The Evolution of Indiana Environmental Law: A View Toward the Future

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I. INTRODUCTION

1989-90 has been a watershed in the evolution[1] of environmental law in Indiana. The Indiana legislature, assisted by the vigorous leadership of Governor Evan Bayh,[2] and the Indiana judiciary, crafted significant new environmental laws during 1989-90. These legal innovations are rooted in common law tort principles moderately protective of environmental interests,[3] but shaped by more recent statutory enactments addressing general environmental policy concerns.[4] In addition, some federal courts resolved Indiana environmental disputes by reaching decisions that applied both Indiana law and federal law.

A plethora of federal environmental laws[5] and rapidly changing

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1. This evolution can be viewed as both a species of broad-based cultural evolution as well as a particular instance of legal evolution whereby modern societies respond to pressures of growth, development, and technology with more comprehensive and stringent environmental regulation. *See generally* J. BRONOWSKI, THE ASCENT OF MAN (1973). *See also* W. RODGERS, JR., 1 ENVIRONMENTAL LAW: AIR AND WATER at v. (1986) (the concept of evolution "tends to surface regularly, probably because the facts, players, policies, rules, and strategies [of environmental regulation] invariably drift and move when plotted over time") [hereinafter RODGERS].

2. Governor Bayh's key environmental policy advisors are Barton R. Peterson, Executive Assistant to the Governor, and Kathy Prosser, Commissioner of the Indiana Department of Environmental Management. I gratefully acknowledge their assistance in providing background information for this Article.

3. *See generally* Erbich Products Co. Inc. v. Wills, 509 N.E.2d 850 (Ind. Ct. App. 1987) (although ultra-hazardous activity could give rise to strict liability, the storage of chlorine in and of itself is not an ultra-hazardous activity that would give rise to strict liability for its release into the environment, resulting in personal injury and property damage, because the challenged activity could be carried out in a safe manner).

4. *See, e.g.*, IND. CODE § 13-7-4-1 (Supp. 1990) (prohibiting discharges, contamination, or deposit of contaminants); *id.* § 34-1-52-1 (1988) (nuisance); *id.* § 13-7-22.5 (1988) (responsible property transfer law).

5. A list of key federal environmental statutes enacted since 1970 includes the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(a) (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), *as amended by* Act of 1977, Pub. L. No. 95-95; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1988), *as amended by* the Clean Water Act of 1977, Pub. L. No. 95-217; Noise Control Act of 1972, 42 U.S.C. §§ 4901-31 (1988), *as amended by* The Quiet Communities Act of 1978, Pub. L. No. 95-

demographic and economic trends[6] prodded jurists and policymakers addressing Indiana environmental issues to encounter what Professor William H. Rodgers, Jr. calls a "spectacle of ever-burgeoning regulation" of things environmental.[7] The result was a remarkable output of Indiana environmental laws — statutory, case law, and regulatory — during the past year. Indeed, as suggested later in this Article, Indiana's recent environmental lawmaking activity is likely to produce further legal changes during the remainder of the decade and into the next century as the current legal regime "produces its own dissatisfactions, gives rise to new 'gaps' to be filled, and creates its own demands for more regulation."[8]

This Article is divided into three major parts. The first section scrutinizes key state environmental legislative enactments during the survey period. In light of the unusual output of environmental statutes during 1989-90, I devote considerable space to an analysis of key legislative provisions. The second section analyzes state judicial decisions interpreting Indiana environmental and natural resources law and federal court opinions addressing specific Indiana environmental disputes. Finally, the Article concludes by providing a view of probable future trends and developments in Indiana environmental law.[9]

II. Key Indiana Environmental Legislation, 1989-90

Indiana's 1990 Second Regular Session of the 106th General Assembly enacted several major bills pertaining to the environment. The General Assembly also generated a variety of less important environmental sta-

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609; Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6991 (1988); Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629 (1988); Federal Insecticide, Fungicide, and Rodenticide Act of 1977, 7 U.S.C. §§ 136-136y (1988); Safe Drinking Water Amendments of 1977, 42 U.S.C. §§ 300f-300j-10 (1988); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988), *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. 96-510, Pub. L. No. 99-962.

6. *See generally* Indiana Department of Environmental Management, The Protection of Indiana's Groundwater: Strategy and Draft Implementation Plan (1987); Indiana Department of Environmental Management, What Are Indiana's Plans for Management of Solid and Hazardous Waste in the 1990s?: A Discussion Document (July 1988) (detailing Indiana population trends, solid waste landfill capacity projections, and industry waste management trends); Indiana Department of Environmental Management, 1986 Annual Report.

7. Blomquist, *The Beauty of Complexity* (Book Review), 39 Hast L.J. 555, 568 (1988) (quoting Rodgers *supra* note 1, § 1.3, at 17).

8. *Id. See generally* S. 82, 107th Gen. Assembly Sess. (1991) (recycling by government bodies); S. 276, 107th Gen. Assembly Sess. (1991) (recycling/remanufacturing income tax credits).

9. Environmental rulemaking, a critical aspect of developing environmental law in Indiana, is beyond the scope of this Article. Similarly, the details of significant legislative changes in environmental regulations of property transfers is beyond the scope of this Article.

tutes. The legislation addressed six subject areas: solid waste planning, management, and recycling; pollution prevention; underground storage tanks; natural resources; water pollution; and pesticides regulation. Because recent legislative developments placed great emphasis on solid waste planning, management, and recycling policy, a substantial portion of the Article discusses these issues in considerable detail.

A. Solid Waste Planning, Management, and Recycling

Public Law No. 10-1990[10] (the "Act") revolutionizes solid waste planning in Indiana. The Act consists of five major policy themes: (1) instituting mandatory solid waste planning; (2) establishing new and complex local governmental entities known as "county solid waste management districts" and "joint solid waste management districts" with extensive powers and responsibilities; (3) providing a variety of governmental tools to finance solid waste planning, management, and recycling activities; (4) promoting recycled product use and discouraging waste production; and (5) regulating solid waste transportation by imposing certification and reporting requirements on waste haulers.[11]

1. State and Regional Solid Waste Planning. —

a. General state policies and goals

In Indiana Code section 13-9.5-11, the Act[12] articulates broad statewide policy principles and goals relating to solid waste. Initially, the legislature indicated a policy preference for source reduction, recycling,

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10. Indiana House Enrolled Act No. 1240, Pub. L. No. 10-1990 (amending IND. CODE § 13-7-1-1 (1988 & Supp. 1990)) [hereinafter the Act]. Section 17 of the Act (adding a new article, Indiana Code § 13-9.5) defines key terminology for solid waste planning. "Landfill" is defined as "a solid waste management disposal facility at which solid waste is deposited on or in the ground as an intended place of final location," but does not include "[a] site that is devoted solely to receiving . . . [f]ill dirt [or] [v]egetative matter subject to disposal as a result of landscaping, yard maintenance, land clearing, or any combination [thereof]." IND. CODE § 13-9.5-1-19 (Supp. 1990).

"Recycling" refers to "a process by which materials that would otherwise become solid waste are collected, separated or processed, and converted into materials or products for reuse or sale." *Id.* § 13-9.5-1-24.

"Solid waste" tracks the existing definitions of Indiana Code § 13-17-1-22 except that the Act excepts from the definition waste regulated under Indiana Code § 13-7-8-5 and "[a]ny infectious waste (as defined in IC 16-1-9.7-3) that is disposed of at an incinerator permitted under rules adopted by the solid waste management board to dispose of infectious waste." *Id.* § 13-9.5-1-26.

"Source reduction" refers to "a reduction in the amount of solid waste generated that is achieved through action affecting the source of the solid waste." *Id.* § 13-9.5-30.

11. *Id.* §§ 13-9.5-1-2 to -11-5.

12. *Id.* § 13-9.5-11 (amending IND. CODE § 13-7-1-1 (1988 & Supp. 1990)).

and other solid waste management alternatives over incineration and landfill disposal as solid waste management methods.[13] To implement this preference for solid waste management, the Act set the goal of reducing the amount of solid waste incinerated and disposed of in Indiana by thirty-five percent before January 1, 1996; and by fifty percent before January 1, 2001.[14]

b. State solid waste planning

The Act also establishes state solid waste planning responsibilities.[15] Two state entities are to be involved with these duties: the Indiana Department of Environmental Management (IDEM)[16] and the state Environmental Policy Commission.[17] The legislation envisions a four-step

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13. *Id.*

14. *Id. Cf.* Regional Note, *The 1988 Pennsylvania Municipal Waste Planning, Recycling, and Waste Reduction Act*, 9 TEMPLE ENVIR. & TECH. L. REV. 107, 110, 113-14 (1990) (describing other states' recycling and waste reduction goals) [hereinafter Regional Note]. For example:

> The Pennsylvania [legislation] calls for twenty-five percent recycling of the state's solid waste stream by 1997. [53 PA. CONS. STAT. ANN. § 4000.102(c)(1) (Purdon 1989)]. By comparison, Florida's law calls for a thirty percent recycling by 1994 [FLA. STAT. ANN. § 403.706(4) (West 1989)]; Maryland's law seeks twenty percent recycling by 1994 [MD. ENVTL. CODE ANN. § 9-505(18) (1989)]; Connecticut's mandatory recycling goal is twenty-five percent recycling by 1991 [1987 Conn. Pub. Acts 87-544, § 1 (Reg. Sess.)].

Id. at 113-14 (footnotes omitted).

15. Indiana House Enrolled Act No. 1240, Pub. L. No. 10-1990, § 17 (adding a new article, IND. CODE § 13-9.5 (Supp. 1990)).

16. The Indiana Chamber of Commerce described IDEM's purpose:

> This department, established as a result of General Assembly action in 1985, administers the Environmental Management Act and other state environmental statutes previously carried out by the Indiana State Board of Health. It cooperates with the U.S. Environmental Protection Agency and is responsible for implementing state programs concerning water and air pollution control, solid waste management, and low-level radioactive waste.

INDIANA CHAMBER OF COMMERCE, HERE IS YOUR INDIANA GOVERNMENT 25 (1987).

17. The Chamber of Commerce also stated the purpose of the State Environmental Policy Commission:

> This commission was created by the Indiana General Assembly in 1985 to provide ongoing evaluation of Indiana's environmental program. It makes reports and legislative recommendations for the governor, the commissioner of the Department of Environmental Management and General Assembly.
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> The commission is composed of 12 members. The Speaker of the House and the president pro tempore of the Senate each appoint four legislators, not more than two from the same political party, and the governor appoints four members representing environmental and economic interests, not more than two from the same political party.

Id. at 26.

process of interaction between these two entities. First, the IDEM is required to submit to the Environmental Policy Commission a draft of a state solid waste management plan.[18] Second, the Environmental Policy Commission must revise the IDEM draft plan to assure a twenty-year state solid waste management plan covering four key planning components. The twenty-year plan must establish in order of priority: (1) voluntary statewide goals for source reduction; (2) criteria for alternatives to final disposal, including recycling, composting, and the availability of markets; (3) general criteria for the siting, construction, operation, closing, and monitoring of final disposal facilities; (4) criteria and other elements to be considered in the adoption of district solid waste management plans.[19]

After receiving the Environmental Policy Commission revisions, the IDEM commissioner must adopt the state plan in final form and provide for its implementation by rules adopted under Indiana Code section 4-22-2.[20] Finally, the process of statewide solid waste management planning comes full circle. The Act mandates that after the IDEM commissioner adopts the state plan, the Environmental Policy Commission must review it every five years,[21] using the earlier three steps of interaction with the IDEM.[22]

c. Regional solid waste planning

Indiana Code section 13-9.5-4[23] — consisting of many detailed requirements — places the most important and palpable planning responsibilities on solid waste management districts.[24] Each district must adopt and submit to the IDEM commissioner for approval its own solid waste management plan that meets a variety of specific technical and procedural criteria.[25] The most important requirements for district solid waste management plans include: public meeting prerequisites; format standards;

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18. IND. CODE § 13-9.5-3-1 (Supp. 1990).

19. *Id.* § 13-9.5-3-3. "Final disposal facility" is defined as: "(1) A landfill; (2) an incinerator; or (3) a waste-to-energy facility" but not including "a transfer station." *Id.* § 13-9.5-1-14. Moreover, the Act requires IDEM to supply a model format to be used in preparing district solid waste plans. *Id.* § 13-9.5-4-2(c).

Another section allows the Environmental Policy Commission to go beyond the minimum plan requirements to "make other revisions [to the state plan] that are not inconsistent with [Chapter 3]." *Id.* § 13-9.5-3-1(2).

20. IND. CODE § 13-9.5-3-2 (Supp. 1990). The Code authorizes the state Solid Waste Management Board to adopt rules on solid waste. *Id.* § 13-1-12-8(a) (1988).

21. *Id.* § 13-9.5-3-4 (Supp. 1990).

22. One additional requirement for future revisions of the state plan is that they must be developed with the advice of the solid waste planning advisory council. *Id.*

23. *Id.* § 13-9.5-4.

24. *See infra* notes 25-41 and accompanying text.

25. IND. CODE § 13-9.5-4-1 (Supp. 1990).

long-range demographic projections for the district;[26] descriptions of the origin, content, and weight or volume of the solid waste to be generated in the district at the time the district plan is developed, and projections of the origin, content, and weight or volume of the solid waste expected to be generated in the district in the next five years, ten years, and twenty years;[27] and a solid waste facility's inventory and needs projection.[28]

The Act also mandates certain procedural requirements to be followed in district solid waste management plans.[29] Each district must integrate its approach to solid waste management with a thorough and balanced consideration of "[s]ource reduction"; "[a]lternatives to complete or partial dependence on final disposal facilities, including recycling and composting"; and, alternatives to "[f]inal disposal facilities," like landfills and incinerators.[30] Furthermore, district solid waste management plans must articulate goals and objectives;[31] consider alternate means of achieving district goals;[32] describe projected operational and capital costs; propose a means of financing the implementation of the district plan;[33] and provide for "surveillance and enforcement procedures" needed for implemention.[34]

Prevailing dormant Commerce Clause precedent prohibits a state from banning the importation of waste from another state.[35] Thus, a potentially vulnerable provision of the Act is section 13-9.5-4-8. This section allows a district plan "to the extent it is constitutionally permissible [to] include provisions to restrict or prohibit the disposal within the district of solid waste originating from another state if the district reasonably considers the provisions necessary to accomplish the long-range planning goals of the district."[36] Although the statutory predicate of an out-of-state ban requires the ban to be constitutional, the legislature

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26. *Id.* § 13-9.5-4-8(1). A district plan must include: "(1) The results of a demographic study of the district predicting the population of the district five (5) years, ten (10) years, and twenty (20) years after the year the district plan is adopted." *Id.*

27. *Id.* § 13-9.5-4-5(2).

28. *Id.* §§ 13-9.5-4-5(3), -5(5).

29. For a general discussion of the importance of process values in environmental law and policy, see Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337 (1988).

30. IND. CODE § 13-9.5-4-6 (Supp. 1990).

31. *Id.* § 13-9.5-4-7(1).

32. *Id.* § 13-9.5-4-7(2).

33. *Id.* § 13-9.5-4-7(3).

34. *Id.* § 13-9.5-4-7(6).

35. *See generally* Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem after* City of Philadelphia v. New Jersey, 24 VAL. U.L. REV. 77 (1989).

