE TO STATE ENVIRONMENTAL MANAGEMENT (1988). This low level of spending for environmental programs comes at a time when Indiana state government has a general fund surplus of $559.6 million and a Rainy Day Fund of $265.4 million for the 1988-89 fiscal year. Interview with William J. Sheldrake, Director Tax & Revenue Policy for State of Indiana in Indianapolis, Indiana, August 31, 1989.

22. Although all three types of action are statutorily authorized, only the first option—action initiated by the commissioner in non-emergency situations—is used with any regularity.

23. This notice of violation must identify the actions required to correct the violation and, if appropriate, a civil penalty. The Commissioner is not required to extend this offer for more than sixty (60) days, and the alleged violator may enter into the agreed order without admitting that the violation occurred. IND. CODE ANN. § 13-7-11-2(b) (Burns Supp. 1989).

violator does not agree to an order within sixty days,[24] the commissioner may issue a unilateral order requiring that a specific action be taken, a civil penalty be paid, or both.[25] The unilateral order of the commissioner takes effect twenty days[26] after the alleged violator receives it, unless the alleged violator files a written request for review of the order with the commissioner before the twentieth day.[27] If a request for review is timely filed, the commissioner must appoint an administrative law judge (ALJ) to conduct the review proceedings on behalf of the appropriate board and in accordance[28] with the Administrative Orders and Procedures Act (AOPA).[29]

2. Emergency Enforcement.—If an emergency[30] exists, the commissioner may bring an action in the name of the state to restrain any person from causing or contributing to the pollution that is causing the emergency.[31] In addition to seeking injunctive relief in emergency situations, the commissioner may provide assistance to prevent, control, or neutralize any contaminant causing the emergency, and recover the cost

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24. Because the Commissioner may not impose a unilateral order upon a violator until 60 days have passed from the time of the Notice of Violation, a recalcitrant violator may avoid the inevitable order (and continue its violation) for two months with no justification and without entering into good faith negotiations with IDEM. The required 60-day wait thus builds an unnecessary delay of up to two months into the administrative enforcement system. *Id.*

25. *Id.* § 13-7-11-2(c) (Burns Supp. 1989). This subsection also requires that the order: be sent via certified mail; be addressed to the last known place of residence or place of business of the alleged violator; specify the statute or rule violated; and state the manner and extent of the alleged violation. A copy of the order may also be sent to a local government unit which may be a party to the action. *Id.*

26. This twenty day delay does not apply to emergency orders. *See infra* notes 31-35 and accompanying text.

Also, the order may, by it own terms, take effect after the twentieth day.

27. IND. CODE ANN. § 13-7-11-2(d) (Burns Supp. 1989).

28. *Id.*

29. *Id.* §§ 4-21.5-1-1 to -6-7.

30. The term "emergency" is used slightly differently for each of the three (3) alternative actions. To request a Governor's order under IND. CODE ANN. § 13-7-12-1(a), the Commissioner must conclude that "contamination of air, water, or land in any area has reached the point where it constitutes a clear and present danger to the health and safety of persons in any area." *Id.* To bring an action on behalf of the state to restrain pollution under IND. CODE ANN. § 13-7-12-2, the Commissioner must receive "evidence that a pollution source . . . is presenting an imminent and substantial endangerment to the health of persons, or to the welfare of persons where such endangerment is to the livelihood of such persons. . . ." *Id.* Finally, in order to provide emergency assistance to abate or remedy a discharge or impending discharge of a contaminant under IND. CODE ANN. § 13-7-12-3(b), the situation must pose "an imminent and substantial danger to the public health or the environment. . . ." *Id.*

31. IND. CODE § 13-7-12-2 (1988).

of such assistance from any person responsible for the emergency.[32] Finally, if the commissioner concludes that a pollution emergency is such that it presents a clear and present danger to the health and safety of persons in an area, the commissioner is required to consult with the secretary of the state board of health and jointly request that the governor proclaim an emergency and order all persons causing the emergency situation to immediately discontinue the emissions of contaminants.[33] Presumably, the commissioner may also issue emergency orders directly under authority granted to state agencies in general under the AOPA.[34]

3. Citizen Initiated Enforcement.—Any citizen of the state of Indiana[35] may maintain an action for declaratory and equitable relief in the name of the state against virtually anyone[36] for the protection of the environment of the state from significant[37] pollution.[38]

Civil penalties for noncompliance may be up to $25,000 per day for each violation.[39] An ongoing offense is considered a separate violation for each day of violation.[40] Criminal penalties are also provided by the Environmental Management Act for knowingly, willfully, recklessly, or negligently violating the statute or rules.[41]

II. Summary of 1989 Legislation

The single most significant piece of new legislation was the Responsible Property Transfer Law.[42] That law requires disclosure between the parties to certain real estate transactions (with notice to certain government entities) of hazardous materials used, stored, released, or disposed of on the property before transfer of the land occurs. While

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32. *Id.* § 13-7-12-3.

33. *Id.* § 13-7-12-1(a).

34. *Id.* §§ 4-21.5-4-1 to -6.

35. In addition to citizens, other entities authorized under Ind. Code § 13-6-1-1 (1988) to maintain an action under that section include: corporations, partnerships or associations maintaining an office in the state of Indiana; any state, city, town, county, or local agency or officer vested with authority to seek judicial relief; or the Attorney General of Indiana. *See infra* notes 117-30 and accompanying text for discussion of amendments to citizen suit provisions.

36. *See* Ind. Code Ann. § 13-6-1-1(a)(4) (Burns Supp. 1989).

37. *Id.* Although "significant pollution" has not yet been defined by Indiana case law, it might be suggested that it at least includes violations of Indiana's environmental statutes and rules.

38. *See infra* notes 117-30 and accompanying text for discussion of citizen enforcement in conjunction with the 1989 amendments to Ind. Code § 13-6-1-1 (1988).

39. Ind. Code Ann. § 13-7-13-1(a) (Burns Supp. 1989).

40. Ind. Code § 13-7-13-3(a) (1988).

41. *Id.*

42. 1989 Ind. Acts 1438.

passage of that law was encouraging, the amendment of Indiana's citizen suit provision[43] was a disappointment. The amendment further weakened what could have been a major weapon in protecting Indiana's environment. These two bills are discussed here in detail, followed by a summary of other environmental legislation adopted in 1989.

A. Responsible Property Transfer Law

1. Introduction.—The most noteworthy environmental statute passed in the 1989 session, at least in terms of its day-to-day impact on practicing attorneys in Indiana, is Senate Enrolled Act 541,[44] the Responsible Property Transfer Law (RPTL).[45] The RPTL requires disclosure of certain information to transferees of property where there is reason to believe hazardous materials have been used, stored, released, or disposed of on the property. The RPTL represents Indiana's recognition of, and participation in, an important trend in environmental legislation toward "transaction-triggered" laws. Such laws are aimed at shifting a part of the burden of environmental regulation away from the government controls to the market place by restricting the alienability of property where hazardous materials activity may have taken place.[46] By imposing disclosure requirements or other restrictions in connection with the transfer of such property, it is thought property owners will be encouraged to clean up contaminated sites. It has long been required by Indiana law and state and federal regulations that the owner of a hazardous waste disposal facility record a statement in the deed to the property indicating that the property was so used, and note restrictions on the use of the property subsequent to the closure of the disposal facility.[47] The "trans-

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43. 1989 Ind. Acts 658.

44. A Senate Bill becomes a Senate Enrolled Act (SEA) and a House Bill becomes a House Enrolled Act (HEA) under Joint Rule 2 of the "Joint Rules For Conducting Business In The Two Houses Of The General Assembly" after the bill has passed both the House and the Senate during a Session of the General Assembly.

45. 1989 Ind. Acts 1438 (codified at IND. CODE ANN. §§ 13-7-22.5-1 to -21 (Burns Supp. 1989)).

46. For a discussion of the "transaction-triggered" approaches taken by various states, see Farer, *Transaction-Triggered ECRA: The New Wave in Cleanup Law*, NAT'L L.J., Feb. 27, 1989, at 24-25; Stevens, *ECRA: Government and Industry Cope with an Evolving Regulatory Program*, 5 TEMP. ENVTL L. TECH. J. 17 (1986); Stever, *ECRA and Other Restrictions on the Transfer of Hazardous Waste Sites* 151, in THE IMPACT OF ENVIRONMENTAL REGULATION ON BUSINESS TRANSACTIONS (Prac. L. Inst. 1988); Tasher and Kaufman, *A Guide to New Jersey's Environmental Cleanup Responsibility Act*, 3 NAT. RESOURCES AND ENV'T. 26 (1988).

47. *See* IND. CODE § 13-7-8.5-5(d) (1988); IND. ADMIN. CODE tit. 329, r. 3-46-10(b) (Supp. 1989) and 40 C.F.R. § 264.119 (1988). The authority of IDEM to require such restrictive covenants was broadened by legislation passed in the 1989 session. Senate

action-triggered'' statutory requirements imposed by the RPTL and similar laws go further, imposing additional requirements of direct notice to a prospective purchaser of a number of types of properties other than waste disposal facilities holding state or federal permits.