36. IND. CODE § 13-9.5-4-8 (Supp. 1990).

implicitly suggests that districts consider experimentation with such bans. This, in turn, is likely to trigger litigation by out-of-state generators and transporters challenging the district bans.[37]

A district must "reconsider and, if appropriate, amend its solid waste management plan at least once every five . . . years"[38] by following the substantive and procedural requirements applicable to initial plans.[39] If a district fails to submit a proper district plan — either by failing to submit any plan at all or by submitting a deficient revised plan after receiving written comments from the IDEM commissioner on changes required to make the district plan acceptable[40] — the IDEM commissioner adopts a solid waste management plan for the district.[41]

2. New, Complicated and Powerful Local Governmental Entities. —

a. Types of solid waste management districts

The Act[42] places the burden on each of Indiana's ninety-two counties,[43] on or before July 1, 1991, to either (a) "[j]oin with one . . . or more other counties in establishing a joint solid waste management district

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37. *See, e.g.*, Government Suppliers Consolidating Serv., Inc. v. Bayh, 734 F. Supp. 853 (S.D. Ind. 1990) (Out-of-state companies engaged in the business of hauling solid waste by truck to permanent disposal sites brought an action challenging an Indiana law imposing certain requirements on haulers who dumped solid waste in landfills located in Indiana. On the companies' motion for temporary restraining order, converted into a motion for preliminary injunction, the court held that although the companies were not entitled to a preliminary injunction against the statutory provision imposing an allegedly discriminatory tipping fee on trash dumped in Indiana landfills, and the companies were not entitled to a preliminary injunction against the provision requiring haulers to certify from where the largest part of the solid waste was generated, companies were entitled to a preliminary injunction against the requirement that a health officer from the foreign state generating the waste certify that the waste contains no hazardous or infectious waste.). *See also* Government Suppliers Consolidating Serv., Inc. v. Bayh, 753 F. Supp. 739 (S.D. Ind. 1990) (out-of-state certification requirement and tipping fees held unconstitutional as a violation of interstate commerce).

38. IND. CODE § 13-9.5-4-11(a) (Supp. 1990).

39. *See supra* notes 23-34 and accompanying text.

40. IND. CODE § 13-9.5-4-3(c) (Supp. 1990).

41. *Id.* § 13-9.5-4-10.

42. *Id.* § 13-9.5-2.

43. *Query*: Given the present practice of municipal collection and transport of a significant portion of nonhazardous solid waste, would it not have made more policy sense for the legislature to have crafted an approach similar to Pennsylvania's recent solid waste legislation which requires that all of the state's municipalities pass recycling legislation or face uniform state penalties for failure to meet the laws' standards and deadlines? *See* 53 PA. CONS. STAT. ANN. § 4000.1501(a), (b) (Purdon 1989). *See also* Regional Note, *supra* note 14, at 114.

that includes the entire area of all the acting counties" or (b) "[d]esignate itself as a county solid waste management district."[44] In the case of a county choosing to designate itself a single-county district, the legal mechanism for achieving this purpose is straightforward: the county must pass an ordinance specifying its intent.[45] However, counties choosing the alternative option of forming a joint solid waste management district must not only pass county-specific ordinances expressing their intent, counties must also pass ordinances that "include the approval of an *agreement* governing the operation of the joint district."[46] Moreover, unlike the relatively simple formation of a single-county district, counties that have decided to become part of a joint district must submit their respective enabling ordinances — incorporating the joint district agreement — to the IDEM commissioner within thirty days of adoption.[47]

Although a county's decision either to designate itself a single-county district or to join with other counties in a joint district is of considerable strategic importance, the Act allows municipal governments to freely change their decisions. Specifically, the Act allows one district to merge with another district,[48] while authorizing a county to exercise the option of withdrawing from a joint solid waste management district if the county's withdrawal ordinance is enacted before the IDEM commissioner approves the pending joint district plan.[49]

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44. IND. CODE § 13-9.5-2-1(a) (Supp. 1990). A county's failure to comply with this requirement before July 2, 1991 leads to the county's automatic designation as a single-county district by the IDEM. *Id.* § 13-9.5-2-1(c).

45. *Id.* § 13-9.5-2-1(a).

46. *Id.* § 13-9.5-2-1(b) (emphasis added).

47. *Id.* § 13-9.5-2-3. Although there exists no express power for the IDEM Commissioner to disapprove or modify a joint district agreement, this power is probably inherent given the authority of the Commissioner to disapprove district plans under Indiana Code § 13-9.5-4-3(c).

48. *Id.* § 13-9.5-4-12. Merging districts must, however, strictly comply with the specific statutory requirements that provide in pertinent part:

> (a) A district may merge with one . . . or more other districts after the adoption of identical resolutions by the board of each district to be merged.
> (b) Upon adoption of identical resolutions under subsection (a), a board for the resulting merged district shall be established using the procedures set forth in IC 13-9.5-2.
> (c) A merged district must adopt its district plan within thirty . . . days after the merger is completed and file the district plan with the commissioner.
> (d) A district plan adopted under this section is considered approved unless the commissioner notifies the district within thirty . . . days after the district plan is filed with the commissioner that the district plan fails to comply with the state plan.

Id.

49. *Id.* § 13-9.5-4-13. Even if a county timely withdraws from a joint district before

b. Composition of district boards

After one or more counties form a solid waste management district, the Act requires that a board of directors be appointed.[50] The board of directors is determined by an elaborate representational scheme that is apportioned among the executive and legislative branches of the counties and municipalities within the district.[51] The form of the respective district boards follows their respective geographic configurations. The statute provides for two basic structures: a single-county district board and a joint district board. However, certain variations on these basic structures are also permitted.

The basic organizational structure for a single-county district requires that a board consist of the following: two members from the county executive; one member from the county fiscal body; one member from the executive body of the largest city or town in the district; one member from the legislative body of the largest city or town in the district; one member from the executive body of a smaller city or town in the district;

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the IDEM Commissioner has approved a pending joint district plan, the county's withdrawal will be ineffective under the Act if it does not follow the detailed follow-up regulations of § 13, which provides in pertinent part:

> (a) Before the district plan of a joint district is approved [by the IDEM Commissioner], a county may by ordinance of its executive remove itself from the joint district and:
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> (1) Designate itself as a country district;
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> (2) Join into a joint district; or
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> (3) Join with one . . . or more other counties in establishing a new joint district.
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> (b) If a county designates itself as a county district . . . the board appointed for the new county district under IC 13-9.5-2-4 must file a district plan with the commissioner within ten (10) days after the passage of the ordinance. If the district plan is not filed, the removal of the county from the joint district is not effective.
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> (c) If a county desires to join into a joint district . . . , the board of the other district must approve the addition of the county to the district, amend its district plan to include the additional county, and file the amended district plan with the commissioner within thirty (30) days after the addition of the county to the district. If the district plan is not filed, the removal of the county under subsection (a) is not effective.
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> (d) If a county desires to join in establishing a new joint district under subsection (a)(3), the board of the new joint district must, within thirty . . . days after the adoption of an ordinance establishing the joint district and approving an agreement governing the operation of the joint district, file a new district plan with the commissioner. If the district plan is not filed, the removal of the county under subsection (a) is not effective.

Id.

50. *Id.* § 13-9.5-2-4.

51. *Id.* § 13-9.5-2.

and one additional member of the county executive.[52] The basic organizational structure for a joint district with only two counties requires that a board consist of the following: one member from the county executive of each participating county; one member from the county fiscal body of each participating county; one member from the executive body of the largest city/town in the joint district; one member from the legislative body of the largest city/town in the joint district; executives of each second-class city in the joint district; by agreement, additional members appointed by the county executive — from among their membership — based on the county's population; and, in the event of an even number on the joint district board, one additional member appointed by the county executive of the most populous county in the district, from among its membership.[53]

One of the Act's more interesting and thoughtful organizational mandates for solid waste management districts[54] is the requirement that each district board "appoint and convene a solid waste management advisory committee of citizens, including representatives of the solid waste management industry operating in the district, who are knowledgeable about and interested in environmental issues."[55] These citizen advisory committees have two broad legislative purposes: to "(1) [s]tudy the subjects and problems specified by the [district] board and recommend to the board additional problems in need of study and discussion, [and] (2) [i]f invited by the board to do so, participate, without the right to vote, in the deliberations of the board."[56]

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52. *Id.* § 13-9.5-2-5(a). The Act provides for more complex arrangements in certain instances. For a single-county district with two second class cities, the executive of each city serves as a member of the district board. *Id.* § 13-9.5-2-5(b). In the case of a single-county district with three second class cities, the district board requires inclusion of one member from the county executive, two members from the county fiscal body, the executives of each second or third class city, and one member from "the fiscal body of each town appointed by the fiscal body." *Id.* § 13-9.5-2-5(d). Moreover, in the unique case of Indianapolis/Marion County (having what the Act refers to as "a county having a consolidated city"), if Marion County chooses to become a single-county district, its board would be the Board of Public Works. *Id.* § 13-9.5-2-5(c).

53. *Id.* § 13-9.5-2-6. The Act provides for a variation on joint district membership in the event of three or more counties comprising the district. In such a case, the counties may enter into an "interlocal cooperation agreement" under Indiana Code § 36-1-7 regarding the memberships and terms of office for the district board provided that all such board members be "elected officials." *Id.* § 13-9.5-2-6(d).

54. Other organizational strictures for both single-county districts and joint districts include term of office provisions, *id.* § 13-9.5-2-8(b), and required officers of the board, *id.* § 13-9.5-2-9(b) (neither applies to Indianapolis/Marion County).

55. *Id.* § 13-9.5-2-10.

56. *Id.* § 13-9.5-2-10(a).

c. District powers

Once a solid waste management district is formed and a board of directors is appointed, the Act provides for broad categories of governmental powers to be exercised. These governmental powers fall into three basic categories: (1) solid waste management powers, (2) fiscal powers, and (3) solid waste management and planning powers.

The most important solid waste management powers include the power to develop and implement a district solid waste management plan; the power to plan, design, finance, construct, manage and maintain solid waste management facilities; the power to acquire real and personal property for solid waste management or disposal; and the power to hire necessary personnel in accordance with an approved budget while contracting for professional services.[57] Key fiscal powers of solid waste management districts entail the power to impose district fees on the disposal of solid waste within the district; the power to disburse and receive funds; the power to borrow money from the district planning revolving loan fund; and the power to levy a district tax to pay for solid waste management operating costs, subject to regular budget and tax levy procedures.[58] Significant general powers also allow districts to sell or lease facilities; sue and be sued; borrow in anticipation of taxes; and to adopt resolutions that have the force of law.[59] A district board does not have the express power of eminent domain or the power to "exclusively control" solid waste collection and disposal activities within a district.[60]

In an expansive and cumbersome section, the Act authorizes district boards to delegate various powers. First, the district may delegate authority to board officers.[61] Second, the board may delegate its powers to "any board or legislative body of a municipality," but the district must ratify any exercise of taxing powers. Further, the delegation of powers to a municipal board must be followed by approval of the municipal legislative body involving tax and fiscal matters.[62] Third, delegation of a district board's powers "must contain reasonable standards

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57. *Id.* § 13-9.5-2-11(a)(1), -11(a)(6), -11(a)(9), -11(a)(16). Incidental solid waste management powers are the power to contract, the power to enter property for examination and testing, and "[t]he power to otherwise do all things necessary for the reduction, management, and disposal of solid waste and the recovery of waste products from the solid waste stream." *Id.* § 13-9.5-2-11(a)(7), -11(a)(12), -11(a)(17).

58. *Id.* § 13-9.5-2-11(a)(2), -11(a)(3), -11(a)(5), -11(a)(14). Incidental district fiscal powers pertain to authority to accept gifts, grants, and loans. *Id.* § 13-9.5-2-11(a)(13).

59. *Id.* § 13-9.5-2-11(a)(4), -11(a)(8), -11(a)(19), -11(a)(15), -11(a)(18).

60. *Id.* § 13-9.5-2-11(b).

61. *Id.* § 13-9.5-2-12(b).

62. *Id.* § 13-8.5-2-12(a).

and parameters within which the delegated powers may be exercised."[63]

3. New and Expansive Local Governmental Financing Tools. — In addition to instituting solid waste planning[64] and establishing new local governmental entities to plan and manage solid waste,[65] the Act also provides these new governmental entities with a variety of new tools to finance waste management activities. Section 13-9.5-9 of the Act creates a special taxing district within each solid waste management district to provide solid waste management services to persons within the district.[66] The special taxing district is conterminous with the particular territory of the solid waste district.[67]

a. Solid waste management fees

In addition to the power to impose solid waste disposal fees to pay for the expense of developing and implementing a district solid waste plan,[68] the Act also authorizes district boards to establish solid waste management fees.[69] These fees apply to persons owning real property benefited by waste collection systems or waste disposal facilities.[70] District

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63. *Id.* § 13-9.5-2-12(c). A number of interpretational questions remain open regarding this section. *Query*: Is the delegation of authority to "any board or legislative body of a municipality" limited by the geographic scope of a district? While such an interpretation would conform to the structure and purpose of the Act, it would be wise for the legislature to clarify this issue. *Query*: What are the implications of a delegation of authority without "reasonable standards and parameters"? Would the exercise of authority be *ultra vires* and, therefore, void, or merely voidable, depending on particular facts and circumstances? Who would be authorized to sue to challenge grants of a board's delegated powers?

64. *See supra* notes 10-41 and accompanying text.

65. *See supra* notes 42-63 and accompanying text.

66. IND. CODE § 13-9.5-9-1(a) (Supp. 1990).

67. *Id.* § 13-9.5-9-1(b). Examples of other taxing districts include park, sanitation, flood control, thoroughfare, and redevelopment districts. Chapter 9 of the Act establishes a new type of special taxing district under Indiana law: a solid waste facilities special taxing district. *Id.* § 13-9.5-9-1(a). The structure and purpose of Chapter 9 authorizes the districts to have the power to issue bonds to finance solid waste facilities and to levy an unlimited *ad valorem* property tax to pay debt service. *Id.* § 13-9.5-9-3. As a result of the ability of solid waste management districts to levy the tax, the bonds should be freely marketable and sell at competitive interest rates.

68. *Id.* § 13-9.5-7. Revenue collected under this chapter is known as the "district solid waste management fund" for the particular solid waste district. *Id.* § 13-9.5-7-2.

69. *Id.* § 13-9.5-9-2(a).

70. *Id.* The district solid waste management board may fix the solid waste management fees on the basis of the following:

(1) A flat charge for each residence or building in use in the waste management district.

(2) On weight or volume of the refuse received.

(3) On the average number of containers or bags of refuse received.

boards may exercise reasonable discretion in adopting differing solid waste management fee schemes based upon a variety of fiscal factors.[71] Solid waste management fees may be used, together with other revenues, to pay for the following expenses: (1) solid waste management facilities' costs; (2) solid waste management facilities' operation and maintenance costs; and (3) principal and interest charges on district waste management or revenue bonds.[72]

b. Waste management district bonds

Boards are allowed to issue waste management district bonds[73] for payment of costs of solid waste management facilities.[74] The solid waste

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(4) On the relative difficulty associated with the collection or management of the solid waste received.

(5) On any other criteria that the board determines to be logically related to the service.

(6) On any combination of these criteria.

Id. § 13-9.5-9-2(b).