The inspiration for the wide variety of new laws imposing transaction-triggered requirements is the New Jersey Environmental Cleanup Responsibility Act (ECRA).[48] The requirements of the New Jersey statute go far beyond mere disclosure of information about hazardous substance activity on the covered property. Under ECRA, the New Jersey Department of Environmental Protection (NJDEP) becomes, in effect, a party to certain real estate transactions; a transferor must, before consummating a transfer, satisfy NJDEP that there has been no release of hazardous materials at the site, that any such release has been adequately cleaned up, or submit a cleanup plan for NJDEP approval. If the transferor fails to comply, the transfer may be voided either by a party to it or by NJDEP. Not surprisingly, the intimate involvement of the state environmental bureaucracy in covered real estate transfers entailing delays of months, or sometimes years, has been perceived as extremely burdensome by the regulated community.[49]

Virtually all of the other ECRA-inspired statutes, including the Indiana RPTL and the nearly identical Illinois Responsible Transfer Act,[50] attempt to avoid such problems by emphasizing full disclosure by the transferor rather than more direct state involvement in the transfer itself. Presumably, if such disclosure is required at the time of the transfer, market forces will encourage the cleanup of contaminated sites, either prior to the sale or pursuant to an agreement by the parties. Regardless of the form of the requirements, the effect upon practitioners is the same; business and real estate lawyers must be prepared to routinely deal with a number of issues which were, until recently, of concern only to the relatively specialized environmental bar.

2. Disclosure requirements of the RPTL.—At the heart of the Indiana RPTL is an ''Environmental Disclosure Document'' which must be provided by a transferor of property subject to the law. The document must be delivered to the other parties to the transfer (including lenders involved in the transaction), recorded in the county where the property

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Enrolled Act 370, 1989 Ind. Acts 1414 (codified at IND. CODE ANN. § 13-7-8.7-12 (Burns Supp. 1989)). This authorizes the commissioner of IDEM to require that restrictive covenants be recorded in connection with additional categories of hazardous waste management facilities and other properties where it is suspected that hazardous substances have been handled. *Id.*

48. N.J. STAT. ANN. §§ 13:1K-6 to -13 (West 1983).

49. *See, e.g.*, Stevens, *supra* note 47, at 35.

50. ILL. ANN. STAT. ch. 30, para. 901-07 (Smith-Hurd Supp. 1989).

is located, and filed with the IDEM. The recommended form of the document is set forth in the statute itself.[51] The document elicits information from the transferor concerning a wide variety of hazardous waste-related activities on the property during the transferor's ownership;[52] the processing, storage, or handling of petroleum; wastewater discharge, air emission, or waste management permits held by the transferor with regard to the property; requirements of the federal Emergency Planning and Community Right-to-Know Act [53] to which the transferor has been subject; and certain other state or federal environmental actions to which the transferor, the property, or a facility on the property has been subject. The transferor must also indicate in the document whether any reportable releases of hazardous substances or petroleum occurred on the site during the transferor's ownership, and must (if he or she has knowledge) state whether certain types of waste facilities were operated on the property when it was under prior ownership. Finally, the document must contain a "liability disclosure" advising the transferor and transferee that their ownership or control of the property may render them liable for cleanup costs even if they did not cause or contribute to any environmental problem on the property. The document must be delivered to the parties by the transferor at least 30 days before the transfer, unless the deadline is waived by all the parties to the transfer.[54] Within 30 days after the transfer, the transferor must file the document with IDEM, and either the transferor or the transferee must record the document with the appropriate county recorder.[55]

3. Applicability of the Act.—The applicability of the RPTL to any given transaction turns upon the definition of "property" and "transfer." A wide range of conveyances constitute "transfers" subject to the provisions of the Act, including a conveyance of an interest in property

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51. IND. CODE ANN. § 13-7-22.5-15 (Burns Supp. 1989).

52. There is also some reason to believe the RPTL was intended to apply to properties where management of the broader category of "hazardous substances" took place. *See infra* notes 109-14 and accompanying text. The 1990 amendments to the RPTL contained in House Enrolled Act 1391 add two catch-all questions concerning the present owner's activities. New question 9(c) asks whether there is any environmental defect on the property that is not reported in response to questions 9(a) or (b); new question 11 asks whether the transferor ever conducted an activity on the property without a permit, when an environmental management permit would have been required.

53. P.L. 99-499, § 4, 100 Stat. 1614 (1986) (codified at 42 U.S.C. §§ 11022-11050 (Supp. 1987)). That statute requires notification to certain emergency response agencies by facilities which deal with hazardous chemicals.

54. IND. CODE ANN. § 13-7-22.5-10 (Burns Supp. 1989).

55. *Id.* § 13-7-22.5-16. The 1990 amendments in House Enrolled Act 1391 add Ind. Code § 13-7-22.5-22, permitting a property owner to add a statement to property records to the effect that an environmental defect of which notice was previously recorded had been ameliorated.

by (1) a deed or other instrument of conveyance; (2) a lease whose term could be over 40 years if all options are exercised; (3) a contract for the sale of property; (4) an assignment of more than 25 percent of the beneficial interest in a land trust; or (5) a mortgage or collateral assignment of a beneficial interest in a land trust.[56]

While a "transfer" is broadly defined, the definition of "property" subject to the statute includes only three categories of parcels of real estate.[57] First, the statute applies to property subject to the reporting requirements of the federal Emergency Planning and Community Right-to-Know Act (the Right-to-Know Act).[58] The Right-to-Know Act requires reporting of a hazardous chemical inventory form by facilities which must prepare Material Safety Data Sheets pursuant to Occupational Safety and Health Administration (OSHA) regulations regarding certain hazardous chemicals. As a practical matter, that definition of "property" will subject virtually all industrial sites to the provisions of the RPTL, because the OSHA regulations cover all employers whose employees are, or may be, exposed to hazardous chemicals in the workplace under normal circumstances or foreseeable emergencies.[59]

The second category of real estate subject to the RPTL is property which is the site of an underground storage tank for which notification is required under state or federal law.[60] The vast majority of such regulated facilities are gasoline stations and other facilities with petroleum storage tanks; however, underground tanks containing certain "hazardous substances"[61] are also regulated by the underground storage tank laws.

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56. *Id.* § 13-7-22.5-7(a). Certain transactions are explicitly excluded from the definition of "transfer" in the RPTL. The term "transfer" does not include: (1) a correction, modification, or supplement, made without additional consideration, to a previously recorded deed or trust document; (2) a tax deed; (3) a deed or trust document of release of property that is security for an obligation; (4) a deed of partition; (5) a conveyance occurring as a result of a foreclosure of a mortgage or lien; (6) an easement; (7) a conveyance of gas, oil, or mineral interests; (8) a conveyance by operation of law upon the death of a joint tenant with right of survivorship; and (9) an inheritance. *Id.* § 13-7-22.5-7(b). The 1990 amendments expanded the definition of "transfer" to include any lease (regardless of term) which includes an option to purchase; a conveyance by a mortgage or trust deed; and it clarifies that a conveyance by "contract" refers to an installment land contract. *See* note 106, *infra*, and accompanying text.

The 1990 amendments also added to the exclusions to the definition of "transfer". Most notably, the amendments clarified that neither a deed in lieu of foreclosure nor a deed or trust document that changes title without changing beneficial interest is considered a "transfer."

57. *Id.* § 13-7-22.5-6.

58. 42 U.S.C. §§ 11022-11050 (Supp. V 1987).

59. *See* 29 U.S.C. §§ 651-678 (Supp. V 1987) and 29 C.F.R. § 1910.1200 (1988).

60. *See* 42 U.S.C. § 6991(a) (Supp. V 1987) and IND. CODE ANN. § 13-7-20-13(a)(8) (Burns Supp. 1989).

61. 42 U.S.C. § 9601(14) (Supp. V 1987).

The third category of subject property includes parcels listed on the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS).[62] The CERCLIS is a comprehensive list of sites which might be candidates for Superfund cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[63] The CERCLIS list is derived from: (1) notices which must be provided to EPA of hazardous substance releases and of facilities where hazardous substances have been treated, stored, or disposed of; (2) cleanup lists created by the states; (3) closed hazardous waste management facilities regulated under the Resource Conservation and Recovery Act (RCRA);[64] and (4) complaints and petitions by citizens. The CERCLIS list serves as the source from which EPA establishes a priority list of sites which will actually be candidates for Superfund cleanups.

It should be noted that certain facilities which fall within the three categories constituting the definition of covered "property" may not be subject to the RPTL if the facilities have been closed in accordance with the applicable Indiana laws. The RPTL applies only to property "that has not been subject to bonding or other financial assurances released by the appropriate governmental agency after compliance with applicable state laws."[65] Presumably, that provision refers to financial assurances which are required for regulated underground storage tanks and for hazardous waste treatment, storage, and disposal facilities. Operators of such facilities are required to post bonds or provide other types of financial assurance in order that funding sufficient to pay for proper closure of the facility will be available when the useful life of the facility has ended. Once the state is satisfied that the closure requirements for the facility have been met, the financial assurance requirements are to be released.[66] Upon such release, the facility is no longer considered "property" subject to the RPTL.

The number of properties included within the three covered categories is not known with precision. Currently, about 1,200 sites are included on the CERCLIS list. The number of properties subject to the other two registration or reporting requirements can only be estimated. IDEM estimates that about 34,000 sites will be subject to the new underground

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62. *Id.* § 9616.

63. *Id.* §§ 9601-9661.

64. *Id.* §§ 6921-6939.

65. IND. CODE ANN. § 13-7-22.5-6(1) (Burns Supp. 1989).

66. *See, e.g.*, IND. CODE § 13-7-20-14 (1988) (financial assurance requirements for underground storage tanks); 12 Ind. Reg. 11 (1989) (financial assurance requirements for solid waste disposal facilities, to be codified as IND. ADMIN. CODE tit. 329, r. 2-12); IND. ADMIN. CODE tit. 329, r. 3-47-4 (Supp. 1989) (financial assurance for closure of hazardous waste facilities).

storage tank regulations. Currently, nearly 6,000 facilities have submitted reports under the Right-to-Know Act. However, it is estimated that about 70 percent of the businesses actually *subject* to the reporting requirements (and thus, presumably, included in the definition of "property" for RPTL purposes) have failed to submit the required reports. [67]

4. Effect of Failure to Provide Disclosure Document.—A number of penalties and other consequences may flow from the failure to properly complete, submit, record, or file the disclosure document. Even if the document is properly provided in a timely manner, the transaction may be affected by a revelation contained in the document indicating that previously unknown environmental problems exist on the property. First, a transferee or lender may be relieved of any obligation to complete the subject transaction as a result of the transferor's failure to provide the document by the statutory deadline or upon demand of a party subsequent to the deadline,[68] or if the document reveals defects previously unknown to the transferee or lender.[69] The RPTL does not permit a party to void the transaction *after* the transfer has been completed, however.[70] Second, the RPTL provides that a party to a covered transfer may bring a civil action against any other party to the transfer for consequential damages arising from a violation of the law. Costs and attorney fees may also be recovered in connection with such actions.[71] In addition to the general provision allowing civil actions, the RPTL classifies certain violations of the law as "infractions." Failure to deliver the disclosure document in a timely manner is a Class B infraction, and subjects the transferor to a fine of up to $1,000.[72] Knowingly making a false statement in a disclosure document is a Class A infraction, with a maximum fine of $10,000.[73] Each day that such a false statement goes uncorrected is a separate infraction. Finally, the failure to record the document in the county where the property is located is also a Class A infraction.[74] While the RPTL does not explicitly provide for additional

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67. Interview with Max Michael, Chief, Prevention Section, Title III Emergency Planning and Community Right-to-Know, Office of Emergency Response, Indiana Department of Environmental Management, in Indianapolis, Indiana, August 16, 1989.

68. IND. CODE ANN. § 13-7-22.5-12 (Burns Supp. 1989).

69. *Id.* § 13-7-22.5-11.

70. *Id.* § 13-7-22.5-14.

71. *Id.* § 13-7-22.5-21.

72. *Id.* § 13-7-22.5-17.

73. *Id.* § 13-7-22.5-18.

74. It should be noted that while most RPTL duties and obligations are imposed upon the transferor, the recording of the document is a joint responsibility of the transferor and transferee. *Id.* § 13-7-22.5-16(c). Curiously, the RPTL does not establish a penalty for the transferor's failure to file the disclosure document with IDEM. Presumably, the general penalty provisions of the Environmental Management Act would apply to such a violation. *See* IND. CODE § 13-7-13-3 (1988).

civil or criminal penalties, it must be presumed that the general penalty provisions which apply to virtually any violation of the Environmental Management Act, the rules which implement it, or administrative orders issued by IDEM or its governing boards would also apply to violations of the various provisions of the RPTL. For example, the Environmental Management Act establishes penalties of up to $25,000 per day for a violation of "any provision" of Indiana Code 13-7, any pollution control board rule or standard, or any IDEM determination, rule, or order.[75] In addition, the Act states that any such violations may also be prosecuted as a Class D felony,[76] and goes on to provide that knowingly making a "false statement . . . in any . . . document filed or required to be maintained" under Indiana Code 13-7 is a Class B misdemeanor.[77] The RPTL took effect on January 1, 1990, and applies to transfers which were closed, or scheduled to close, after December 31, 1989.

5. Issues Arising From the RPTL Provisions.—The relative novelty of the "transaction-triggered" approach to environmental protection generally, and the untested and sometimes unclear language of the RPTL in particular, give rise to a number of questions and concerns about the meaning and application of the RPTL. The most important concern to the parties involved in a covered transfer is the effect (or, more accurately, the lack of effect) on potential liability under CERCLA of a parcel's apparent clean bill of health with regard to its RPTL disclosure document. Liability under CERCLA[78] is, or should be, a major concern to many property transferees, especially those taking an interest in an industrial facility or other parcel where hazardous substances may remain on-site. Essentially, CERCLA liability may arise in any situation where the federal government has spent money on a Superfund cleanup, or where the state has incurred similar expenses under its parallel cleanup authority. Joint, several, and strict liability attaches not only to the party who operated the facility at the time hazardous substances were discharged, but also to present owners (regardless of whether they had any involvement in past discharges of hazardous materials) and to any other persons involved in the treatment, transportation, or disposal of the substances involved.[79] It should be additionally noted that the CER-

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75. IND. CODE § 13-7-13-1(a) (1988).

76. *Id.* § 13-7-13-3(a). The felony provisions of the Act establish "strict liability" criminal offenses. "Negligent" violations, as well as intentional, knowing, and reckless acts are punishable under that section.

77. *Id.* § 13-7-13-3(b).

78. The extremely broad CERCLA liability provisions are found at 42 U.S.C. § 9607 (Supp. V 1987). Senate Enrolled Act 370, 1989 Ind. Acts 1414, imposes equally broad liability to the State of Indiana when cleanups are financed by the state rather than by the federal "superfund." *See infra* notes 132-47 and accompanying text.

79. 42 U.S.C. § 9607(a) (Supp. V 1987).

CLA definitions of "owner or operator"[80] and "hazardous substance"[81] are very broad. Under the CERCLA and Indiana schemes, potential liability arises for the costs of cleanup of the site, other response costs incurred in connection with the discharge, and for damages for related injuries to natural resources.[82] It is common for CERCLA liability to far exceed the value of the parcel where cleanup was necessary. The CERCLA statute sets forth a small number of strictly limited defenses to Superfund cleanup expense liability.[83] Of particular interest in connection with the RPTL is the so-called "innocent landowner" defense[84] created by the Superfund Amendment and Reauthorization Act of 1986 (SARA).[85] To establish "innocence" for purposes of the defense, a property owner must be able to show that she took all prudent steps to determine that no hazardous substances were disposed of on the site prior to her purchase of the parcel.[86] In practice, the necessary, prudent steps have consisted primarily of an "environmental audit," a detailed study of the environmental history of the subject parcel and of its record of compliance with environmental regulations.[87]

While the RPTL requires that useful information be provided to transferees, and gives the transferee an option to cancel the transaction if previously unknown environmental "defects" are discovered,[88] it must be emphasized that the RPTL disclosure document cannot substitute for an environmental audit of suspect property. For a number of reasons, the disclosure document should not be considered even an implied guarantee that property is free of environmental problems; a careful real estate attorney will continue to insist that an environmental audit be conducted when appropriate, regardless of the contents of the RPTL disclosure document. A major inadequacy of the RPTL document, at least with regard to protecting against CERCLA liability, is that it does not, strictly speaking, address the environmental quality of the property itself; rather, it requires the transferor only to answer a number of

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80. *Id.* § 9601(20).

81. *Id.* § 9601(14).

82. *Id.* § 9607(a). *See also* IND. CODE § 13-7-8.7-8 (1988).

83. 42 U.S.C. § 9607(b) (Supp. V 1987)

84. *See id.* §§ 9607(b)(3), 9601(35) (Supp. 1987). For a further discussion of the "innocent landowner" defense, see Leifer, *EPA's Innocent Landowner Policy: A Practical Approach to Liability Under Superfund*, 20 ENV'T REP. (BNA) 646 (1989).

85. Pub. L. No. 99-499, 100 Stat. 1628, 1692 (1986).

86. 42 U.S.C. §§ 9607(b), 9601(35) (Supp. 1987).

87. *See generally* J. MOSKOWITZ, ENVIRONMENTAL LIABILITY IN REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE §§ 16-21 (1989). The 1990 amendments add a disclaimer to the disclosure document, indicating that compliance with the RPTL will likely not be sufficient to protect the transferee as an "innocent landowner."