71. *Id.* § 13-9.5-9-2(d). These factors — which are subject to a discretionary balancing test — include: "(1) [t]he cost of furnishing . . . [solid waste] services . . . to various classes of owners of property; (2) [t]he distance of the property benefited from the facility; [and] (3) [a]ny other variations the board determines to be logically related to the cost of the service." *Id.*

72. *Id.* § 13-9.5-9-2(g).

73. *Id.* § 13-9.5-9-3. The bond issuing process commences when plans and specifications are proposed according to the public bidding requirements of § 36-1-12 or a resolution approving a request for proposals under § 13-9.5-8 has been adopted. Thereafter, the board must adopt a resolution declaring that the "public health and welfare" and the "public utility and benefit" would be served by constructing, modifying, acquiring, or maintaining a solid waste facility. *Id.* § 13-9.5-9-3(b).

74. The term "facility" is quite broad:

"Facility" means any facility, plant, works, system, building, structure, improvement, machinery, equipment, fixture, or other real or personal property of any nature that is to be used, occupied, or employed for the collection, storage, separation, processing, recovery, treatment, marketing, transfer, or disposal of solid waste.

Id. § 13-9.5-1-13. Therefore, "facility" includes more than just disposal facilities, such as landfills and incinerators, but also includes recycling and composting facilities.

"Cost" is also broadly defined under the Act.

"Cost," as applied to a facility or any part of a facility, includes the following:

(1) The cost of construction, modification, decommissioning, disposal, or acquisition of the facility or any part of the facility.

(2) Financing charges.

(3) Interest before and during construction and for a reasonable period after the construction as determined by the board.

(4) The cost of funding reserves to secure the payment of principal and interest on bonds issued by the district.

(5) The cost of funding an operation and maintenance reserve fund.

management district boards levy the special tax on real estate each year in the amount necessary to pay principal and interest on the waste management district bonds.[75] The waste management district bonds are "special obligations" and not "in any respect" obligations of the counties and municipalities that make up the district.[76] Rather, the bonds are to be payable out of a special tax levied upon all property of the district.[77]

c. Revenue bonds

Solid waste management district boards may also issue revenue bonds to finance the costs of solid waste facilities.[78] A board must authorize revenue bonds by resolution, and specify as part of the resolution that the bonds are payable "solely from and secured by a lien upon the revenues of all or part of the facilities."[79] Like waste management district bonds, revenue bonds are special obligations of the district and not a debt of any local governmental entity.

d. Waste management development bonds

The Act allocates additional power to solid waste management district boards to finance solid waste facilities by providing financing similar to industrial development bond financing. Specifically, boards are authorized to make direct loans to users or developers for the cost of acquisition, construction, or installation of facilities, including real property, machinery, or equipment.[80] Development bonds need to be secured by the pledge of one or more bonds or other secured or unsecured debt obligations of the users or developers.[81]

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(6) The cost of funding a major repair or replacement fund.
(7) Legal and underwriting expenses.
(8) Municipal bond insurance premiums.
(9) The cost of plans, specifications, surveys, and estimates of costs and revenues.
(10) Other expenses necessary or incidental to determining the feasibility or practicability of constructing the facility.
(11) Administrative expense.
(12) Other expenses necessary or incidental to the construction, modification, or acquisition of the facility, the financing of the construction, modification, or acquisition, and the placing of the facility in operation.

Id. § 13-9.5-1-6.

75. *Id.* § 13-9.5-9-3(h).
76. *Id.* § 13-9.5-9-3(f).
77. *Id.*
78. *Id.* § 13-9.5-9-4(a).
79. *Id.* § 13-9.5-9-4(c).
80. *Id.* § 13-9.5(a)(5).
81. *Id.*

e. District notes

The Act also empowers solid waste management districts to borrow money by issuing notes pending receipt of grants or in anticipation of the issuance of bonds.[82] District notes may be sold at public or private sales.[83] The maximum maturity of the notes is five years, and they are payable from the proceeds of the anticipated grant or bond revenue.[84]

4. Recycling and Waste Reduction Incentives and Regulation. — The legislature has delegated mandatory command and control authority to the state solid waste management board to adopt rules "establishing a date after which the disposal of recyclable materials in a final disposal facility will be prohibited or, if disposal is necessary, restricted to the greatest extent practicable."[85] The Act also provides a panoply of economic incentives and study provisions to encourage recycling and waste reduction activities. First, Indiana Code section 13-9.5-5 imposes a state solid waste management fee beginning January 1, 1991, on the disposal of solid waste in a final disposal facility in Indiana (such as a landfill, waste-to-energy facility, or incinerator).[86] Revenue from the fund is paid into the state solid waste management fund. Money in the fund will be used to provide grants and loans to promote recycling within Indiana.[87]

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82. *Id.* The financing agreement between a developer or user and a district waste management board must provide for payments sufficient to pay the district's debt service on the bonds and may not exceed 40 years duration. *Id.* § 13-9.5-9-5(f).

83. *Id.* § 13-9.5-9-7(b).

84. *Id.* § 13-9.5-9-7(b), (c). For general bond provisions dealing with matters such as terms of issue, type of interest, redemption, reserves, maturity, taxability, security, and other matters, see *id.* § 13-9.5-9-8.

85. *Id.* § 13-7-28-3. The "solid waste management board" refers to the pre-existing state board established by Indiana Code § 13-1-12. "Final disposal facility" means "(1) an incinerator (as defined in IC 13-7-1-13.5); or (2) [a] solid waste landfill." *Id.* § 13-7-28-1. For purposes of the chapter, "'solid waste landfill' means a solid waste disposal facility at which solid waste is deposited on or beneath the surface of the ground as an intended place of final location." *Id.* § 13-7-28-2.

86. *Id.* § 13-9.5-5-1. The fee for solid waste generated in Indiana is 50¢ per ton. The fee for solid waste generated outside Indiana is the greater of the following:

> (A) The cost per ton of disposing of solid waste, including tipping fees and state and local government fees, in the final disposal facility that is closest to the area in which the solid waste was generated, minus the fee actually charged for the disposal or incineration of the solid waste by the owner or operator of the final disposal facility in Indiana.
>
> (B) Fifty cents. . . .

Id. § 13-9.5-5-1(a)(2). Whether the out-of-state generation state disposal fee will pass constitutional scrutiny under the dormant commerce clause analysis is a problematic issue. *See supra* note 37.

87. IND. CODE § 13-9.5-5-1(b) (Supp. 1990). The owner or operator of a final disposal facility will be responsible for collecting the fees and will receive as compensation

In addition to the state solid waste management fee, the fund may also receive appropriations from the legislature and gifts and loans.[88]

Second, the Act also adds a new recycling promotion and assistance fund.[89] The purpose of this provision is "to promote and assist recycling throughout Indiana by focusing economic development efforts on businesses and projects involving recycling."[90] Third, the Act creates mandates for state consideration of markets for new products made from recycled materials.[91] Fourth, the legislation requires the state Department of Commerce to consider the state economic development assistance's potential environmental impact and to give priority to businesses and industries that "convert recyclable materials into useful products or [that] create markets for products made from recycled materials."[92]

Fifth, the Act renames the state energy development board the "Indiana recycling and energy development board."[93] The Act mandates additional responsibilities of the board that include consideration of projects creating markets and new products from recycled materials.[94] Sixth, the Act requires the IDEM to establish two new task forces: a "packaging waste reduction task force"[95] and a "recycled paper task force."[96]

In light of these overlapping recycling provisions in the Act, juxtaposed with the mandatory state and regional solid waste planning provisions discussed above,[97] the planning process will at first probably

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an amount equal to 1% of the fees collected. *Id.* § 13-9.5-5-4. The fee does not apply to the disposal of solid waste by a person who generated the solid waste and disposed of it at a site owned by the person and limited to disposal of the person's solid waste. *Id.* § 13-9.5-5-5.

88. The Indiana Department of Environmental Management will administer the money in the fund. Grants and loans from this fund will probably concentrate on assisting local governments and not-for-profit organizations in establishing recycling programs. *Id.* § 13-9.5-5-2.

89. *Id.* § 4-23-5.5-14 (1988 & Supp. 1990).

90. *Id.* § 4-23-5.5-14. Sources of money for the fund consist of appropriations from the legislature, repayment of proceeds of loans made from the fund, gifts and donations, and money from the solid waste management fund. *Id.* § 4-23-5.5-15(b). During the 1990 legislative session, no state money was appropriated to either the state solid waste management fund or the recycling promotion and assistance fund. Thus, all funding for the initial year will have to come from the 50¢ per ton state solid waste disposal fee. Regulations addressing the distribution of monies between the two funds would help clarify and guide distribution policies.

91. *Id.* § 4-3-11-6.

92. *Id.* § 4-4-3-8.1.

93. *Id.* § 4-23-5.5-2(a).

94. *Id.* § 4-23-5.5-6.

95. *Id.* § 13-7-3-14 (Supp. 1990).

96. *Id.* § 13-7-3-15.

97. *See supra* notes 10-41 and accompanying text.

focus on ideas for recycling. "Recycling is popular. It allows community groups, municipalities, and businesses to work cooperatively toward a common goal. There are many attractive options to evaluate, and much to learn."[98] However, as the July 1, 1992 deadline for preparation of district solid waste plans approaches,

> the planning focus will naturally shift away from recycling to solid waste treatment and disposal. Community leaders will have the political and legal responsibility to answer the tough questions on long-term solid waste management. They must consider specific energy recovery, incinerator and landfill operations in detail. This discussion is not popular or attractive, but it is as necessary as the discussion on recycling.[99]

Specific recycling and waste reduction policies that likely will be considered in the course of solid waste planning in Indiana include curbside pickup, closed loop recycling, user-fees, composting, mandated reduced excess packaging, and household hazardous waste recycling programs.[100]

5. Solid Waste Transportation Regulations. — Two important solid waste hauling certification requirements are incorporated into the Act. The first provision, section 13-7-22-2.7(c), requires a hauler who transports solid waste to a final disposal facility in Indiana to present to the owner/operator of the facility (1) a written statement in which the hauler certifies under oath the Indiana county or the state in which the largest part of the solid waste was generated, and (2) if the largest part of the solid waste was generated outside Indiana, a document in which an officer of the state or local government who has responsibility for protection of public health certifies that the solid waste generated in that state is not subject to regulation as a hazardous waste under federal law or as an infectious waste under Indiana law.[101]

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98. INDIANA RECYCLING COALITION NEWSLETTER No. 1 (Aug. 1990).

99. *Id.*

100. *Id. See also* THE INSTITUTE FOR LOCAL SELF-RELIANCE, INDIANA'S ALTERNATIVES TO SOLID WASTE DISPOSAL (May 1990).

101. IND. CODE § 13-7-22-2.7(c) (Supp. 1990). The solid waste must not be "subject to regulation as hazardous waste under the federal Solid Waste Disposal Act (42 U.S.C. §§ 6901-6992k) or as infectious waste under Indiana Code section 16-1-9.7." *Id.* The hauler certificate is not required under § 13-7-22-2.7(g) if the county executive or local district board of the county where the disposal facility is located has entered into an agreement with a governmental unit in a county in another state, but contiguous to Indiana, and the hauler certifies that the largest part of the waste was generated in that governmental unit, or if the IDEM Commissioner exempts solid waste generated in a contiguous county, if the Commissioner determines that the disposal will not impair the long-term disposal capacity of Indiana or the health and safety of the people of Indiana. *Id.* § 13-7-22-2.7(h). Moreover, the hauler certificate requirements do not apply to disposal of waste

The Act's second solid waste hauler certification requirement is in section 13-9.5-11-1.[102] This provision requires that after June 30, 1990, a hauler disposing of waste in Indiana certify under oath the origin of the largest part of the solid waste by volume. Moreover, under this section, after June 30, 1990, a hauler that collects waste in Indiana and takes waste to a transfer station or final disposal facility outside Indiana is required to maintain records that identify the county and state of origin of the largest part of the solid waste by volume, and is also required to file quarterly reports stating the location of the out-of-state transfer station or disposal facility and the volume of waste from each county and state taken to each facility.[103]

6. Miscellaneous Solid Waste Mandates. — In addition to the solid waste planning, management, and recycling provisions, the General Assembly enacted and the Governor signed a miscellany of new solid waste laws during 1990. First, the legislature tightened administrative and financial disclosure requirements in four separate bills. Portions of Public Law No. 70-1990 require IDEM to designate ten of its employees as

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by generators in a site owned by the generator and limited to the generator's use, *i.e.*, "captive sites." *Id.* § 13-7-22-2.7(b).

Query: Does the burden on interstate commerce created by the hauler certification requirement pass constitutional muster under the dormant Commerce Clause analysis? *See supra* note 37.

102. *Id.* § 13-9.5-11-1.

103. *Id.* § 13-9.5-11-2. If the hauler picks up waste from other than the point of origin (*i.e.*, a transfer station), the hauler may obtain certification from the owner of the transfer station of the waste's county and state of origin. Captive sites are exempt. *Id.* §§ 13-9.5-11-3, -4. *Query*: Does the burden on interstate commerce created by the hauler record provision comply with the dormant Commerce Clause? *See supra* note 37.

Two additional statutes passed by the Indiana General Assembly deal with other solid waste transportation issues. Indiana Code Chapter 31 addresses municipal waste transportation and requires municipal waste collection and transportation vehicles (including trucks or rail cars used to transport solid waste from a generator or processing facility to a processing facility in Indiana) to be licensed by IDEM. *Id.* § 13-7-31-9. This provision also grants IDEM power to inspect vehicles transporting municipal waste. *Id.* § 13-7-31-11. Moreover, municipal waste collection and transportation vehicles transporting waste from processing facilities must (1) bear a placard, stating that the vehicle is carrying municipal wastes, and (2) be accompanied by a manifest stating the weight of solid wastes transported, the processing facility from which the waste is transported, and the destination and name of the transporter. Under this statute, a solid waste or processing facility in Indiana may not accept a shipment of waste from a vehicle not licensed and not accompanied by a proper manifest. *Id.* § 13-7-31-12.

Indiana Code § 16-1-28-13.5 specifies that trucks used to transport more than 4,000 pounds of solid waste to a landfill, incinerator, or transfer station may not be used to transport food less than 15 days after transporting solid waste, unless properly sanitized. *Id.* § 16-1-28-15.5. Under this legislation, the State Board of Health may adopt rules to implement the law and to require documentation regarding transportation of food and to establish procedures for sanitizing trucks. *Id.* § 16-1-28-13.5(g).

landfill inspectors.[104] The Act also requires permit applicants for hazardous waste landfills, solid waste landfills or transfer stations to assure financial responsibility for closure and post-closure, and monitoring and maintenance costs.[105] Likewise, Public Law 107-1990 prohibits IDEM from issuing an "original permit" for the construction or operation of a solid waste disposal facility unless the permit applicant submits an audited financial statement indicating that the applicant's net worth is at least $250,000 and swears or affirms that there are no outstanding liens, judgments, or other obligations arising from the applicant's violation of an environmental law.[106] Similarly, Public Law No. 19-1990 adds administrative requirements by specifying that the state solid waste management board address detailed conditions in authorizing the issuance of permits to control solid waste, hazardous waste, and atomic radiation at hazardous waste facilities, incinerators, solid waste landfills, and transfer stations in Indiana.[107] Public Law No. 109-1990 concludes the

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104. *Id.* § 13-7-22-3.