88. IND. CODE ANN. § 13-7-22.5-11 (Burns Supp. 1989).

questions concerning what she *knows* about the property.[89] The questions need be answered only to the best of the transferor's "knowledge and belief," and the law nowhere imposes upon the transferor any duty to inquire or to independently verify the information provided. Further, the disclosure document concentrates almost entirely on the *transferor's* activities on the real estate;[90] however, the CERCLA liability may attach to the current property owner for environmental contamination arising from the activities of prior owners.[91]

The disclosure document also fails to elicit some information which might be crucial to a determination of CERCLA liability. A notable example is found in Section III(A)(8) of the document,[92] which asks whether the transferor, the property, or a facility on the property has ever been subject to the filing of an environmental enforcement action with "a court or the solid waste management board" for which a final order or consent decree was entered.[93] While the response to that question will no doubt be of interest to the transferee, as a practical matter, the majority of administrative enforcement actions initiated by IDEM are concluded with consent decrees entered into by the violator and the Department, without the involvement of either the Solid Waste Management Board or the courts.[94] The document also fails to elicit information about administrative actions that might have been carried out by any number of other entities, such as the air or water pollution control boards, the EPA, or the Indiana Department of Natural Resources.[95] As such, even a thorough, knowledgeable, and honest response to that portion of the disclosure document could leave a transferee with no protection against CERCLA liability, and in fact, inadequate information even to meet the purpose of the RPTL.

A similar problem may arise from the definition of "property" subject to the RPTL.[96] As indicated above, property which was previously subject to, and later released from, certain bonding or other financial assurance requirements (for example, financial guarantees of closure and

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89. *Id.* § 13-7-22.5-15, Section III A.

90. *Id. But see id.* § 13-7-22.5-15, Section III B (requiring the transferor to disclose limited information about activity of prior owners to the extent that the transferor knows of them).

91. 42 U.S.C. § 9607(a) (Supp. V 1987).

92. IND. CODE ANN. § 13-7-22.5-15 (Burns Supp. 1989).

93. *Id.*

94. *See generally id.* §§ 4-21.5-1 to -6 (administrative procedure and judicial review).

95. Kane, *Enactments of the 1989 General Assembly Affecting Environmental Issues* 21, unpublished manuscript of an address to the Indianapolis Bar Association, July 12, 1989.

96. *See supra* notes 59-69 and accompanying text.

post-closure funding for hazardous waste disposal sites[97] and underground storage tanks[98]) is exempt from the disclosure provisions of the RPTL, apparently on the assumption that the financial assurance requirements would not have been released unless it was certain that the property was free of environmental defects. Where potential CERCLA liability is concerned, that is not a safe assumption. Such financial assurance obligations might have been released in accordance with earlier, less stringent statutes and rules. Further, most such financial assurance requirements were imposed upon facilities which, when they were operational, dealt with the relatively limited category of "hazardous wastes."[99] The broader category of "hazardous substances,"[100] the discharge of which might give rise to CERCLA liability, is not fully addressed in the various financial assurance statutes and rules which determine whether the RPTL applies to a particular parcel.

A number of issues unrelated to potential CERCLA liability are likely to arise from provisions of the RPTL which are unclear or which have been left undefined. The most significant source of potential confusion (and litigation) in connection with the RPTL is the crucial voidability provision.[101] That section provides that the parties to the transfer are not obliged to accept the transfer, or to finance it, if the transferor's disclosure document reveals "environmental defects" that were not previously known to the other parties.[102] In what appears to be a curious omission, the term "environmental defect" is not defined in the RPTL (nor in its Illinois counterpart[103]). As a result, a dispute over whether any information which is revealed in the disclosure document and which is relied upon by a party seeking to void the transfer constitutes an "environmental defect" may be anticipated. It seems clear that a "yes" response to any question asked on the disclosure document cannot, without more, be considered to reveal an "environmental defect."[104] The

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97. *See generally* 40 C.F.R. § 264.140-.151 (1989).
98. *See generally id.* § 280.90-.112.
99. *See generally* 42 U.S.C. § 6901(5) (Supp. 1987) and 40 C.F.R. § 261 (1989).
100. *See infra* note 113.
101. IND. CODE ANN. § 13-7-22.5-11 (Burns Supp. 1989).
102. *Id.*
103. ILL. ANN. STAT. ch. 30, paras. 901-907 (Smith-Hurd Supp. 1989). The 1990 amendments to the RPTL add a definition of "environmental defect" in new Ind. Code § 13-7-22.5-1.5. An "environmental defect" includes a violation of an environmental law or rule; a situation requiring environmental remedial action; a situation that substantially endangers health, welfare or the environment; a situation which would materially lower the value of the subject property or adjoining property; or a problem that would prevent or interfere with someone else's ability to obtain an environmental permit needed to operate a facility on the property.
104. Kane, *supra* note 96, at 12.

fact that a transferor once held a permit for emissions to the atmosphere, for example, cannot reasonably be seen as evidence of a present "defect" sufficient to justify avoidance of the transfer obligation. Until or unless the RPTL is amended to clarify the term, the burden may fall upon the parties to the transfer to define the relevant "environmental defects" within each transfer agreement.

Another definitional question arises from the application of the RPTL to a "contract for the sale of property."[105] While that section presumably contemplates typical installment land contracts, the absence of any definition of "contract for the sale of property" leaves open the possibility that other kinds of agreements might be subject to the RPTL. For example, if the agreement to purchase real estate which commonly precedes a conveyance by deed is considered such a "contract," the RPTL disclosure document would have to be provided at least 30 days before the parties decided to enter into their purchase agreement, rather than (or possibly in addition to) 30 days prior to the actual conveyance by deed (which is itself defined as an RPTL "transfer"). An overly inclusive interpretation of "contract" could thus cause substantial, unexpected, and unnecessary delays in connection with otherwise routine transactions.[106]

Finally, a third definitional issue arises from a provision in the RPTL which is not unclear, but may be erroneous. Section III(A)(1) of the RPTL disclosure document asks whether the transferor has ever "conducted operations on the property which involved the generation, manufacture, processing, transportation, treatment, storage, or handling of 'hazardous waste', as defined by IC 13-7-1."[107] The document then goes on in Section III(A)(3) to ask, without mentioning the consumer goods exclusion, a virtually identical question: "Has the transferor ever conducted operations on the property which involved the generation, transportation, storage, treatment, or disposal of 'hazardous waste', as defined in IC 13-7-1."[108] There are three reasons to believe that Question III(A)(1) of the Indiana disclosure document should have referred to "hazardous substances" rather than "hazardous waste."[109] First, the use of "haz-

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105. IND. CODE ANN. § 13-7-22.5-7(a)(5) (Burns Supp. 1989). There is no parallel provision in the Illinois Responsible Transfer Act after which the Indiana statute is modeled. ILL. ANN. STAT. ch. 30, para. 903(g) (Smith-Hurd Supp. 1989) does not address a conveyance by "contract" within the definition of "transfer."

106. *See* Kane, *supra* note 96, at 6.

107. IND. CODE ANN. § 13-7-22.5-15 (Burns Supp. 1989) (certain consumer goods are excepted).

108. *Id.*

109. *See* Kane, *supra* note 96, at 21. The 1990 amendments changed the wording of question III (A) (1) to refer to a "hazardous substance."

ardous waste" in the two nearly identical sections of the Indiana document causes the questions to be, for all practical purposes, redundant. Second, "hazardous substances" are referred to elsewhere in the disclosure document as a category distinct from "hazardous wastes."[110] Third, the nearly identical Illinois act refers to "hazardous substances" rather than "hazardous wastes" in the section of the Illinois disclosure document which parallels question III(A)(1) of the Indiana document.[111] The choice of terminology potentially has a tremendous effect on the extent of the RPTL's applicability, because "hazardous substance," as defined in the Indiana, Illinois and federal statutes, is a far more inclusive term than "hazardous waste." The statutory definition of "hazardous substances" includes a far broader range of materials than does the definition of "hazardous waste," and is not limited to materials which have been "discarded." As such, "hazardous substances" may include products in use, as well as discarded "waste."[112] Thus, it appears that

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110. *See* IND. CODE ANN. § 13-7-22.5-15 (Burns Supp. 1989), questions III (A)(4) and III (A)(9) of the disclosure document.

111. ILL. ANN. STAT. ch. 30, para. 905 (Smith-Hurd Supp. 1989). Question IV(1) of the Illinois disclosure document, which corresponds to question III (A)(1) of the Indiana document, asks whether the transferor ever conducted operations on the property involving the "generation, manufacture, processing, transportation, treatment, storage, or handling of "hazardous *substances*" as defined by the Illinois Environmental Protection Act?" *Id.* (emphasis added). Question IV(3) of the Illinois document, which corresponds to question III (A)(3) of the Indiana document, refers (like the Indiana question) to "hazardous *wastes*" as defined in the appropriate state's environmental protection statute. (The Illinois question also asks about "special wastes," a category which includes certain industrial process waste, pollution control waste, and hazardous waste. *See* ILL. ANN. STAT. ch. 111 1/2, para. 1003.45 (Smith-Hurd 1988). "Special waste" is also recognized as a separate category by the Indiana solid waste rules, see 12 IND. REG. 1179-83 (1989) (to be codified as IND. ADMIN. CODE tit. 329, r. 2-21), but the Indiana disclosure document does not inquire about special waste.

112. The definition of "hazardous waste" which is referred to in Questions III(A)(1) and III(A)(3) of the Indiana disclosure document is found at IND. CODE ANN. § 13-7-1-12 (Burns Supp. 1989). The statute defines "hazardous waste" as:

> a solid waste . . . that, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may: (1) cause or significantly contribute to an increase in mortality or increase in serious, irreversible, or incapacitating reversible, illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, or disposed of, or otherwise managed."