105. *Id.* §§ 13-7-22-3, -32. Financial responsibility under the legislation may be established by any one or combination of the following legal means in an appropriate amount: (1) trust fund agreement, (2) surety bond with a standby trust fund agreement, (3) letter of credit with a standby trust fund agreement, (4) insurance policy with a standby trust fund agreement, or (5) proof that the applicant meets a financial test established by the state waste management board, in the event that the applicant "derives less than fifty percent . . . of the persons' gross revenue from waste management." *Id.* § 13-7-32-5(b). The discretionary financial test may offer applicants an opportunity to evade the more specific and rigorous financial assurances by creating multiple interconnected corporate entities and having one entity that does not derive more than 50% of its gross revenue from waste management apply for the permit. The specific financial assurance provisions arguably provide insufficient monetary protection against potential environmental problems that may develop at various facilities. *See id.* § 13-7-32-6(a) (in the case of a solid waste landfill or hazardous waste landfill the "greater of . . . $15,000 for each acre or part of an acre" or "an amount determined by the [IDEM] Commissioner that is sufficient to [properly] close the hazardous waste landfill or solid waste landfill. . . ."); *id.* § 13-7-32-6(b) (in the case of a transfer station "the greater of . . . $4,000 for each acre or part of an acre" or "an amount determined by the [IDEM] Commissioner that is sufficient to [properly] close the transfer station. . . ."). The legislature should consider amending these financial provisions by substantially raising the minimum dollar financial assurance to more accurately reflect closure and monitoring costs of similarly situated facilities.

106. *Id.* § 13-7-22-2. Although this provision is sound and will provide a modicum of financial protection to the public in the event that environmental problems arise at the site, it is fundamental that an applicant could strategically file bankruptcy under the federal bankruptcy laws notwithstanding technical insolvency. In the event of a bankruptcy filing, the government would have an unsecured claim for cleanup expenses with the possibility of claiming limited priority for remedial expenses deemed to be "administrative expenses" by the bankruptcy court. *See generally* ENVIRONMENTAL PROTECTION: LAW AND POLICY 682-84 (F. Anderson, D. Mandelker & A. Tarlock eds., 2d ed. 1990).

107. IND. CODE § 13-7-10-1 (Supp. 1990). This section added an amendment to existing legislation. The amendment expands the definition of "facility" to encompass "a

miscellaneous additional administrative requirements enacted during the 1990 General Assembly. It requires applicants for permits concerning solid waste, hazardous waste, and atomic radiation to submit a disclosure statement with the permit application demonstrating the applicant's "good character."[108] Moreover, this legislation compels applicants for solid waste management facility permits to demonstrate a need for the facility in the area in which the facility will be located.[109]

Second, the legislature created another category of miscellaneous solid waste provisions that were passed into law during the 1990 General Assembly that strengthen the regulation of asbestos removal workers and asbestos contractors. Public Law No. 19-1990 generally requires that persons who work on asbestos removal projects be properly accredited or licensed.[110]

A third miscellaneous solid waste statute enacted during the review period requires a retailer, wholesaler, or manufacturer of lead acid batteries, upon selling new lead batteries, to accept used lead batteries from its customers.[111] This legislation also requires retail establishments in which lead batteries are sold to conspicuously post notices regarding battery recycling laws of Indiana.[112] The new law specifically restricts lead battery disposal practices and establishes a criminal offense for violation of the provisions.[113]

The fourth significant miscellaneous solid waste legislative enactment during the last General Assembly requires IDEM to develop an informational clearinghouse on various environmental topics and to assist in the development of public educational programs on alternatives to landfill disposal.[114] Fifth, the legislature also requires that operators of outdoor waste tire sites must obtain a permit. This legislation also subjects the waste tire storage operator to state inspections.[115]

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structure or area of land used for the disposal, treatment, storage, recovery, processing, or transferring of solid waste, hazardous waste, or atomic radiation" and specifically includes the generic types of facilities mentioned in the text by way of nonexclusive example. *Id.* Therefore, the practical effect of this amendment will be to require the state Solid Waste Management Board to promulgate rules prescribing standards for a wide panoply of solid waste facilities in the state.

108. *Id.* § 13-7-10.2-3.

109. *Id.* § 13-7-10-1.5. This localized need assessment may be subject to constitutional attack for violation of the dormant Commerce Clause doctrine. *See supra* note 37.

110. IND. CODE § 13-1-1-24 (Supp. 1990).

111. *Id.* § 13-1-15.

112. *Id.* § 13-1-15-6.

113. *Id.* § 13-1-15-7.

114. *Id.* § 13-7-3-14. The mandated environmental topics include the following: Source separation, recycling, composting, solid waste minimization, solid waste reduction, hazardous waste minimization, and hazardous waste reduction. *Id.*

115. *Id.* §§ 13-7-23-7, -10. As used in the statute, waste tire storage sites subject

The sixth miscellaneous solid waste bill enacted provides a price preference for state agency purchases of supplies that contain recycled materials.[116] Specifically, state agencies must give a price preference of ten percent over competing non-conforming supplies when at least one of the following descriptions is fulfilled:

> (1) At least fifty percent . . . of the volume of the original components of the supplies consisted of recycled materials.
>
> (2) The cost of purchasing recycled materials constituted fifty percent . . . of the cost of producing the supplies.
>
> (3) A percentage by weight or volume of recycled materials which [IDEM] determines by rule is eligible for procurement preference . . . .[117]

Seventh, the 1990 General Assembly also enacted new legislation addressing changes to the responsible property transfer laws.[118]

B. Pollution Prevention

As a complement to the public information clearinghouse mandate established in separate legislation during the 1990 General Assembly,[119] Public Law No. 105-1990 creates the division of pollution prevention and technical assistance within IDEM.[120] Perhaps the most significant component of this important new law is the expansive definition of "pollution prevention" that governs the activities addressed in the statute:

> (a) "Pollution prevention" means the employment by a business of a practice that reduces the industrial use of toxic materials or reduces the environmental . . . waste[s] without diluting or concentrating the waste before the release, handling, storage, transport, treatment, or disposal of the waste. The term includes changes in production technology, materials,

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to regulation are sites "at which five hundred . . . or more waste tires . . . are accumulated in the outdoors at a single location . . . and . . . are not completely enclosed within a structure or vehicle." *Id.* § 13-7-23-5. In addition, the legislation provides for various exceptions for recycling programs and retail tire outlets under a certain size. *Id.* § 13-7-23-6.

116. *Id.* § 5-17-6-20.

117. *Id.*

118. *Id.* §§ 13-7-22.5-1.5 to -22.

119. *See supra* note 114 and accompanying text.

120. IND. CODE §§ 13-7-27-2(2), -9-2-1 (Supp. 1990). The division of pollution prevention and technical assistance does not take effect until June 30, 1993. Until that date, an office of pollution prevention and technical assistance is constituted within IDEM. *Id.*

processes, operations, or procedures, or the use of inprocess, inline, or closed loop recycling according to standard engineering practices.

(b) The term does not include a practice that is applied to an environmental waste after the waste is generated or comes into existence or after the waste exists in production or commercial operation.

(c) The term does not promote or require any of the following:

(1) Waste burning in industrial furnaces, boilers, smelters, or cement kilns for purposes of energy recovery.

(2) The transfer of an environmental waste (otherwise known as waste shifting) from one. . .environmental medium to any of the following:

(A) Another environmental medium.

(B) The workplace environment.

(C) A product.

(3) Off-site waste recycling.

(4) Any other method of end-of-pipe management of environmental wastes, including waste exchange and the incorporation or imbedding of regulated environmental wastes into products or byproducts.[121]

The scope of "pollution prevention" activities under IDEM jurisdiction favorably conforms to the rigorous approach recently recommended to Congress by the U.S. Office of Technology Assessment (OTA) which urged "a comprehensive, multimedia approach to reducing waste going into the air, land, and water . . . ."[122] Indeed, Indiana's approach to pollution prevention — in OTA parlance — adopts "a new highly visible waste reduction program"[123] by requiring IDEM to undertake a variety of governmental activities including the following:

- Periodic "review [of] state environmental programs and projects for their ability and progress in promoting multimedia industrial pollution prevention."

- "Encouraging regulatory flexibility to afford businesses the opportunity to develop or implement pollution prevention technologies and practices."

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121. *Id.* § 13-9-1-14.

122. U.S. Congress, Office of Technology Assessment, Serious Reduction of Hazardous Waste: For Pollution Prevention and Industrial Efficiency 4 [hereinafter OTA Report]. *See also* Blomquist, *Beyond the EPA and OTA Reports: Toward a Comprehensive Theory and Approach to Hazardous Waste Reduction in America*, 18 Envtl. L. 816 (1988).

123. OTA Report, *supra* note 122, at 40.

- Promoting coordination between governmental regulatory programs in all media of environmental pollution.

- "Develop[ing] policies and programs to reduce the generation of municipal wastes, reduce the generation of household hazardous wastes and pollutants, and reduce the use of toxic materials in consumer products by means of industrial pollution prevention."[124]

A pathbreaking provision in the new statute allows the IDEM to "seek unified reporting and permitting authority from the United States Environmental Protection Agency with respect to federal toxic material, waste management, and pollution control laws and regulations . . . ."[125] Section 13, article 9 also establishes a pollution prevention board,[126] forms a safe materials institute at a public or private Indiana University or not-for-profit corporation,[127] authorizes the IDEM to make pollution prevention grants to non-profit organizations,[128] and establishes a computer-based state information clearing house for pollution prevention.[129]

This legislation is reportedly "considered one of the best three pieces of pollution prevention legislation in the country by the National Toxic's Campaign,"[130] an environmental lobby group instrumental in passing similar laws throughout the country. A variety of additional legislative proposals regarding pollution prevention in Indiana are being formulated for the 1991 Indiana General Assembly.[131] Accordingly, it appears that

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124. IND. CODE § 13-9-1.3-5 (Supp. 1990).

125. *Id.* § 13-9-1.3-7.

126. *Id.* § 13-9-3-1.

127. *Id.* § 13-9-4-1. A novel directive to the Safe Materials Institute established under the legislation requires the Institute to encourage business to develop what are known as "multi-media pollution prevention plans." *Id.* § 13-9-5-1.

128. *Id.* § 13-9-2-10.

129. *Id.* § 13-9-2-9.

130. Undated Memorandum from Grant Smith, Indiana Toxic Action Campaign Coordinator at 1 [hereinafter Smith]. The Toxic Action Project is a state-wide project of the Citizens Action Coalition of Indiana.

131. The Indiana Toxic Action Project described some proposals in progress for the 1991 General Assembly:

> (1) [T]he Industrial Efficiency and Pollution Prevention Planning Act of 1991. This legislation would require companies which file toxic release inventories under the community right to know law to complete and submit to the [I]DEM pollution prevention plans. Planning requirements now exist in twelve states and are considered to be a middle ground between completely voluntary programs and strictly regulatory programs. Planning requirements are designed to get business to go [through] the steps of planning how to implement pollution prevention programs at their facilities; and

Indiana Code section 13, article 9 may evolve into a more comprehensive statute in coming years.

C. Underground Storage Tanks

More than 1.4 million underground storage tank systems exist in the United States. These tanks store everything from petroleum products to hazardous materials. Of these, the U.S. Environmental Protection Agency estimates that approximately 189,000 tank systems are leaking.[132]

Spurred on by recent federal legislation[133] and EPA rulemaking[134] regarding underground storage tanks, the Indiana General Assembly enacted Public Law No. 13-1990,[135] which made important changes in the state's underground storage tank program.

> (2) The Truth in Toxics Act. Much more detailed information is required by state government and the public in determining the extent to which industry is actually pursuing pollution prevention. This legislation would ask for throughput information as to the use of toxic chemicals . . . on a mass balance level. Such reporting requirements exist now in New Jersey and Massachusetts. This higher level of detail concerning the amount, use, and emissions of chemicals has been in effect since 1986 in New Jersey and has not compromised the competitive position of industry in the state.

Smith, *supra* note 130.

132. M. Hannifan, Underground Storage Tanks: A Technical Paper 1 (1989).

133. In the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act, Congress mandated the development and implementation of a comprehensive regulatory program for underground storage tanks (USTs). This legislation also required UST owners to notify states of the existence of their tanks. The EPA was also required under HSWA to issue design, construction, installation, and compatibility standards for new USTs and to issue operating regulations applicable to all tank owners. *See* Pub. L. No. 89-272, Title II, §§ 9001-9010, as added Nov. 8, 1984; Pub. L. No. 98-616, Title VI, § 601(a), 98 Stat. 3277-3287 (1984) (codified at 42 U.S.C. §§ 6991-6991i).

Subsequent federal legislation, the Superfund Amendments and Reauthorization Act of 1986 (SARA), modified Pub. L. No. 89-272 by mandating that EPA issue regulations requiring owners and operators of UST systems to maintain evidence that they are financially responsible for corrective action and for compensating third parties for bodily injury and property damage arising from operating a UST. *See id., as amended* Oct. 17, 1986, Pub. L. No. 99-499, Title II, § 205(a), 100 Stat. 1696 (1986) (codified at 42 U.S.C. §§ 6991-6991i).

134. On September 23, 1988, EPA published the final technical standards for USTs. 40 C.F.R. §§ 280.1-280.74 (1990). On October 26, 1988, the final financial responsibility regulations were published by EPA. *See* 40 C.F.R. §§ 280.90-280.111 (1990). Key requirements of this federal regulation include the following: construction standards for new USTs; upgrading of existing USTs over ten years to the performance level established for new tank systems; spill prevention equipment standards; overfill prevention equipment standards; reporting requirements; recordkeeping requirements; release detection requirements; spill containment and notification procedures; and minimal financial assurance provisions. *Id.*

135. Indiana House Enrolled Act No. 1393, Pub. L. No. 13-1990, § 6 (codified at Ind. Code § 13-7-20-12 (Supp. 1990)).

First, the new state legislation amends current law to require the IDEM and the state fire marshall to jointly operate "an underground storage tank release detection, prevention, and correction program."[136] However, consistent with notions of cooperative federalism whereby Congress and the U.S. Environmental Protection Agency set minimum national standards for environmental protection programs, the recently enacted Indiana legislation mandates that state standards and regulations for underground storage tank (UST) programs "must be no less stringent than" federal standards.[137]

Second, the statute requires the state fire marshall to establish industry standards for persons involved in underground storage tank installation, testing, upgrading, and removal.[138] These standards also include procedures for certification revocation.

Third, the new statute makes numerous changes to the funding of the underground petroleum storage tank excess liability fund.[139] These changes focus on bonding authority,[140] increased fee charges per tank,[141] loan guarantee procedures from the state rainy day fund,[142] and establishment of a UST financial assurance board.[143]

D. Natural Resources

The State of Indiana administers, preserves, and protects a wide range of natural resources. Given guidance by legislation and regulations on matters including fish and wildlife, forestry, historic preservation and archeology, nature preserves, outdoor recreation, surface mining reclamation, and other matters, the Indiana Department of Natural Resources (IDNR), supervised by the Natural Resources Commission, pursues numerous important responsibilities.[144] The General Assembly enacted a

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136. IND. CODE § 13-7-20-12(a) (Supp. 1990). The joint administration is to be governed by rules adopted by the "fire prevention and building safety commission" with IDEM and the state fire marshall operating the program "under a memorandum of agreement . . . that must contain the specific duties of the department and the state fire marshall." *Id.*

137. *Id.* § 13-7-20-12(b). Specific reference is made to "regulations adopted by the administrator of the Environmental Protection Agency under 42 U.S.C. § 6991 through 6991i, as amended." *Id.*

138. *Id.* § 13-7-20-13.1.