The definition of "hazardous waste" in the Illinois Environmental Protection Act is nearly identical. *See* ILL. ANN. STAT. ch. 111 1/2, para. 1003.15 (Smith-Hurd 1988). "Solid waste," in turn, is any "discarded material resulting from industrial, commercial, mining, or agricultural operations or community activities." IND. CODE ANN. § 13-7-1-22 (Burns Supp. 1989). The regulatory definition of "hazardous waste," however, specifically excludes sewage, industrial discharges regulated by the federal water pollution control statutes, certain nuclear waste, and waste resulting from some farming operations. *See* IND. ADMIN.

the application of the Indiana Act, because of its possibly erroneous reference to "hazardous waste" in Question III(A)(1), might be limited to a much narrower range of properties than was contemplated by legislators intending to adopt legislation similar to the Illinois Act. Until or unless the wording in Questions III(A)(1) and (3) is clarified, transferors might be well advised to err on the side of greater disclosure, responding to Question III(A)(1) as if the broader class of "hazardous substances" rather than the relatively narrow class of "hazardous wastes" was actually the subject of the inquiry.

In addition to the above-mentioned definitional issues left unsettled until the RPTL is interpreted by the courts or clarified by the legislature, two potential practical problems are immediately apparent. First, while the types of "property" subject to the RPTL are relatively clearly defined, a determination of whether a given parcel is included within the definition will, as a practical matter, be difficult. As discussed previously,[113] there is an excellent possibility that the owner of a parcel subject to the underground storage tank or Right-to-Know Act reporting requirements has failed to submit the required reports. Even if information about a property has been reported as required, information about the status of the property may be difficult to obtain. Parties to real estate transactions and their attorneys will, in large part, be dependent upon the already-strained resources of IDEM for information about whether a parcel is on the CERCLIS list, whether it is the site of an underground storage tank, or whether Right-to-Know Act reports have been submitted with regard to the property. While virtually all IDEM records which are not

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CODE tit. 329, r. 3-3-4 (1988).

A "hazardous substance," by contrast, is not limited either to "waste" or to "solid" or semi-solid material. Indiana has adopted the CERCLA definition of "hazardous substance," 42 U.S.C. § 9601(14) (Supp. V 1987) and also includes other substances declared hazardous by IDEM. IND. CODE ANN. § 13-7-8.7-1 (Burns Supp. 1989). The Indiana and federal definition of "hazardous substance," as well as the nearly identical Illinois definition found at ILL. ANN. STAT. ch. 111 1/2, para. 1003.14 (Smith-Hurd 1988), encompass the entire category of "hazardous waste" regulated by the Federal Resource Recovery and Conservation Act (RCRA), 42 U.S.C. §§ 6921-6939 (Supp. V 1987) and by the Illinois and Indiana statutes. In addition, "hazardous substances" include substances designated as hazardous by CERCLA regulations pursuant to 42 U.S.C. § 9602 (Supp. V 1987), as well as pollutants regulated under certain provisions of the Clean Air Act, 42 U.S.C. § 7412 (1984), the Water Pollution Control Act, 33 U.S.C. §§ 1317, 1321 (Supp. V 1987), and the Toxic Substances Control Act, 15 U.S.C. § 2606 (1984). So, a "hazardous substance" may include virtually anything the EPA determines may threaten significant danger if released to the environment, whether or not it is "waste" or "solid." Petroleum and natural gas are generally excluded from the definition of "hazardous substance." 42 U.S.C. § 9602(14) (Supp. V 1987). *See* 40 C.F.R. § 302.4 (1988) (list of CERCLA hazardous substances).

113. *See supra* note 69 and accompanying text.

"trade secrets" or "privileged" are available for public inspection,[114] the agency is, in most situations, not obliged to search for and provide such information to members of the public who need it. As a result, a transferor or transferee who is out of state or in areas of Indiana far from the IDEM offices may bear a heavy burden in time and expense in searching IDEM records to determine whether a specific parcel falls within a class of "property" subject to the RPTL provisions.[115]

A second practical problem arises from the very nature of the CERCLIS list, the placement of property upon which will bring the RPTL requirements into play. While most of the sources of the CERCLIS list suggest that a listed parcel is, indeed, likely to be environmentally "defective," it should be noted that a number of CERCLIS properties are placed on the list solely because citizen complaints have been received. As a result, it is probable that a number of CERCLIS properties pose no environmental threat; the citizen complaints which led to the listing of the property might well have been unrelated to the concerns the RPTL seeks to address, or may simply have been unfounded from an environmental perspective. It is likely, however, that the very fact that a parcel is on the CERCLIS list, and the resulting imposition of the RPTL requirements, could have an occasional "chilling effect" on a prospective transferee, whether or not a factual basis existed for the citizen complaint that resulted in the CERCLIS listing.

6. Conclusion.—The disclosure requirements of the RPTL, when properly observed, will no doubt benefit purchasers of most industrial parcels in Indiana by assuring that the purchaser receive certain valuable information about the subject real estate. It must be emphasized, however, that the RPTL serves to provide only information, and not protection from liability which may independently arise from prior environmental

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114. IND. CODE §§ 5-14-3-3 to -4, 13-7-6-6 (1988).

115. It should be noted that new Indiana hazardous waste rules will require IDEM to search for and provide some agency records upon request. The rules, 12 Ind. Reg. 2035-46 (1989) (to be codified at IND. ADMIN. CODE tit. 329, r. 3-58) adopt the federal disclosure requirements and provide that IDEM must search for and provide to the requestor certain "hazardous waste records." While it is likely that some of the information pertinent to determining the applicability of the RPTL to a particular parcel of land will fall within the definition of "IDEM hazardous waste record" in IND. ADMIN. CODE tit. 329, r. 3-58-1 (1989), it is doubtful that all three categories of covered "property" will be included. If relevant property information is not within the definition of "IDEM hazardous waste record," an interested prospective transferor or transferee cannot expect IDEM assistance in locating or providing the information. The 1990 amendments add new Ind. Code sec. 13-7-22.5-9.5, which requires IDEM to "provide information" that is in its possession concerning whether a parcel falls within the RPTL definition of "property". The new section does not, however, indicate what service IDEM must provide beyond simply opening its files. The new section also releases the state, IDEM, and IDEM employees from liability for providing incomplete or erroneous information.

damage to the property. A cautious purchaser or lender will thus continue to insist on a thorough environmental audit appropriate to the property.

B. Citizen Suit Provisions

While an increase in the amount of environmental legislation passed shows increased interest in the environment, not all the legislation will necessarily have a positive effect. One disappointing enactment of the 1989 legislative session was House Enrolled Act 1148.[116] Sections 2 and 4 of that law, which became effective July 1, 1989, weakened an already anemic "citizen suit" provision.[117] The citizen suit statute which allows citizens to act as "private-attorneys general" to bring suit against violators of environmental laws is theoretically an integral part of most states' and the federal government's environmental protection strategies.[118] Indiana's provision allows a citizen to "bring an action for declaratory and equitable relief in the name of the state against an individual . . . a company . . . or any other legal entity . . . for the protection of the environment of Indiana from significant pollution, impairment, or destruction."[119]

An overview of this provision reveals an already weak statutory scheme for citizen suits in Indiana. A citizen suit filed under the Indiana statute may be used only to gain declaratory or equitable relief. No provision for civil penalties or for litigation expenses such as attorney or expert witness fees is provided for in the Indiana statute. Civil penalties are an integral part of any enforcement scheme because the threat of fines for past violation may provide an economic incentive for regulated entities to bring themselves into prompt compliance with the applicable laws. This is especially true in environmental regulation given the considerable expense of compliance. Further, when citizen litigants cannot

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116. 1989 Ind. Acts 658.

117. IND. CODE §§ 13-6-1-1 to -6 (1988). An item of note here is the difference between Indiana's citizen suit authority and the provisions set out in the federal environmental laws. The federal provisions allow citizens to sue for civil penalties as well as injunctive relief to provide consistency in the regulatory program implemented by the agency and by the citizens. The federal provisions also allow citizen plaintiffs to recover the costs of the action, including attorney and expert witness fees, when the court deems it appropriate. There is no such provision in the Indiana statute. For an excellent discussion of environmental citizen suits see Miller, *Private Enforcement of Federal Pollution Control Laws*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10,309 (1983).

118. *See generally* Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1969-70); Note, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L. Q. 561 (1971). *See also* Annotation, *Maintainability in State Court of Class Action for Relief Against Air or Water Pollution*, 47 A.L.R.3d 796 (1973).

119. IND. CODE ANN. § 13-6-1-1(a)(4) (Burns Supp. 1989).

recover reasonable expert witness and attorney's fees, the cost of litigation effectively prohibits all but the wealthiest persons from bringing private enforcement actions. Thus, to earnestly undertake a citizen suit under Indiana law, one must be prepared to suffer substantial financial loss for litigation expenses with the prospect of merely receiving injunctive relief. Absent the authority to recover penalties or the cost of litigation, environmental citizen suits in Indiana's courts are currently prohibitively expensive and unfortunately incomplete tools of enforcement. This seems contradictory to the goal of encouraging private actions as a supplement to government efforts to protect the environment. Federal citizen suit provisions, by contrast, allow for the recovery of civil penalties, attorney's fees and expert witness fees.[120]

As a condition precedent to maintaining an action in Indiana, notice must be given to the Department of Natural Resources, the IDEM, and the attorney general.[121] Those state agencies are then required to notify all state administrative agencies having jurisdiction over or control of the pollution, impairment, destruction, or protection of the environment for which relief is sought.[122] This notice allows the appropriate agency to institute an administrative action against the alleged violation. These provisions were not changed by the 1989 amendments.

The amendment that could allow a great deal more bureaucratic foot-dragging deleted the requirement that a "final determination" of the administrative action be completed within 180 days after receipt of notice by the Attorney General.[123] If the agency failed to meet that 180-day requirement, the citizen suit could then proceed. Either way, the action moved forward to some kind of final determination whether administratively or judicially. The new provision requires only that the agency "commence an administrative proceeding" within 90 days of the citizen's notice.[124] The new provision may permit indefinite bureaucratic delays. Under the new 90-day rule, an action may not be maintained unless none of the agencies that receives notice of the action commences an administrative proceeding or a civil action on the alleged pollution within 90 days after receiving notice.[125] In other words, all the government agency need do to halt a citizen suit is to begin "administrative proceedings." Another option to halt a citizen suit is for a notified agency

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120. *See* 42 U.S.C. § 7604 (Supp. V 1987) (Clean Air Act); 33 U.S.C. § 1365 (Supp. V 1987) (Federal Water Pollution Control Act); 42 U.S.C. § 6972 (Supp. V 1987) (Resource Conservation and Recovery Act).

121. IND. CODE ANN. § 13-6-1-1(a) (Burns Supp. 1989).

122. *Id.*

123. IND. CODE § 13-6-1-1(b) (1988).

124. IND. CODE ANN. § 13-6-1-1(b) (Burns Supp. 1989).

125. *Id.* § 13-6-1-1(b)(1)(A); IND. CODE § 13-7-11-2(i) (1988).

to "take steps" within 90 days after receiving notice to have a criminal prosecution commenced. Finally, the agency that commences an administrative proceeding on the alleged pollution must "diligently pursue" the proceeding after it is commenced. In contrast to the previous rule, no time frame is set for a final determination by the administrative agency. A court, moreover, might allow the agency an excessive amount of time to act by broadly interpreting "diligently pursue" because of the constraints within which the agencies are conducting their business.[126] The Indiana Department of Natural Resources and IDEM are understaffed and underfunded.[127] The effect of the disincentives in the original citizen suit provision is reflected in the fact that the statute has rarely been used since it was originally passed in 1971.[128] The 1989 modification of Indiana's citizen suit provision will only further cripple any citizen-enforced environmental protection strategy.

The citizen suit could be a vital part of this state's comprehensive environmental protection strategy, especially considering the scarcity of IDEM resources[129] and the popularity of environmental protection initiatives. One might think that the legislature would embrace the opportunity to impose the cost of effective environmental enforcement on the parties creating the environmental problems. An adequate citizen suit provision would be a privately administered failsafe system to complement IDEM's underfunded enforcement mechanism.

C. Property Owner Liability

Senate Enrolled Act 370[130] created statutory provisions to make Indiana provisions for clean-up of environmentally contaminated sites more similar to the federal provisions in CERCLA.[131] The amendments were intended to make state law parallel to federal law for liability of property owners[132] and also to allow the state to place a restrictive

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126. Judicial construction of these statutory terms is open to speculation because there is no case law addressing such new legislation. Furthermore, this weakening of Indiana's citizen suit provision seems to be in response to the already rare use of the provision.

127. *See supra* notes 20-22 and accompanying text.

128. *See* Sekerez v. United States Reduction Co., 168 Ind. App. 526, 344 N.E.2d 102 (1976); Sekerez v. Youngstown Sheet & Tube Co., 166 Ind. App. 563, 337 N.E.2d 521 (1975); J.M. Foster Co., Inc. v. Northern Ind. Pub. Serv. Co., 164 Ind. App. 72, 326 N.E.2d 584 (1975). These are the only reported cases citing Indiana's citizen suit provision. The number of suits or notices filed under this provision is unknown.

129. *See supra* note 22 and accompanying text.

130. 1989 Ind. Acts 1414 (amending IND. CODE § 13-7-1) (1988).

131. *See supra* notes 80-89 and accompanying text.

132. 1989 Ind. Acts 1422 (amending IND. CODE § 13-7-8.7-8) (1988).

covenant on property.[133] A person that is liable under section 107(a) of CERCLA for: (1) costs of removal or remedial action; (2) costs of any health assessment or health effects; or (3) damages for injury to or loss of natural resources of Indiana is liable, in the same manner and to the same extent, to the State of Indiana.[134] Any person that is responsible for a release of hazardous waste and fails, without sufficient cause, to provide removal or remedial action by court order is liable for punitive damages.[135] The IDEM commissioner may seek punitive damages of up to 300 percent of the total costs incurred by IDEM as a result of the person's failure to properly provide removal or remedial action.[136] The commissioner of IDEM may compel any responsible person to undertake removal or remedial action.[137] A restrictive covenant may be placed on property if the commissioner determines that it is necessary for the "protection of the public health or welfare or the environment from unreasonable risk of future exposure to a hazardous substance."[138] The restrictive covenant may be altered if "a change of conditions or advancements in science or technology permit."[139]

House Enrolled Act 2061[140] provides liability protection for landowners on whose land "garbage or other solid waste (except hazardous waste) has been illegally dumped without the landowner's consent."[141] The Commissioner, however, may take enforcement action against the landowner after making "a diligent and good faith effort" to identify, locate, and take enforcement action against a person who appears likely to have committed or caused the illegal dumping.[142] The provision also gives protection to the landowner for providing "good faith" information to the Commissioner about potentially responsible persons. The Commissioner may include the landowner as a party to any enforcement action against an alleged violator.[143] This permits the Commissioner to allow the alleged violator access to the land to remove and dispose of the solid waste illegally dumped on the land.[144] Finally, the "landowner on whose land garbage or other solid waste has been illegally dumped

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133. 1989 Ind. Acts 1425. *See* IND. CODE ANN. § 13-7-8.7-12 (Burns Supp. 1989).
134. 1989 Ind. Acts 1422. *See* IND. CODE ANN. § 3-7-8.7-9 (Burns Supp. 1989).
135. 1989 Ind. Acts 1423. *See* IND. CODE ANN. § 3-7-8.7-10(b)(2) (Burns Supp. 1989).
136. 1989 Ind. Acts 1423.
137. 1989 Ind. Acts 1422. *See* IND. CODE ANN. § 13-7-8.7-9 (Burns Supp. 1989).
138. 1989 Ind. Acts 1425. *See* IND. CODE ANN. § 13-7-8.7-12(b) (Burns Supp. 1989).
139. 1989 Ind. Acts 1425. *See* IND. CODE ANN. § 13-7-8.7-12(d) (Burns Supp. 1989).
140. 1989 Ind. Acts 1434 (amending IND. CODE § 13-7-11) (1988).
141. 1989 Ind. Acts 1434. *See* IND. CODE ANN. § 13-7-11-6(a) (Burns Supp. 1989).
142. 1989 Ind. Acts 1434.
143. *Id. See* IND. CODE ANN. § 13-7-11-6(b) (Burns Supp. 1989).
144. 1989 Ind. Acts 1434.

without the landowner's consent may, in addition to any other legal or equitable remedy, recover from the responsible dumper: (1) reasonable expenses incurred by the landowner in disposing of the waste, and (2) reasonable attorney fees."[145]

D. Water

House Enrolled Act 1592[146] made minor changes to the procedure involved in the declaration of a ground water emergency by the Director of the Department of Natural Resources (DNR).

The Director of the DNR is required to declare a ground water emergency,[147] by temporary order, if an investigation discloses the well of an owner of a "nonsignificant ground water withdrawal facility"[148] (a facility that has a withdrawal capability of less than 100,000 gallons of ground water in one day) has been adversely affected by the owner of a "significant ground water withdrawal facility"[149] (a facility that has a withdrawal capability of 100,000 gallons or more of ground water in one day). The Director may then restrict the quantity of water that may be extracted by the significant ground water withdrawal facility.[150]

Previously, the declaration of the ground water emergency was effective when a copy of the declaration was served upon the owner of the significant ground water withdrawal facility.[151] House Enrolled Act 1592 added Indiana Code section 13-2-2.5-6(c) which provides that if a ground water emergency requires action before a copy of the declaration can be served upon the owner of the significant ground water withdrawal facility, then oral notification of the owner by a representative of the DNR is sufficient to make the ground water emergency effective until a copy of the declaration can be delivered to the owner.[152] Oral notification is effective for no more than 96 hours after being delivered.[153]

House Enrolled Act 1592 also specified that the temporary order issued by the Director remains in effect for 90 days unless it is terminated by the Director before that time or is extended under Indiana Code section 4-21.5-4, the Administrative Adjudication Act.[154]

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145. *Id.*
146. 1989 Ind. Acts 1392 (amending IND. CODE § 13-2-2.5) (1988).
147. 1989 Ind. Acts 1392. *See* IND. CODE ANN. § 13-2-2.5-3(c) (Burns Supp. 1989).
148. IND. CODE § 13-2-2.5-2 (1988).
149. *Id.*
150. 1989 Ind. Acts 1394. *See* IND. CODE ANN. § 13-2-2.5-3.5 (Burns Supp. 1989).
151. IND. CODE § 13-2-2.5-6 (1988).
152. 1989 Ind. Acts 1394.
153. *Id.*
154. 1989 Ind. Acts 1395. *See* IND. CODE ANN. § 13-2-2.5-11(a) (Burns Supp. 1989).