139. *Id.* § 13-7-20-31.

140. *Id.* §§ 4-4-11-1 to -31.

141. *Id.* § 13-7-20-32.

142. *Id.* § 13-7-20-33.3.

143. *Id.* § 13-7-20-35.

144. The Indiana Chamber of Commerce describes the function of the Indiana Department of Natural Resources as follows:

The Indiana Department of Natural Resources oversees various forms of con-

variety of substantial, additional natural resource laws during the 1990 legislative session that will require IDNR to undertake further administrative responsibilities. First, Public Law No. 22-1990 allows the IDNR director to impose civil penalties up to $1,000 per violation for certain infractions of the state flood plain law.[145] Second, the new statute restricts participation in IDNR's surface coal mining reclamation bond pool fund.[146] Third, the statute directs the IDNR to formulate timber management plans for each classified forest within Indiana,[147] and toughens certain procedures for granting and renewing surface coal mining and reclamation permits.[148]

Fourth, the statute adds to the IDNR's responsibilities in regulating the impact of surface coal mines on certain historical and archeological sites.[149] Significantly, the new legislation provides for measures to mitigate the effects of mining operations on important archeological sites while liberalizing the types of information the agency must consider in assessing the archeological significance of proposed mining sites.[150]

Fifth, the legislation authorizes the Natural Resources Commission to designate, by rulemaking, various Indiana streams to be "recreational streams."[151] Moreover, the new statute permits the IDNR to conduct onsite investigations and to issue temporary restraining orders to stop water withdrawals by certain water pumping installations if an owner of a lake, by riparian right, complains of a significant drop in the level of the fresh water lake.[152]

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servation and manages the state's mineral and wildlife programs, flood control and water resources, recreational areas and historical landmarks. It has a director appointed by the governor; three deputy directors and a full-time staff of 1,510. The Department has jurisdiction over all public and private waters in the state as well as adjoining lands necessary for flood control purposes. All works of any flood control nature must be approved by the Natural Resources Commission. It has certain regulatory functions, including approval of construction and the floodways of rivers and streams; inspection and enforcement of maintenance and repair of dams, levees, dikes and floodwalls; approval of work to alter shoreline or beds of public freshwater lakes; review of plans for reconstruction or construction of drainage ditches, and removal of minerals and withdrawal of water from navigable waters.

INDIANA CHAMBER OF COMMERCE, HERE IS YOUR INDIANA GOVERNMENT 17 (1987).

145. IND. CODE § 13-2-22-21 (Supp. 1990).

146. *Id.* § 13-4.1-6.5-4.

147. *Id.* § 6-1.1-6-16 (1988 & Supp. 1990). This section changes prior law, which simply required that owners or operators of classified forest follow "minimum standards of good timber management prescribed by the Department of Natural Resources." *See id.*

148. *Id.* § 13-4.1-4-5.1 (Supp. 1990).

149. *Id.* §§ 13-4.1-3-3.1, -4-3.1.

150. *Id.*

151. *Id.* §§ 13-2-33-4, -5.

152. *Id.* §§ 13-2-2.6-9 to -12.

E. Water Pollution

Two significant legislative changes in Indiana water pollution control law occurred as a result of legislation enacted during the 1990 General Assembly. The first change apparently provides for more protection of the state's diverse water bodies. Public Law No. 19-90 addresses freshwater pollution concerns due to the 1988 oil spill caused by a storage tank's failure on the Monongahela River.[153] The statute requires the state water pollution control board to adopt rules directing the construction of secondary containment structures at facilities in which hazardous materials are stored or handled.[154] Importantly, "secondary containment structure" is defined as "a structure or part of a structure that prevents or impedes a hazardous material that is released accidentally from entering surface water or groundwater."[155] Moreover, the legislature has specifically delegated power to the board to require the "development by the owner or operator of each facility at which hazardous materials are stored or handled of a plan for responding to the release of a hazardous material at that facility."[156] The exemption provisions of this statute, however, arguably go too far in requiring the board to adopt generic exemptions from secondary containment structures in planning requirements for expansive categories of facilities that should be regulated by the state.[157]

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153. *Id.* § 13-1-3-19.

> Supplies of drinking water to some 23,000 residents of suburban Pittsburgh, Pennsylvania, were cut off after a storage tank at Floreffe, Pennsylvania, spilled about 3.3 million liters (860,000 gallons) of diesel oil into the Monongahela River on January 2 [1988]. The oil slick spread into West Virginia, and by January 10 it was 77 km (48 mi) long and had reached Steubenville, Ohio. The oil was eventually cleaned up by a combination of inflatable booms with deep skirts, activated carbon, and bentonite.

BRITANNICA WORLD DATA ANNUAL 197 (1989).

154. IND. CODE § 13-1-3-19(d)(1) (Supp. 1990).

155. *Id.* § 13-1-3-19(d).

156. *Id.*

157. *Id.* § 13-1-3-19(e). The pertinent exemption language provides:

> The rules adopted under this section must provide exemptions for the following:
> (1) A facility that is subject to similar requirements under other administrative rules or under state law, federal law, or federal regulation.
> (2) Hazardous materials that are stored or transferred as products packaged for distribution to and use by the public.
> (3) An aboveground storage tank that is used to store oils or petroleum products and that has a capacity of not more than six hundred sixty (660) gallons.
> (4) Tanks subject to regulation adopted by the administrator of the United States Environmental Protection Agency under 42 U.S.C. § 6991 through 6991(i), as amended.
> (5) Tanks subject to IC 13-7-20.

Id.

The second change in state water pollution control law during the survey period creates the prospect of less protection of Indiana waters. Public Law No. 106-1990 allows the water pollution control board to grant a variance from a water quality standard for a maximum period of five years, or when the permit expires, whichever is longer.[158] Prior to this statute, the maximum permissible period for all variance applications before the water pollution control board was one year.[159]

In light of the primacy of water quality standards in maintaining ambient water standards for designated uses,[160] it is surprising that this statute allows such significant extensions of variance timeframes, even if the prior one-year variance time limitation arguably created administrative problems in reviewing or modifying NPDES permits.[161] Indeed, as Professor William H. Rodgers, Jr. observed, although one might expect to find "moderating influences" in "a world of universal constraint and ubiquitous violation [of] water quality standards,"[162] there needs to be "legal limits to this pattern, especially for violators who choose to defend [their non-compliance] on the ground that the standard should conform to their practice."[163]

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158. *Id.* § 13-7-7-6 (1988 & Supp. 1990).

159. *Id.* § 13-7-7-6(a) (1988), *amended by id.* § 13-7-7-6 (Supp. 1990).

160. The terms water quality criteria and water quality standards often are used synonymously. . . . Water quality criteria can be defined as ambient water standards, or legal expressions of permissible amounts of pollutants allowed in a defined water segment. This formulation typically appears in one or both of two forms: quantitative and descriptive. Examples of quantitative criteria are: not less than 5 parts per million of dissolved oxygen or more than 500 micrograms per liter of dissolved solids or more than 200 fecal coliforms per 100 milliliters of water. Examples of descriptive criteria are: Surface waters must be "free from floating debris, scum and other floating materials attributable to municipal, industrial or other discharges of agricultural practices in amounts sufficient to be unsightly or deleterious."

RODGERS, *supra* note 1, at 243 (footnote omitted).

161. National Pollution Discharge Elimination System (NPDES) permits "are for fixed terms not exceeding five years." 33 U.S.C. § 1342(b)(1)(B). *See* 40 C.F.R. § 122.46 (1990).

162. RODGERS, *supra* note 1, at 255.

163. *Id.* at 256 (footnotes omitted). Professor Rodgers continues his analysis on this point and analyzes the New York case of Koch v. Dyson, 85 A.D.2d 346, 448 N.Y.S.2d 698 (1982) to advance his argument. In *Koch*,

a power plant anticipated discharges into water already exceeding the thermal pollution standards. Granting of a variance was upheld without noticeable agonizing. Had the issue arisen under the Clean Air Act, by contrast, the legal problem would be called nonattainment, the nongrowth prospects would be conceded, and the new source would be obliged to buy, borrow, or beg to partake of this fully allocated resource.

RODGERS, *supra* note 1, at 256 (footnotes omitted).

F. Pesticides

Public Law No. 113-1990 largely consists of a series of technical amendments to preexisting pesticide regulatory standards in Indiana.[164] A few amendments will result in significant legal changes in this important policy area.

Indiana Code section 15-3-3.5-18.1 expands current pesticide law to make it unlawful to distribute an unregistered, adulterated, or misbranded product.[165] Moreover, the state chemist — as the key regulatory official involved in administering and enforcing the pesticide laws — is afforded new enforcement powers under another section. The state chemist may deny, suspend, revoke, or amend a person's pesticide registration for violating pesticide regulation, or "may warn, cite, or impose a civil penalty"[166] within the statutory confines. Related changes afford the state chemist additional enforcement flexibility in sanctioning holders of licenses, permits, or certifications for pesticide use in Indiana[167] in the event of violations of appropriate law.

III. State and Federal Environmental Case Law, 1989-90

Federal and state decisions involving Indiana environmental disputes broke new ground during the survey period.[168] These decisions may be usefully grouped into three subject areas: (1) hazardous and toxic substances, (2) administrative law, and (3) natural resources.

A. Hazardous and Toxic Substances

Several federal and state decisions rendered during the survey period significantly contributed to the expanding and complex area of hazardous and toxic substance law.

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164. Ind. Code §§ 15-3-3.5-2 to -26 (1988 & Supp. 1990).

165. *Id.* § 15-3-3.5-18.1 (Supp. 1990).

166. *Id.* § 15-3-3.5-18.3.

167. *Id.* §§ 15-3-3.6-14, -14.5 (1988 & Supp. 1990).

168. The United States Court of Appeals for the Seventh Circuit reviewed several environmental matters within its territorial jurisdiction during the survey period. However, none of these decisions focused on Indiana environmental disputes. *See* Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990); American Paper Inst., Inc. v. U.S. Envt'l. Protection Agency, 882 F.2d 287 (7th Cir. 1989), *revised by* 890 F.2d 869 (7th Cir. 1989); Rosenberg v. Tazewell County, 882 F.2d 1165 (7th Cir. 1989); National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989). Moreover, environmental case law from other federal circuits and other state courts constitute persuasive authority for environmental disputes in Indiana. *See generally* American Bar Association Section Natural Resources, Energy and Environmental Law, 1989 The Year in Review (1990).

1. Citizens May Intervene and Substantially Expand RCRA Civil Penalty Enforcement Action. — United States v. Environmental Waste Control, Inc.[169] was a landmark citizen enforcement action under the Resource Conservation and Recovery Act of 1976 (RCRA)[170] that resulted in the highest penalty ever assessed in such actions.[171] United States District Judge Robert Miller permanently shut down a previously licensed hazardous waste landfill located in Fulton County, Indiana, otherwise known as the "Four County Landfill."[172] Concluding that the site had

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169. 710 F. Supp. 1172 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *petition for cert. filed*, (U.S. Jan. 29, 1991) (No. 90-1229). *See also* 698 F. Supp. 1422 (N.D. Ind. 1988) (denial of defendants' summary judgment motion); 737 F. Supp. 1485 (N.D. Ind. 1990) (ruling on citizen group's attorneys' fees and costs) for other aspects of the case.

170. 42 U.S.C. §§ 6901-6992 (1989).

171. *See generally* Note, *Putting Recovery Back Into RCRA: An Effective Addition to the Resource Conservation and Recovery Act*, 25 VAL. U.L. REV. 59 (1990). I have assisted the citizen group intervenor, Supporters to Oppose Pollution, Inc. (STOP), during portions of the litigation by assisting lead counsel John C. Hamilton of South Bend, Indiana. The views expressed in this analysis are my own and should not be ascribed to either STOP or Mr. Hamilton.

In UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989 7-8 (1990) (emphasis in original), the EPA describes the litigation as follows:

> On March 29, 1989, EPA and STOP, Inc., a citizens' group, obtained a judgment against Environmental Waste Control (EWC), Inc., for improper hazardous waste management practices under the Resource Conservation and Recovery Act (RCRA). EPA had alleged the following counts against defendants regarding the operation of the "Four-County Landfill" in Fulton, IN: (1) operating the landfill without legal authorization as a result of a false certification for compliance with groundwater monitoring and insurance requirements; (2) inadequacy in the existing system for monitoring possible groundwater contamination; (3) violation of the minimum technology requirement designed to limit migration of contaminants from the disposal area; and (4) the need for corrective action at the site to remedy ongoing releases of hazardous waste constituents into the groundwater site. *This is one of the most favorable decisions out of a number of cases EPA has successfully prosecuted in an initiative against owners and operators who have failed to certify proper groundwater monitoring systems and proper financial capability for hazardous waste management activity.*
>
> The ruling upheld EPA's assertion that the landfill lost its authority to legally operate on November 8, 1985, after it falsely certified to EPA that the landfill had met both groundwater monitoring and liability requirements. It also required defendants to cease immediately receiving hazardous wastes for storage and disposal at the site, and to implement closure upon approval of a closure plan. In addition, it ordered the defendants to implement the corrective action plan proposed by EPA. *The judgment included the imposition of a civil penalty of $2,778,000, which is the largest civil penalty assessed by a court under the Resource Conservation and Recovery Act.*

172. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1178.

lost its interim status because the owners and operators had filed a false certificate of compliance with regulatory authorities, Judge Miller also found that the landfill's groundwater monitoring system was inadequate and that hazardous waste constituents had been illegally released into the groundwater.[173] In assessing a civil penalty of $2,778,000,[174] the court summarized and simplified the overwhelming evidence of environmental law violations at Four County Landfill:

> Through the last day of trial, the Landfill had operated illegally by continuing to accept and store hazardous waste with neither interim status nor a final permit for 1,173 days, and each such day constitutes a separate violation; on the EPA's first claim, [the Landfill] faces civil penalties of as much as $29,325,000. The Landfill placed hazardous waste in unlined trenches as part of its lateral expansion for 468 days . . .; with each such day viewed as a separate violation, [the Landfill] faces civil penalties of as much as $11,700,000 on the EPA's second claim. [The Landfill also] faces civil penalties for 773 days of violations, or as much as $19,325,000 on the EPA's third claim.
>
> In all, then, [the Landfill] faces civil penalties totalling $60,350,000, even setting aside the additional penalties STOP [the citizen group] seeks . . . . The imposition of $60,000,000 or more in civil penalties would be wholly punitive and would far exceed the scope of any proper deterrent purpose. On the other hand, this landfill should have ceased operation . . . when it had no lined cells in which to place hazardous waste in accordance with the law. It did not cease operation then. . . . The Landfill should have ceased operation . . . when its interim status was lost. Again, it did not do so; it continued to operate, ultimately earning income in excess of $10,000,000 per year. [The Landfill] has been faced more than once with a choice between disobeying the law or continuing its operations; each time [the Landfill] chose to disobey the law and make more money. Substantial penalties, albeit penalties well below $60,000,000 are warranted.[175]

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173. *Id.* at 1225-28.