House Enrolled Act 1702[155] added a new chapter to the Indiana Code concerning ground water protection. The Act established the Interagency Ground Water Task Force to coordinate the implementation of the Indiana ground water quality protection and management strategy, study ground water contamination in Indiana, and coordinate efforts among government agencies to address ground water pollution problems.[156] The Task Force is required to make an annual report on its activities to the Governor and the General Assembly.[157]

House Enrolled Act 1702 also required the IDEM to establish and operate a ground water clearing house to receive and ensure investigation of complaints about ground water contamination, provide information to the public about ground water and ground water pollution, and coordinate the management of ground water quality data in Indiana.[158] Also, the Water Pollution Control Board is required to adopt a variety of rules regarding ground water. First, before July 1, 1990, the Board must establish ground water quality standards.[159] Second, the Board is required to adopt rules before January 1, 1991, establishing protection zones around community water system wells,[160] and also establishing procedures for the construction and monitoring of surface impoundments used for the storage or treatment of nonhazardous waste and wastewater.[161]

House Enrolled Act 1261[162] amended Indiana Code section 14-3-1-14, which lists the powers and the duties of the Department of Natural Resources, by adding new language that states the Department of Natural Resources is to cooperate with the IDEM, other state agencies, and local units of government to protect the waters and the lands of Indiana from pollution.[163] House Enrolled Act 1261 also added a new section to the Code that requires a person or an entity, other than a public or municipal water utility, to obtain a permit from the Department of Natural Resources before filling, erecting a permanent structure in, or removing material from a navigable waterway.[164]

Senate Enrolled Act 340[165] established the Water Resources Study Committee, comprised of six state Senators and six state Representatives,

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155. 1989 Ind. Acts 1452 (adding IND. CODE § 13-7-26) (1988).
156. 1989 Ind. Acts 1452. *See* IND. CODE ANN. § 13-7-26-2 (Burns Supp. 1989).
157. 1989 Ind. Acts 1452. *See* IND. CODE ANN. § 13-7-26-2(h) (Burns Supp. 1989).
158. 1989 Ind. Acts 1452. *See* IND. CODE ANN. § 13-7-26-4 (Burns Supp. 1989).
159. 1989 Ind. Acts 1452. *See* IND. CODE ANN. § 13-7-26-6 (Burns Supp. 1989).
160. 1989 Ind. Acts 1452. *See* IND. CODE ANN. § 13-7-26-7 (Burns Supp. 1989).
161. 1989 Ind. Acts 1452. *See* IND. CODE ANN. § 13-7-26-8 (Burns Supp. 1989).
162. 1989 Ind. Acts 890.
163. 1989 Ind. Acts 890. *See* IND. CODE ANN. § 14-3-1-14(8) (Burns Supp. 1989).
164. 1989 Ind. Acts 889. *See* IND. CODE ANN. § 13-2-4-9 (Burns Supp. 1989).
165. 1989 Ind. Acts 1388.

to serve during the One Hundred Sixth Session of the General Assembly. The Committee is to study and make recommendations to the General Assembly on all matters relating to the surface and ground water resources of Indiana.

E. Recycling

House Enrolled Act 1148[166] added a new chapter to the Indiana Code that requires the IDEM Office of Technical Assistance (OTA) to gather and disseminate information on industrial practices that reduce, eliminate, or avoid the generation of hazardous waste in order to reduce risks to human health and the environment.[167] The OTA is to provide this information in response to a request from a business that is active in Indiana and, in the absence of a request, the OTA may present advice on hazardous waste to a business that, in the judgment of the Commissioner of the IDEM, could significantly reduce, eliminate, or avoid the generation of hazardous waste through industrial waste reduction practices.[168] In an effort to aid the OTA with gathering data on the generation and generators of hazardous waste in Indiana, the statute requires a person who submits the required biennial report concerning hazardous waste generation[169] to include additional information in the report concerning the person's hazardous waste generation and the person's industrial operation.[170]

House Enrolled Act 1310[171] established the Solid Waste Separation and Recycling Projects Fund. If money is available in the Fund, the IDEM may make grants from the Fund to cities, towns, and counties for projects involving solid waste separation or solid waste recycling.[172] The Fund is scheduled to terminate July 1, 1991.[173]

Senate Enrolled Act 415[174] requires state government agencies, including the legislative and judicial branches of state government and state supported colleges and universities, to make reasonable efforts to collect and recycle paper products used by the agencies.[175] The Act also requires state government agencies to procure recycled paper products

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166. 1989 Ind. Acts 663 (adding IND. CODE § 13-7-27).

167. 1989 Ind. Acts 663. *See* IND. CODE ANN. § 13-7-27-4(a), (b) (Burns Supp. 1989).

168. 1989 Ind. Acts 663. *See* IND. CODE ANN. § 13-7-27-4(c) (Burns Supp. 1989).

169. *See* 42 U.S.C. § 6922(a)(6) (Supp. V 1987).

170. 1989 Ind. Acts 663 (amending IND. CODE § 13-7-27-7) (1988).

171. 1989 Ind. Acts 2101.

172. *Id.*

173. *Id.*

174. 1989 Ind. Acts 525. See IND. CODE ANN. §§ 4-13-4.1-5 and 20-12-67-1 to -3 (Burns Supp. 1989).

175. *Id.*

if recycled paper products are available at the time of a paper products procurement and it is economically feasible to procure those paper products.[176]

Senate Enrolled Act 430[177] requires the same state government entities affected by Senate Enrolled Act 415[178] to procure disposable plastic products that are degradable if degradable plastic products are available at the time of a procurement of plastic products, the procurement is appropriate, and the procurement is economically feasible.[179]

Beginning January 1, 1992, under Indiana Code Section 13-7-22-1, as added by Senate Enrolled Act 219,[180] a person may not sell a plastic bottle with a capacity of sixteen fluid ounces or more or a rigid plastic container with a capacity of eight fluid ounces or more unless the bottle or container is coded with a three sided triangular arrow with a number in the center and letters underneath indicating the resin from which the bottle or container is made.[181] This coding is to assist recyclers in sorting plastic bottles and containers by resin composition.

House Enrolled Act 1926[182] added a new chapter to the Indiana Code, creating the Indiana Institute on Recycling located at Indiana State University.[183] The Institute is to develop concepts, methods, and procedures to assist in efforts in recycling solid waste in Indiana.[184] The Institute is to be administered by a Board of Governors which consists of seven members representing state and local government, business and industry, and environmental interests.[185] The Board is to report biennially to the General Assembly on the operations, findings, and recommendations of the Institute.[186] The Institute is scheduled to terminate July 1, 1994.[187]

F. Regulatory

Senate Enrolled Act 393[188] prohibits the land application of used oil to any ground surface without first obtaining a permit from the IDEM.[189]

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176. *Id.* IND. CODE 4-13.4-4-7.
177. 1989 Ind. Acts 527.
178. 1989 Ind. Acts 525.
179. 1989 Ind. Acts 528, IND. CODE. §§ 4-13.4-4-6 and 20-12-68.
180. 1989 Ind. Acts 1437.
181. IND. CODE ANN. § 13-7-22 (Burns Supp. 1989).
182. 1989 Ind. Acts 1450.
183. IND. CODE ANN. §§ 13-7-25-3, -4 (Burns Supp. 1989).
184. *Id.* § 13-7-25-5.
185. *Id.* § 13-7-25-6(b).
186. *Id.* § 13-7-25-7.
187. *Id.* § 13-7-25-13.
188. 1989 Ind. Acts 1427 (amending IND. CODE § 13-7-4-1) (1988).
189. IND. CODE ANN. § 13-7-4-1(14) (Burns Supp. 1989).

Senate Enrolled Act 393[190] amended Indiana Code section 13-7-8.5-7(b) which had required a generator of 1,000 kilograms or more of hazardous waste in a month to submit to the Office of Solid and Hazardous Waste Management of the IDEM a copy of the manifest that was created for any transportation of the hazardous waste. Senate Enrolled Act 393[191] changed this requirement so that it now applies to generators of as little as 100 kilograms or more of hazardous waste in a month.[192] Senate Enrolled Act 393[193] also added a requirement that a manifest prepared by and purchased from the IDEM must be used in the transportation of hazardous waste to a treatment, storage, or disposal facility located in Indiana.[194]

Senate Enrolled Act 220[195] amended Indiana Code section 13-7-8.6-5 to allow a person who proposes to construct a hazardous waste or low-level radioactive waste facility to apply for a certificate of environmental compatibility from the Hazardous Waste Facility Site Approval Authority before obtaining other required state or federal approval for the facility.[196] Previously, a person was required to obtain all other state and federal approval before applying to the Authority.[197]

Senate Enrolled Act 220[198] also added a requirement, which would have become effective July 1, 1992, but was repealed by the 1990 legislature, concerning rules adopted by the Air Pollution Control Board, the Water Pollution Control Board or the Solid Waste Management Board. If a rule adopted by one of those boards had required a plan, study, report, or other technical information prepared on behalf of a person subject to the rule to be certified by a registered professional engineer, the appropriate board would have required that the information be certified by a hazardous materials manager certified by the Institute of Hazardous Materials Management.[199]

G. Agency Related

Senate Enrolled Act 548[200] amended Indiana Code section 13-7-13-2 concerning the Environmental Management Special Fund. The Envi-

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190. 1989 Ind. Acts 1429.
191. *Id.*
192. *See* IND. CODE ANN. § 13-7-8.5-7(b) (Burns Supp. 1989).
193. 1989 Ind. Acts 1429.
194. IND. CODE ANN. § 13-7-8.5-7(f) (Burns Supp. 1989).
195. 1989 Ind. Acts 1432.
196. *Id.*
197. *See* IND. CODE § 13-7-8.6-5 (1988).
198. 1989 Ind. Acts 1431 (repealed by P.L. 19-1990).
199. IND. CODE ANN. § 13-7-7-7 (Burns Supp. 1989).
200. 1989 Ind. Acts 1435.

ronmental Management Special Fund is a dedicated environmental fund that may be used by the IDEM after approval of the Governor and the State Budget Director.[201] As amended, the statute now specifies that fees collected by the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board are to be deposited in the Environmental Management Special Fund instead of continuing to be deposited in the State General Fund.[202] Senate Enrolled Act 548 also requires the Auditor of State to issue a report on the Special Fund every four months.[203] A copy of the report is to be forwarded to the IDEM Commissioner, the standing committees of the Indiana House and Senate concerned with the environment, the Environmental Policy Commission, the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board.[204]

House Enrolled Act 1650[205] made several changes to the Wastewater Revolving Loan Program. These changes included amending the Loan Program to allow the Water Pollution Control Board to adopt emergency rules to implement the Program,[206] and amending numerous sections of Indiana Code 4-23-21 to allow loans to be made for the planning and designing of wastewater systems, allow the IDEM to sell the creditor's rights connected with the loans and to invest the money in the loan fund in trusteed accounts, allow a political subdivision to issue and sell notes to the IDEM, and allow the IDEM to enhance the obligations of political subdivisions by granting money to be deposited in reserve funds, paying bond insurance premiums or credit enhancement fees, or guaranteeing the obligations.[207]

H. Air Pollution

House Enrolled Act 1837[208] added a new chapter to the Indiana Code concerning radon gas.[209] An individual now may not engage or profess to engage in testing for radon gas or abatement of radon gas unless the individual has been certified by the Indiana State Board of Health (ISBH).[210] Also, the ISBH is required to collect and disseminate

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201. IND. CODE § 13-7-13-2(a), (b) (1988).
202. *See* IND. CODE ANN. § 13-7-13-2(a) (Burns Supp. 1989).
203. *Id.* § 13-7-13-2(c).
204. *Id.*
205. 1989 Ind. Acts 2291.
206. *See* IND. CODE ANN. § 4-23-21 (Burns Supp. 1989).
207. *Id.*
208. 1989 Ind. Acts 335.
209. IND. CODE ANN. § 13-1-14 (Burns Supp. 1989).
210. *Id.* § 13-1-14-6(b).

information concerning radon gas.[211] The Radon Gas Trust Fund was established to pay the expenses of administering the chapter.[212]

House Enrolled Act 1905[213] revised the enforcement of the auto emissions testing program required in Indiana counties that are not in compliance with ozone air quality standards established by the EPA.[214] Currently, Clark, Floyd, Lake, and Porter Counties are not in compliance with these standards. House Enrolled Act 1905 replaced the requirement that stickers were to be displayed on a new vehicle to show the vehicle was in compliance with emissions standards with the requirement that a certificate of proof was to be issued and used to prove compliance.[215] Proof of compliance is now a condition for registering a vehicle with the Bureau of Motor Vehicles (BMV) if the vehicle is located in a county that has not attained the required ozone air quality level.[216] The BMV must now suspend the registration of a vehicle in a nonattainment county if the vehicle is not in compliance with emissions standards.[217]

House Enrolled Act 1905 repealed the law that required a vehicle that was registered outside of a nonattainment area to be in compliance with the emissions standards in the nonattainment area if the vehicle travelled regularly in the area.[218] House Enrolled Act 1905 also repealed the civil penalties for noncompliance.[219]

Senate Enrolled Act 505[220] defined clean coal technology as "a technology that is used at an electric generating facility and directly or indirectly reduces airborne emissions of sulfur or nitrogen based pollutants associated with the combustion or use of coal and was not in use in the United States as of January 1, 1989, or had been selected by the United States Department of Energy for funding under the Innovative Clean Coal Technology Program after December 31, 1988."[221] Senate Enrolled Act 505 provides for recovery of preconstruction costs of clean coal technology as operating expenses, construction work in progress reimbursement for clean coal technology, amortization of clean coal technology, and preapproval of clean coal technology by the Utility Regulatory Commission.[222]

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211. *Id.* § 13-1-14-4(5).
212. *Id.* § 13-1-14-9.
213. 1989 Ind. Acts 1214-16.
214. IND. CODE ANN. §§ 13-1-1-6 to -12 (Burns Supp. 1989).
215. *Compare* IND. CODE § 13-1-11-1(b) (1988) *with* IND. CODE ANN. § 13-1-1-11(b) (Burns Supp. 1989).
216. IND. CODE ANN. § 9-1-4-3.6 (Burns Supp. 1989).
217. *Id.* § 13-1-1-6(b).
218. 1989 Ind. Acts 1213. *See* IND. CODE § 13-1-1-11(a) (1988).
219. 1989 Ind. Acts 1213. *See* IND. CODE § 13-1-1-9 (1988).
220. 1989 Ind. Acts 113.
221. *Id.* IND. CODE 8-1-8.7-1.
222. *Id.*

III. Future Legislation

In addition to the bills previously discussed, two bills with potentially major environmental impact were introduced in 1989 but failed to pass. One, Senate Bill 545, dealt with solid waste management and the other, House Bill 1910, dealt with underground storage tanks.[223]

The introduced version of Senate Bill 545 would have required each county, by itself or jointly, to form a solid waste management district and adopt a district solid waste management plan. The bill would have also imposed state fees on the disposal of solid waste and required IDEM to formulate a state solid waste management plan. The basic goal of both the district and state plans was to reduce the amount of solid waste being generated and reduce the amount of solid waste being disposed of in landfills.

The introduced version of House Bill 1910 would have specified the IDEM and the State Fire Marshal to jointly operate the underground storage tank program in Indiana. Also, the State Fire Marshal was to establish a program to certify persons involved in underground storage tank installation, testing, upgrading, and removal. This bill also would have established a program to give financial assistance to owners and operators of underground storage tanks to meet state or federal underground storage tank requirements. Both of these bills were examined by the Interim Study Committee on Environmental Issues during the summer and fall of 1989 and will certainly be discussed during the 1990 Session.

IV. Conclusion

Despite an obvious increase in concern about environmental degradation on the part of legislators and the general public alike, the state government has, in large part, failed to either address the major environmental issues with effective legislation or to provide the state's environmental agencies with sufficient staff or funding to effectively administer existing programs. The legislature may also have inadvertently weakened Indiana's environmental protection strategy by effectively denying private citizen participation in the enforcement process. If there is a ray of hope with regard to the future of environmental protection efforts in Indiana, it may be that the state has begun, if hesitantly, to pursue avenues other than traditional regulatory programs in an effort to encourage environmental improvement while shifting the burden of funding and administering such activity from the clearly inadequate state

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223. Shortly before the printing of this Article, similar bills were passed by the 1990 Session of the General Assembly.

mechanisms to private industry and individuals. Prime examples of that approach are the "transaction-triggered" disclosure requirements of the Responsible Property Transfer Law and the expanded restrictive covenant provisions of Senate Enrolled Act 370, which aim at achieving environmental compliance by restricting the alienability of property where regulatory requirements have not been adequately observed. Other examples seen in 1989 legislation include "market-based" acts encouraging recycling of paper and plastics and legislation intended to encourage clean coal technology. As noted by former EPA administrator Lee Thomas, "there are limits to how much environmental improvement can be achieved under these [control] programs, which emphasize management after pollutants have been generated."[224] For that reason, EPA's policy has shifted to pollution prevention rather than pollution control.

While the legislature's willingness to turn to somewhat innovative approaches to environmental protection must be applauded, the legislators must realize that disclosure documents and codes on plastic bottles cannot, by themselves, lift Indiana from the cellar it occupies in many national environmental quality rankings. A more comprehensive package of planning, creativity, initiative, and financial support of the regulatory structure sufficient to allow effective administration of existing law must be provided if Indiana is to see improvement in its national standing with regard to environmental protection, or, more importantly, improvement of our land, air, and water.

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224. Commoner, "Why We Have Failed," GREENPEACE 12-13 (September/October 1989) (quoting L. Thomas, "Pollution Prevention Policy Statement" (unpublished)).