174. Within a few days of the order in *Environmental Waste Control, Inc.*, 710 F. Supp. at 1248-55, the defendants filed for bankruptcy protection. *See In re* Environmental Waste Control, Inc., 31 Envt. Rep. Cas. (BNA) 1462 (N.D. Ind. 1990) (denial of EPA's motion to withdraw reference of disclosure statements and plan of reorganization); *In re* Stephen Shambaugh, 30 Envt. Rep. Cas. (BNA) 2038 (Bankr. N.D. Ind. 1989) (denial of motion to withdraw reference of cases to the bankruptcy court). That matter is still pending. Recovery of the civil penalty and citizen suit attorney fees will largely depend on the outcome of the bankruptcy litigation.

175. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1244-45.

Judge Miller's eighty-three-page printed opinion is a veritable primer on RCRA. The scholarly opinion is a substantive contribution to the law of RCRA enforcement actions in numerous respects. First, the court held that the EPA had authority under the statute to "proceed on the issues of groundwater monitoring and financial assurance requirements."[176] This holding was based on a reading of section 6928(a) which, according to the court, "authorizes the EPA to bring an independent enforcement action, even in a RCRA authorized state"[177] like Indiana. According to Judge Miller's analysis, "[t]he sole restriction on this enforcement authority is that the EPA must notify the state before commencing any action."[178] However, "[s]ection 6928 'explicitly reserves federal authority in the face of an authorized state program.'"[179]

A second significant aspect of the opinion is the expansive and flexible manner in which the court dealt with the problem of citizen suit notice under RCRA. The court found that the exception to the usual sixty-day notice in RCRA actions was applicable because the citizen group had made allegations concerning hazardous waste mismanagement.[180] In light of these allegations, the citizen suit could "be brought immediately after some notification" to the EPA, the IDEM, and the Four County Landfill's owners and operators.[181] The court reasoned that this result was justified because the rationale of using a notice period as a "non-adversarial period in which environmental conflicts might be resolved administratively" did not apply in the case of environmental disputes concerning hazardous waste management.[182] The district court concluded — in a flexible interpretation of litigation reality juxtaposed with the requirements of the statute — that "those entitled to notice under [RCRA] . . . had ample notice" of the citizen suit claims by virtue of STOP's motion to intervene.[183] This motion, in turn, attached a proposed complaint which fully set forth all allegations, and the motion papers were served on the EPA, the IDEM, and the owners/operators of the Four County Landfill. Moreover, the court interpreted 42 U.S.C.

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176. *Id.* at 1186. The court also upheld the EPA's authority under 42 U.S.C. § 6928(h) to seek corrective action whenever it determines that "there is or has been a release of hazardous waste into the environment." *Id.* at 1187.

177. *Id.* (citing United States v. Allegan Metal Finishing Co., 696 F. Supp. 275, 282 (W.D. Mich. 1988); United States v. Conservation Chemical Co. of Ill., 660 F. Supp. 1236, 1244 (N.D. Ind. 1987)).

178. *Id.* (citing 42 U.S.C. § 6928(a)(2) (1988)).

179. *Id.* (quoting Wyckoff Co. v. Environmental Protection Agency, 796 F.2d 1197, 1201 (9th Cir. 1986)).

180. *Id.* at 1187-93.

181. *Id.* at 1189 (citing 42 U.S.C. § 6972(b)(1)(A)).

182. This motion attached a proposed complaint. *Id.* at 1190.

183. *Id.* at 1191.

§ 9613(i) — the section utilized by the citizen group to intervene in the RCRA enforcement action — to have resulted in an "absolute" right to intervene because the court had earlier "placed no conditions upon STOP's intervention."[184] Accordingly, the court found that no independent ground of federal jurisdiction need be shown[185] and that such intervention came within a federal court's ancillary jurisdiction.[186]

Third, the *Environmental Waste Control* court shed considerable light on the defense of primary jurisdiction in citizen environmental enforcement actions. Approving of dicta in another federal district court opinion, the court noted that "if the primary jurisdiction doctrines apply at all to citizens' claims, it should be invoked 'sparingly where it would serve to preempt a citizens' suit.'"[187] Furthermore, Judge Miller pointed out that "[t]estimony and exhibits introduced by STOP rang with frustration at the ongoing alleged violations occurring at the Landfill and [the citizens'] repeated attempts to get Indiana to act."[188] The court acknowledged that ready resort to the primary jurisdiction doctrine might lead to situations in which "delay by the state or federal government could frustrate the congressional interest of broadened enforcement" of citizen suits.[189] Thus, the court concluded that "[t]o deprive STOP the opportunity to bring its claims . . . would thwart the legislative intent behind the RCRA and CERCLA provisions for citizen intervention . . . ."[190]

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184. *Id.*

185. *Id.* at 1192 (citation omitted).

186. *Id.* "The exercise of ancillary jurisdiction promotes judicial economy and fairness. The EPA filed this enforcement action alleging that the defendants violated provisions of RCRA. STOP's additional claims, while different in nature, allege violations of RCRA. . . . All alleged RCRA violations are contained in the same lawsuit." *Id.*

187. *Id.* at 1195 (quoting Merry v. Westinghouse Elec. Corp., 697 F. Supp. 180, 182 (M.D. Pa. 1988)). Earlier in its opinion, the court catalogued four major distinguishable principles encompassed by what is euphemistically referred to as the "primary jurisdiction doctrine": "Primary exclusive jurisdiction, true primary jurisdiction, statutory exceptions, and agency [immunity]." *Id.* at 1193 (citing United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting) and Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867, 868 (1976)). According to the *Environmental Waste Control* court:

> "Primary exclusive jurisdiction" deprives the court of all power over a case except the very limited power . . . to review an agency's determination. "True primary jurisdiction" affords an agency the initial opportunity to consider a legal issue or find facts, but the court retains the power to render a judgment.

Id. "EWC's assertions involving EPA's and STOP's claims could only fall, if at all, within the boundaries of these two doctrines." *Id.*

188. *Id.* at 1195.

189. *Id.* (summarizing Merry v. Westinghouse Elec. Corp., 697 F. Supp. 180 (M.D. Pa. 1988)).

190. *Id.*

Fourth, the district court in *Environmental Waste Control* amplified vital principles regarding the use of collateral estoppel in complex environmental litigation in which prior administrative orders or consent decrees may have preceded enforcement litigation. In addressing this question, the court held that rules of collateral estoppel, rather than *res judicata*, should govern the effect of an earlier state administrative action involving the Four County Landfill.[191] The court then determined that the earlier Indiana administrative proceeding did not have collateral estoppel effect with respect to the EPA's and the intervening citizen group's claims under RCRA. The court based its holding on the failure of the Four County Landfill's owners and operators to establish essential issue preclusion parameters: that the enforcement suit at bar presented the same issue that was resolved in the Indiana administrative proceeding; that the administrative consent order in the Indiana proceeding was a final decision on the merits; and that an identity of parties existed as governing Indiana law requires.[192]

A fifth noteworthy dimension of the case is its analysis of the persons liable for hazardous waste storage sites under RCRA.[193] In a matter of first impression, the court held that a "facility can have more than one operator for RCRA purposes."[194] Adopting the reasoning from its earlier opinion in the case disposing of the defendants' summary judgment motion, the court reasoned:

> [I]t is difficult to believe that if three persons operated a hazardous waste facility as a joint venture on property owned by four other persons, only two of the persons (one as an owner, another as an operator) could be liable for civil penalties under . . . RCRA. Not every act will render a person an operator, but the court is unpersuaded that no more than one person may be an operator with respect to a given hazardous waste facility.[195]

Sixth, the court also made new law in interpreting the meaning of the EPA's minimal insurance coverage regulation for hazardous waste sites. These regulations read as follows:

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191. *Id.* at 1196-97.

192. *Id.* at 1197-1201.

193. The pertinent provisions of RCRA applying to "owners" and "operators" of hazardous waste storage sites define "operator" as "the person responsible for the overall operation of the facility," while "owner" is defined as "the person who owns a facility or part of a facility." 40 C.F.R. § 260.10 (1989). The term "person" is defined at 42 U.S.C. § 6903(15) (1988).

194. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1202.

195. *Id.* (quoting United States v. Environmental Waste Control, Inc., 698 F. Supp. 1422, 1429-30 (N.D. Ind. 1988)).

(a) The owner or operator must have and maintain liability coverage for *sudden*, accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs.

(b) The owner or operator must have and maintain liability coverage for *non-sudden*, accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs.[196]

The court ruled on a number of novel insurance issues. Initially, the district court held that certification of compliance with RCRA regulations mandated both certification and actual compliance.[197] In addition, the *Environmental Waste Control* court ruled that the explicit limits of an environmental liability insurance policy governed; a general policy endorsement regarding the insurer's commitment to issue a certificate of liability insurance attesting to the site's compliance with federal environmental financial responsibility obligations did not operate to provide additional coverage for purposes of judging whether the owners and operators complied with federal financial responsibility obligations.[198] Moreover, Judge Miller found the EPA regulations to be clear and unambiguous[199] and that the EPA was not estopped from enforcing regulatory minimum liability regulations as a result of alleged misinformation verbally supplied over EPA's "hotline" telephone inquiry service.[200] The court also held that good faith efforts to obtain appropriate RCRA liability insurance coverage, although pertinent to civil penalty assessment, were not relevant in determining compliance with RCRA financial responsibility requirements.[201]

Seventh, the court amplified the meaning of EPA's groundwater monitoring certification regulation.[202] That regulation "require[s] that a hazardous waste landfill's groundwater monitoring system consist of at least four wells: one well . . . required to be installed hydraulically upgradient from the limit of the waste management area, while the remaining wells (at least three) [are] to be installed hydraulically down-

196. 40 C.F.R. § 265.147(a), (b) (1985) (emphasis added).

197. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1205. These certification requirements are mandated by 42 U.S.C. § 6925(e)(2) (1988), which compels compliance certification with financial responsibility and groundwater monitoring requirements.

198. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1206-07.

199. *Id.* at 1209-11.

200. *Id.* at 1211-12.

201. *Id.* at 1212-13.

202. 40 C.F.R. § 265.91(a) (1985).

gradient at the limit of the waste management area."[203] The purpose of this regulatory requirement was succinctly described as follows:

> The groundwater monitoring system is intended to provide immediate detection of any release of hazardous waste or hazardous waste constituents into the groundwater. Prompt detection reduces the cost and effort involved in arresting the spread of contaminants and restoring the quality of the groundwater.[204]

Eighth, the court reaffirmed its earlier partial summary judgment against the defendants[205] while concomitantly clarifying the "minimum technology" provision of RCRA.[206] Ninth, the court determined that the Four County Landfill's groundwater monitoring system failed to protect the environment and human health as required by statute[207] and EPA regulation.[208] In its rationale on groundwater assessment, the court demonstrated a sophisticated grasp of difficult scientific principles[209] and an admirable facility to focus on relevant scientific information while insisting that the defendants bear the burden of demonstrating adequate groundwater monitoring.

A tenth remarkable aspect of the *Environmental Waste Control* decision is the court's review of enforcement claims of release of hazardous wastes into the environment. The district court followed Seventh Circuit precedent and gave the EPA regional administrator's determination of a hazardous waste release at the landfill a presumption of regularity.[210] The court also emphasized the importance of the required

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203. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1213 (citing 40 C.F.R. § 265.91(a)).

204. *Id.*

205. *Id.* at 1221.

206. *Id.* at 1220-21. The court reasoned that:

> 42 U.S.C. § 6924 requires owners and operators of hazardous waste facilities to meet certain minimum technology standards. Section 6924(o)(1)(A) required owners and operators of existing landfills to use two more liners and with a leachate collection system above and below the liners when conducting a "lateral expansion" with respect to waste received after May 8, 1985. Owners and operators were required to notify the EPA of such lateral expansion at least sixty days before receiving any waste for placement in that expansion. 42 U.S.C. § 6936(b)(2). EWC violated both these sections by failing to notify the EPA of its intended lateral expansion and by placing hazardous waste in unlined cells and trenches.

Id.

207. *Id.* at 1222 (citing 42 U.S.C. § 6925(e) (1988)).

208. *Id.* at 1225 (citing 40 C.F.R. § 265.90(a)).

209. *See generally* R. PATRICK, E. FORD & J. QUARLES, GROUNDWATER CONTAMINATION IN THE UNITED STATES (2d ed. 1987); P. BIRKELAND & E. LARSON, PUTNAM'S GEOLOGY (5th ed. 1989).

210. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1226.

self-monitoring by hazardous waste landfill owners and operators[211] and carefully reviewed the presence of six carcinogens in the groundwater beneath the landfill, several at levels exceeding maximum contaminant levels (MCLs) under the Safe Drinking Water Act.[212]

Finally and most importantly, the court addressed remedies.[213] Subdividing its treatment of this issue into five parts — loss of interim status, corrective action, civil penalty, permanent closure, and attorneys' fees — the court candidly observed:

> The matter of remedies presents the most troubling [of] issues in this case. Some of the issues, such as the loss of interim status and corrective action, present relatively little difficulty in light of the proven violations. The issues of the amount of civil penalties and the permanent closure sought by STOP, however, present thorny questions. No party has cited cases addressing those issues, and the court's research has disclosed none. This court appears to write on a clean slate with respect to these issues.[214]

a. Loss of interim status

The *Environmental Waste Control* court concluded that "[Four County Landfill] lost its interim status to operate . . . on November 8, 1985 because it lacked the requisite insurance and an adequate groundwater monitoring system. Having lost interim status and lacking a final permit to operate a hazardous waste facility, EWC has no legal basis to continue its operation of the Four County Landfill."[215] The court reasoned that whatever form of prosecutorial discretion the EPA may exercise in assessing consent orders short of a loss of interim status under RCRA, when the EPA seeks a shutdown, the court should look to the statutory language and structure that "provide that hazardous waste facilities may operate only through a final permit . . . or interim status,"[216] neither of which the defendants possessed. Moreover, the court concluded that the defendants' purported "good faith" in making the Part A certification of interim compliance had no bearing on the remedy of loss of interim status. Even if it did have bearing, the court held that the defendants

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211. *Id.*
212. *Id.* at 1227.
213. *Id.* at 1240.
214. *Id.*
215. *Id.* (citing Vineland Chem. Co. v. United States Envt'l. Protection Agency, 810 F.2d 402 (3d Cir. 1987)).
216. *Id.* (citing 42 U.S.C. § 6925(e)).

did not act "in good faith in failing to install a minimally adequate groundwater monitoring system by the deadline date."[217]

b. Corrective action

As a remedy for the site's demonstrated release of hazardous waste constituents into the groundwater beneath the landfill, the court ordered that the corrective action plan, requested by EPA, be implemented by the defendants.[218] The court articulated the following rationale: "Time is of the essence in remedying such contamination; to await the passage of the contamination from the facility's boundaries simply compounds the difficulties. [O]ne need not await a catastrophe before ordering corrective action."[219] However, the court did not combine its order for implementation of a corrective action plan with the citizen group's request for the appointment of a special master to implement the plan because "the proposed plan require[d] EWC to report to EPA frequently."[220]

c. Civil penalty

In its most extensive discussion of remedial relief in *Environmental Waste Control*, the court imposed a $2,778,000 civil penalty on the defendants jointly and severally.[221] In reaching this penalty assessment, the court rejected EPA's argument that pursuant to EPA's interpretation of RCRA's civil penalty provision,[222] "the [judiciary] should presume a penalty of $25,000 per day to be reduced downward only upon a showing of mitigating considerations."[223] Judge Miller noted that although the EPA may adopt regulations for its own administrative assessment of civil penalties, the agency "may not . . . impinge upon the discretion Congress has afforded the courts."[224] Thus, a district court has discretion

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217. *Id.* at 1241. The court also concluded that although "Indiana's regulatory agency found no insufficiency in the landfill's insurance coverage," and although 42 U.S.C. § 6926(d) provides that "[a]ny action by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter" this did not insulate the Landfill from RCRA liability "because the state took no action." *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1242.

221. *Id.* at 1242-45.

222. 42 U.S.C. § 6928(g) (1988).

223. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1242 (citing Brief for EPA, at 48 n.23 (citations omitted)).

224. *Id.* (citing Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49 (1987)).

to assess civil penalties under RCRA[225] with Congress's guidance of discretionary factors in RCRA legislation.[226] These two statutory factors are the seriousness of the violation and any good faith efforts to comply with applicable requirements.

The court viewed defendants' "illegal operation of a hazardous waste facility,"[227] "placement of hazardous waste in unlined trenches,"[228] and actions leading to the groundwater monitoring system's "continuing inadequacies"[229] to be serious violations of RCRA. Because the purpose of civil penalties is to "provide a meaningful deterrence without being overly punitive,"[230] the court assessed penalties of $2,000 per day for the various RCRA violations determined earlier in the opinion.[231] In making this assessment,[232] the court concluded that the penalty should exceed the amount imposed in *United States v. T & S Brass and Bronze Works, Inc.* of $1,000 per day "for considerably less egregious conduct,"[233] but not more than $2,000 per day because such penalties "would be overly punitive."[234]

d. Permanent closure

The district court stated that "[n]o reported case has considered the quantum of proof that should be required to close a facility permanently, rather than simply order the facility's owners and operators to comply with RCRA in the future and/or to take remedial action."[235] Writing on a clean slate, the court sketched a tentative benchmark that something more than a simple violation of RCRA must be shown. "Such relief

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225. *Id.* (quoting United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314, 322 (D.S.C. 1988)).

226. *Id.* (citing 42 U.S.C. § 6928(a)(3)).

227. *Id.* (citing 42 U.S.C. § 6928(a)(3)).

228. *Id.*

229. *Id.* at 1243.

230. *Id.* at 1244.

231. *Id.* (citation omitted).

232. *Id.* at 1245.

233. *Id.* (citing United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D.S.C. 1988)).

234. *Id.*

235. *Id.* The court's annotated citations for this proposition stated:

See, e.g., United States v. Charles George Trucking Co., 823 F.2d 685 (1st Cir. 1987) (defendant ordered to disclose information pursuant to RCRA and CERCLA); Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983) (citizens obtained injunction requiring future compliance); United States v. Clow Water Systems, 701 F. Supp. 1345 (S.D. Ohio 1988) (corrective action order entered on summary judgment).

Id.

should be granted only in unusual, perhaps even extraordinary, cases."[236] The court recognized that mere technical violations — such as a failure to provide sufficient insurance, failure to provide required information to a regulatory body, or infrequent lapses of regulatory compliance — would make imposition of a permanent closure remedy extremely unlikely.[237] The overwhelming record of persistent violations, delays, and misstatements to regulatory officials,[238] however, coupled with examples of arguably reckless[239] and intentional conduct[240] led the court to conclude that ample reason for permanently closing the landfill existed. In the final analysis, the district court concluded that the defendants' action and inaction "demonstrated an inability to operate a hazardous waste facility in sufficient compliance with RCRA to achieve [the] congressional purpose"[241] of eliminating "air pollution, subsurface leachate and surface run off" from land disposal practices in the nation.[242]

e. Attorneys' fees

Instead of bringing suit under either of the citizen provisions of RCRA[243] or CERCLA,[244] STOP had technically intervened as of right in the EPA's enforcement action in *Environmental Waste Control*.[245]

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236. *Id.* at 1245-46.
237. *Id.* at 1246.
238. *Id.* at 1246-47.
239. The court stated:
> EWC was forbidden from lateral expansion into unlined cells after May 8, 1985. Despite the lack of double-lined cells with leachate collection systems, EWC continued to accept hazardous waste after that date. EWC had no appropriate cells until August, 1986. Perhaps most significantly, Indiana warned EWC repeatedly to apply cover to exposed hazardous waste. EWC did so sporadically, if at all. As a result, hazardous waste lay uncovered, allowing carcinogenic hazardous waste constituents to be swept from the site into the surrounding area by wind and surface water.

Id. at 1246.
240. The court recognized:
> At least one example undermines trust in EWC's representations. The EPA Task Force examined the Landfill's waste analysis plan in June, 1986 and found that parts of it were not being followed. The Task Force appears to have expressed concern regarding the procedures for sampling and analyzing waste in barrels, and EWC stated that it did not accept barrels in the future. Yet on October 11, 1988, more than two years later, [the citizen plaintiffs] videotaped Landfill personnel pushing barrels into a working cell.

Id. at 1246-47.
241. *Id.*
242. *Id.*
243. *See* 42 U.S.C. § 6972(a) (1988).
244. *See id.* § 9659(a).
245. The citizen group intervened pursuant to 42 U.S.C. § 9613(i).

The court concluded, nevertheless, that "citizen groups intervening as a matter of right [should] be able to recover their costs and attorneys' fees."[246] The court predicated this remedial holding on "the common concern of RCRA and CERCLA with hazardous waste and the common purpose of each Act's authorization of attorneys' fees to promote citizen enforcement."[247] The court declined to establish a reserve to pay costs for post-trial and appellate matters without legal authority or an evidentiary basis.[248]

2. Controversial Views of Indiana "Toxic Torts" Law by the Seventh Circuit. — In *City of Bloomington v. Westinghouse Electric Corp.*,[249] the court affirmed the district court's Rule 12(b)(6) dismissal of Bloomington's second amended complaint which was based upon theories of nuisance, trespass, and abnormally dangerous activities for the alleged actions of Monsanto Company in contributing polychlorinated biphenyls (PCBs) contamination at a city-owned landfill, sewage treatment plant, and connected sewers.[250] According to the complaint, Monsanto had sold PCBs to Westinghouse's Bloomington, Indiana factory where Westinghouse used the substances as an insulator in the manufacture of electrical capacitors. "Westinghouse waste containing PCBs was hauled to various Bloomington area landfills and small concentrations of PCBs also got into the sewer effluent of the Westinghouse plant."[251]

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246. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1248.

247. *Id.*

248. *Id.*

249. 891 F.2d 611 (7th Cir. 1989).

250. *Id.* at 613.

251. *Id.* at 612-13. The court stated the elaborate procedural history of the case — worthy of full exposition — as follows:

> In April 1981 the City of Bloomington, Indiana, and its Utilities Service Board (collectively "City") sued Westinghouse Electric Corporation for $149,000,000 damages and equitable relief alleging Westinghouse discharged waste containing polychlorinated biphenyls (PCBs) into Bloomington's sewers and into its Winston-Thomas Sewage Treatment Plant. In October 1981 the City filed an amended complaint adding Monsanto Company as a defendant and also covering the presence of PCB waste at the City's Lemon Lane landfill. The amended complaint sought $80,000,000 in damages and equitable relief from Monsanto. Proceedings were stayed in October 1983 to permit Westinghouse and the City to negotiate a settlement. The negotiations resulted in an agreement — referred to by the parties in the lower court as a consent decree — approved by Judge Dillin in August 1985.
>
> In March 1986 the City filed its second amended complaint solely against Monsanto, reasserting liability under theories of public and private nuisance, trespass, abnormally dangerous activity, and negligence, and adding a willful and wanton misconduct count as well as three counts under the Racketeering Influenced Corrupt Organizations Act (RICO). The *ad damnum* was $387,000,000.

Because the case arose as a diversity suit, the Seventh Circuit applied Indiana tort law to resolve the issue of whether the City had stated various "toxic tort"[252] causes of action.

a. Nuisance

A majority of the panel affirmed the district court's dismissal of the City's public and private nuisance counts based on precedent from a 1977 Indiana Court of Appeals decision which had stated that the essence of the tort of nuisance is one party "using his property to the detriment of the use and enjoyment of others."[253] Yet, as recognized in Judge Cudahy's dissenting opinion,[254] the majority's reliance on one state intermediate appellate court's isolated dicta to stand for an inflexible

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> On June 27, 1988, the district court handed down an opinion dismissing the counts of the second amended complaint based on nuisance, trespass, abnormally dangerous activity and RICO. Two days thereafter the district court denied leave to file a third amended complaint and a week thereafter the case went to trial on the negligence and willful and wanton misconduct counts contained in the second amended complaint. The jury found in favor of Monsanto and on July 18, 1988, judgment was entered in its favor.
>
> The City has appealed basically on the ground that the trial evidence presented jury issues under the theories of nuisance, abnormally dangerous activity, and trespass, and that the trial court therefore erred in granting the defendant's Rule 12(b)(6) motion to dismiss these claims. If the City is right, it's entitled to a new trial. We conclude, however, that the City had no viable claim against Monsanto based on those theories and therefore affirm.

Id.

252. The field of toxic torts law has exploded in the past decade. During the last ten years a number of important books, articles, and judicial opinions have been published that attempt to define the nature of toxic torts. *See generally* M. SEARCY, 1 A GUIDE TO TOXIC TORTS § 1.01 (1989) ("Because of the scale and insidiousness of toxic injury, the application of traditional legal principles has been inadequate to compensate the injured victims in many cases. The legal system itself has therefore had to change in order to accommodate itself to the challenge of compensating these victims. In the 1980s, the law of toxic torts has come of age."); TOXIC TORTS AND PRODUCT LIABILITY: CHANGING TACTICS FOR CHANGING TIMES 11 (M. Brown ed. 1989) (toxic tort actions typically involve plaintiffs who "contend that they have sustained actual or potential physical injuries, emotional distress, property damages, and economic losses, which were caused by substances in the air, ground and water"); *Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1602-1603 (1986) (footnotes omitted) ("Compensation of toxic waste victims and deterrence of future personal injury stemming from exposure to hazardous substances present a serious challenge to our society. Hazardous waste sites are increasingly located in residential communities, and environmentally-induced cancers are now considered a major public health problem.").

253. *Westinghouse*, 891 F.2d at 614 (citing Friendship Farms Camps, Inc. v. Parson, 172 Ind. App. 73, 76, 359 N.E.2d 280, 282 (1977)).

254. *See id.* at 618 (Cudahy, J., dissenting).

"requirement" of Indiana nuisance law,[255] without conducting meaningful review of Indiana's expansive statutory provision on nuisance,[256] was misplaced. The real reason for the *Westinghouse* majority's result was probably based on a judicial policy assessment that it is inappropriate to hold "manufacturers [like Monsanto] liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale."[257] The majority noted the absence of Indiana precedent on the question and referred to two federal court decisions applying New Hampshire law for the proposition that "manufacturers [are] not liable for nuisance claims arising from the use of their product subsequent to sale."[258]

b. Trespass

The majority opinion in *Westinghouse* also affirmed the trial court's dismissal of the City's trespass claim against Monsanto.[259] The court premised its ruling on Indiana's adoption of the *Restatement (Second) of Torts* rule that imposes liability for trespass if the actor "*intentionally* . . . enters land in the possession of another, or causes a thing or a third person to do so . . . ."[260] This rule led the court to conclude that "Monsanto did not deposit PCB wastes in City property nor did Monsanto instruct Westinghouse to do so. Therefore, any trespass was Westinghouse's sole responsibility."[261] The court's analysis of intent, however, is subject to criticism for omission of any discussion about the character of an actor's conduct sufficient to trigger a finding of intent. It is possible under traditional principles of tort law that the City could have adduced evidence to prove that Monsanto's sale of PCBs to Westinghouse in significant quantities over the years would have led Monsanto decisionmakers to possess "substantial certainty" that the PCB wastes would be discharged in public disposal facilities. Under the *Restatement* ap-

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255. *Id.* at 614.

256. As quoted by Judge Cudahy, *see supra* note 254, the Indiana Nuisance Statute states that "[w]hatever is injurious to the senses, or an obstruction of the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." IND. CODE ANN. § 34-1-52-1 (Burns 1986).

257. 891 F.2d at 614 (footnote omitted).

258. *Id.* at 614 n.4 (citing City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986) (asbestos); Town of Hooksett School Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 133 (D.N.H. 1984) (asbestos)).

259. *Id.* at 615.

260. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 158(a) (1965) (emphasis in original)).

261. *Id.*

proach to intent, "substantial certainty" that a given act will result in certain unlawful consequences triggers a finding of intent.[262]

c. Abnormally dangerous activity

Although the court of appeals acknowledged that "Indiana recognizes the doctrine of strict liability stemming from carrying on an abnormally dangerous activity,"[263] the majority opinion upheld the trial court's dismissal of this count based on lack of causation. The court stated that the harm to the City's sewage treatment plant and landfill was not caused by any abnormally dangerous activity of Monsanto, but by the buyer's failure to safeguard its waste.[264]

In dissent, Judge Cudahy criticized the majority for allowing the trial court to "eschew [ ] clear Indiana precedent adopting section 520 [of the *Restatement (Second) of Torts*] and instead created its own criteria, without any basis in Indiana law for assessing the adequacy of the City's abnormally dangerous activity claim."[265] In closing, Judge Cudahy observed:

> It seems to me that, on the basis of the majority opinion, sellers of toxic chemicals and other dangerous substances, simply by virtue of their commercial status, become insulated from any liability — except that cognizable under a negligence or product

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262. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965). "The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty." W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS 36 (5th ed. 1984) (footnote omitted).

263. *Westinghouse*, 891 F.2d at 615 (citing Enos Coal Mining Co. v. Schuchart, 243 Ind. 692, 188 N.E.2d 406 (1963); Erbrich Products Co., Inc. v. Wills, 509 N.E.2d 850, 853 (Ind. Ct. App. 1987)).

264. *Id.*

265. *Id.* at 619 (Cudahy, J., dissenting). Judge Cudahy interpreted Erbrich Products Co. v. Wills, 509 N.E.2d 850, 853 (Ind. Ct. App. 1987) to require a court to decide on a case-by-case basis whether the factors in RESTATEMENT (SECOND) OF TORTS § 520 militated in favor of finding a particular activity as "abnormally dangerous." *Westinghouse*, 891 F.2d at 619 (Cudahy, J., dissenting). According to § 520:

> Those factors are:
> (a) Existence of a high degree of risk of some harm to the person, land or chattels of another;
> (b) Likelihood that the harm that results from [the activity] will be great;
> (c) Inability to eliminate the risk by the exercise of reasonable care;
> (d) Extent to which the activity is not a matter of common usage;
> (e) Inappropriateness of the activity to the place where it is carried on; and
> (f) Extent to which its value to the community is outweighed by its dangerous attribute.

RESTATEMENT (SECOND) OF TORTS § 520 (1965).

> liability theory — beyond the point of sale for any of their activities occurring either before or after the sale. . . . This seems to me a potentially dangerous precedent, [and] one inconsistent with Indiana law.[266]

The dissent was particularly troubled because there were extensive allegations regarding Monsanto's involvement "in events subsequent to the [PCB] sale . . . ."[267]

3. Federal Court Review of Remedial Action Proposed at a Superfund Site is Barred. — In *Schalk v. Reilly*,[268] which involved another aspect of waste problems addressed in *City of Bloomington v. Westinghouse Electric Corp.*,[269] citizens brought actions to challenge a consent decree between Westinghouse and the EPA "to clean up hazardous waste sites in and around Bloomington, Indiana."[270] Focusing its attention on section 113(h)(4) of CERCLA, the United States Court of Appeals for the Seventh Circuit held that the federal courts lack subject matter jurisdiction to consider challenges to remedial actions that have not yet been completed.[271] Adopting the reasoning of the Eleventh Circuit, the court agreed that

> [t]he plain language of the statute indicates that Section 113(h)(4) [allowing a citizen suit under 42 U.S.C. § 9659 to proceed in certain circumstances] applies only after a remedial action is actually completed. This section refers in the past tense to remedial actions *taken* under Section 104 or secured under 106. Absent clear legislative intent to the contrary, this language is conclusive.[272]

Moreover, the court was also persuaded that the "relevant legislative history supports the conclusion that federal courts are deprived of subject matter jurisdiction where remedial action has not yet been completed."[273] In addition, the court concluded that ample opportunity for public comment and involvement was provided regarding Westinghouse's proposal to incinerate hazardous waste as part of necessary Superfund remedial action.[274]

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266. *Westinghouse*, 891 F.2d at 619-20.
267. *Id.* at 619.
268. 900 F.2d 1091 (7th Cir. 1990).
269. 891 F.2d 611 (7th Cir. 1989). *See supra* notes 249-67 and accompanying text.
270. *Schalk*, 900 F.2d at 1092.
271. 42 U.S.C. § 9613(h) (1988).
272. *Schalk*, 900 F.2d at 1095 (quoting Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir. 1989) (emphasis in original)).
273. *Id.* at 1096.
274. *Id.* at 1097. Less extensive portions of the opinion rejected the plaintiffs'

4. Judicial Consideration of a Motion for Judgment on the Evidence in a Toxic Tort Suit Must Not Compare Evidence. — In *Sipes v. Osmose Wood Preserving Co.*,[275] the Supreme Court of Indiana reversed the court of appeals's and the trial court's approval of a Trial Rule 50 motion for judgment on the evidence.[276] The case involved a toxic tort suit against a chemical company for negligence, strict liability, and failure to warn[277] based on allegations that the plaintiff "became extremely ill subsequent to sawing wood treated with a chemical compound of chromium, copper and arsenic (CCA)"[278] manufactured by the defendant corporation.

The supreme court recognized that although the court of appeals had cited the correct test for ruling on a Trial Rule 50 motion,[279] the court of appeals applied the law incorrectly in upholding dismissal of plaintiff's punitive damage claims by weighing all the evidence relevant to punitive damages.[280] After reviewing a variety of evidence in the record on the issue of whether the defendant corporation "consciously and intentionally engaged in misconduct, knowing that such misconduct would probably result in injury" to others,[281] the supreme court articulated the correct application of the law to the facts of the underlying motion:

> Judgment on the evidence is proper only when there is no probative evidence or reasonable inferences which could support a judgment. [Plaintiff] presented probative evidence, though people could differ as to the result on the issue of punitive damages. Judgment on the evidence was therefore improper; the issue of punitive damages should have been presented to the jury.[282]

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argument that subject matter jurisdiction existed under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1988), to consider the EPA's failure to perform an Environmental Impact Statement (EIS). The court rejected this claim, citing a United States Supreme Court decision, Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984), for the proposition that "review is not available when a federal statute specifically precludes judicial review." *Shalk*, 900 F.2d at 1097. The court gave scant attention to further assertions that plaintiffs' "Fifth Amendment rights to substantive and procedural due process, meaningful access to the courts, and equal protection" were violated, characterizing the arguments as "novel theories [that] rest on undesirable expansions of the meaning of the Fifth Amendment. . . ." *Id.* at 1098.

275. 546 N.E.2d 1223 (Ind. 1989).

276. *Id.* at 1226.

277. *Id.* at 1224.

278. *Id.*

279. *Id.* at 1224-25. Jones v. Gleim, 468 N.E.2d 205 (Ind. 1984), describes the appellate standard for reviewing grants of Trial Rule 50 motions.

280. *Sipes*, 546 N.E.2d at 1225.

281. *Id.*

282. *Id.* at 1226.

5. EPA May Regulate Sites with Injection Wells Under RCRA. — In a remarkable decision at the intersection of several federal environmental statutes, Circuit Judge Richard Posner wrote an opinion for the United States Court of Appeals for the Seventh Circuit in *Inland Steel Co. v. EPA*.[283] Two steel companies — Inland Steel Co. and Bethlehem Steel Corp. — challenged orders by the EPA requiring them to take corrective action under RCRA at steel manufacturing facilities in Northern Indiana.[284] In rejecting their challenge, and upholding EPA's corrective action orders, the court of appeals held that RCRA regulation did not exempt the deep injection wells used by the steel makers for disposal of unwanted hazardous by-product liquid wastes.[285] The linchpin of the court's holding was that the RCRA exemption was inapplicable; although the steel companies had water discharge permits for their injection wells, they were not, according to the court, "*required* by the Clean Water Act to have . . . permit[s]."[286]

Judge Posner's opinion is a valuable addition to environmental jurisprudence on two levels: first, general observations about hazardous waste regulation and reality; and, second, specific analysis of ostensibly conflicting environmental policies regarding different environmental media. On the general level, the court's opinion acknowledges the apparent complexity of the problem presented: "The legal and technical matrix in which this challenge is embedded is immensely complex . . . ."[287] Yet, in setting the stage for its analysis, the court indicated that the "complexities are irrelevant" and that the court will resolve the issues by "simplify[ing] ruthlessly."[288] In this Alexandrian spirit,[289] the court described that the steel companies' real motivation was to attempt to avoid the extremely expensive EPA corrective action orders on inactive waste management units on their property, even though the EPA had no plans to restrict the operation of the deep injection wells themselves.[290] Moreover, Judge Posner's opinion trenchantly points out the unrealistic nature of the steel companies' argument that being issued past deep well injection permits under the Clean Water Act makes them exempt from RCRA.

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283. 901 F.2d 1419 (7th Cir. 1990).

284. The EPA's corrective action order was issued pursuant to 42 U.S.C. § 6924(u) (1988).

285. *Inland Steel Co.*, 901 F.2d at 1422.

286. *Id.* (emphasis in original).

287. *Id.* at 1420.

288. *Id.*

289. The Gordian Knot was an intricate knot tied by King Gordius of Phrygia and cut by Alexander the Great with his sword after hearing an oracle promise that whoever could undo it would be the next ruler of Asia. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 568 (1969).

290. *Inland Steel Co.*, 901 F.2d at 1421.

According to the court, "[t]he companies have *begged* Indiana to continue including the deep injection wells in the permits that it periodically renews, though the state has no desire to include them because it does not think that these particular wells" need a Section 402 permit.[291]

On the specific level of analysis, the *Inland Steel* decision is noteworthy in several important respects. Initially, the court framed the ostensible conflict between the Clean Water Act and RCRA as follows:

> We are in a Statutory Cloud Cuckoo Land in which "solid waste" expressly includes liquid wastes. 42 U.S.C. § 6903(27). This same subsection, however, contains the statutory language on which the companies do rely: "The term 'solid waste' . . . does not include . . . solid or dissolved materials in . . . industrial discharges which are point sources subject to permits under" Section 402 of the Clean Water Act, 33 U.S.C. § 1342. The companies argue that the wastes that they pump into their deep injection well is a point source within the meaning of the Clean Water Act because pollutants might be discharged from them. 33 U.S.C. § 1362(14). If they are right on both counts and therefore subject to the permit requirements of Section 402 of the Clean Water Act, then the wells are not solid waste disposal facilities and are not regulable under the Resource Conservation and Recovery Act.[292]

In resolving this statutory tension between RCRA and the Clean Water Act, the court engaged in pragmatic policy analysis. The court noted that the Clean Water Act does not exempt from RCRA a form of waste disposal that poses any environmental hazard to a part of the environment other than to the navigable waters of the United States.[293] The court observed that

> [t]he purpose of the [RCRA] exemption . . . is to avoid duplicative regulation, not to create a regulatory hole through which billions of gallons of hazardous wastes be pumped into the earth without any controls provided they are pumped deeply enough to endanger neither navigable waters nor the supply of drinking water, the latter being protected by the Safe Drinking Water Act, 42 U.S.C. §§ 300f *et. seq.*[294]

The court justified its focus on practicality in the final paragraph of its opinion:

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291. *Id. See* 33 U.S.C. § 1342 (1988).
292. *Inland Steel Co.*, 901 F.2d at 1421-22.
293. *Id.* at 1423.
294. *Id.*

> Regulation is not a seamless whole, and when the seam reflects a compromise we are duty-bound to honor it if constitutional. . . . But we can find no indication that Congress intended to exempt the owners of deep injection wells from regulation under [RCRA], and the language of the Act does not so compellingly prescribe such a result that we must do or die without reasoning why. If the language does not compel, neither is it deformed by the EPA's interpretation, to which we owe some, perhaps considerable, deference . . . .[295]

6. City's Decision to Place Landfill Off Limits for City Garbage Upheld. — In a short but strongly worded opinion, Judge Easterbrook, writing for the United States Circuit Court of Appeals for the Seventh Circuit in *Northside Sanitary Landfill, Inc. v. City of Indianapolis*,[296] rebuffed the landfill's due process challenge to the city's decision not to have its waste haulers deposit city garbage at the landfill in question. In an opening salvo foreshadowing the result, the court opined: "Despite constant reminders that a federal court is not a Board of Zoning Appeals, persons disappointed with local land-use decisions persist in seeking new avenues of review."[297] Examining the rationality of Indianapolis's action under the rational basis due process test, the court concluded:

> Indianapolis told waste haulers to stop using Northside because chemicals from refuse dropped off there might seep into the water supply. Leakage was the reason for its placement on the National Priorities List. Indianapolis . . . also fears that as a former user of Northside's services, it is potentially liable for cleanup costs at the site, and it does not want these costs to mount. These are rational grounds for governmental action. Northside wanted the district court to hold a trial to determine whether these are the real reasons Indianapolis put its dump off limits, but governmental action passes the rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction.[298]

After disposing of the constitutional issue, the Seventh Circuit indicated a willingness to consider appropriate sanctions in environmental cases when a party "appears to be pursuing a common tactic of multiplying litigation in order to buy time — and perhaps to make matters so costly for its adversaries that they will cave in."[299]

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295. *Id.* at 1424 (citations omitted).
296. 902 F.2d 521 (7th Cir. 1990).
297. *Id.* at 522 (citations omitted).
298. *Id.*
299. *Id.* at 523.

7. Seller Not Liable for Breach of Warranty of Habitability for Conveying Home Insulated with Urea Formaldehyde. — In the recent Indiana Court of Appeals decision *Kaminszky v. Kukuch*,[300] the court refused to hold a seller liable for breach of an implied warranty of habitability in a toxic tort suit brought by a couple trying to have the sale of their house rescinded after they discovered it was insulated with urea formaldehyde.

Tibor and Judit Kaminszky purchased the house from Abel Kukuch in 1985. Prior to the purchase, the Kaminszkys inspected the house three times. During one inspection, they saw insulation similar to the insulation in their previous home, but they did not specifically ask what type of insulation the purchased house contained. Before the sale, Kukuch had rented the house to tenants. In 1978, he hired a contractor to install insulation. Kukuch testified that he relied on the contractor's expertise to use the best insulation available, and that he was not informed what type of insulation was used.[301]

After the sale, the buyers experienced skin irritation and dizziness. While cleaning the house, they discovered an access panel covered with wallpaper, which on closer examination revealed a different type of insulation than what they had earlier observed. Testing revealed that it was urea formaldehyde foam insulation.

The Kaminszkys initiated suit alleging mutual mistake and that Kukuch had breached the implied warranty of habitability and failed to disclose key facts.[302] The buyers sought rescission and damages. The Lake County Superior Court ruled in favor of the buyers, and the sellers appealed.[303]

The Indiana Court of Appeals noted that the implied warranty of fitness in the sale of a new house has evolved in various judicial decisions from liability for a builder-vendor to the immediate purchaser, and was then extended to encompass subsequent purchasers.[304] The court completed its review by rejecting the buyers' argument that the seller should have disclosed the presence of the formaldehyde insulation, finding that the seller had relied on an installer to use the best insulation available.[305]

B. Administrative Law

1. EPA May Not Base Enforcement Action on a Memorandum

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300. 553 N.E.2d 868 (Ind. Ct. App. 1990).
301. *Id.* at 869.
302. *Id.* at 870.
303. *Id.*
304. *Id.*
305. *Id.*

Not Promulgated Within Appropriate Notice and Comment Formalities. — In *United States v. Zimmer Products, Inc.*,[306] the district court invalidated the EPA's reliance upon an agency guidance memorandum to establish air violations for a paper manufacturer.[307] After the Indiana State Implementation Plan (SIP) had been approved by the EPA, the agency distributed what it characterized as an "internal memorandum" to the chiefs of the Air Programs branch in EPA regional offices. The memorandum — authored by Richard Rhoads, Director of EPA's Control Programs Development Division (Rhoads memo) — articulated the difficulties that the EPA had experienced in assuring compliance with air emission limitations in the paper industry when using certain control equipment. To alleviate these problems, the Rhoads memo instructed EPA regional offices that units of emissions in mass volatile organic compounds (VOC) per volume of coating "*cannot* be used."[308] Rather, emission limitations "must be based on mass VOC per volume of *solids* consumed."[309]

Zimmer Paper Products runs a manufacturing plant in Indianapolis which coats, prints, and cuts paper for food packaging over-wrap and labels. After an EPA inspection in 1987, Zimmer was given a notice of violation for failure to comply with Indiana's SIP; later, the EPA commenced an action against Zimmer for injunctive relief and civil penalties.[310]

In opposition to Zimmer's argument that the Rhoads memo was actually being relied upon by the EPA as a legislative rule, the government contended that the memo was a "policy statement" or "interpretative rule" which clarified how to determine whether add-on controls, such as incinerators, could conform with Indiana's emissions limitations. In other words, the EPA argued that the memo was merely intended to provide guidance with the emissions limitations and was not a substantive change to those limitations.[311]

The district court, on cross-motions for summary judgment, ruled for Zimmer because the Rhoads memo made two substantive changes in the regulations which had the effect of imposing more stringent requirements on Zimmer.[312] First, the memo changed the requirements under the applicable air emissions standard by requiring that emissions be measured in units of "volumes of [coating] solids consumed" rather

306. 30 Env't Rep. Cas. (BNA) 2093 (S.D. Ind. 1989).
307. *Id.* at 2100.
308. *Id.* at 2094 (emphasis in original).
309. *Id.* (emphasis in original).
310. *Id.*
311. *Id.* at 2094-95.
312. *Id.* at 2100.

than in pounds of VOC per gallon of coating solution.[313] Second, the court construed the memo to require that if add-on equipment was used to achieve compliance, then the emissions must be equivalent to those attainable by using a higher solids/low solvent coating.[314] Indeed, the court concluded that EPA's Rhoads memo represented "a real change on the regulatory approach — recognized as such by agency officials — rather than a mere interpretation of existing regulations."[315]

C. Natural Resources

1. The Department of Natural Resources is Entitled to Recover on Behalf of the State a Full Measure of Natural Resources Damages During Time of Illegally Imposed Injunction. — Because natural resources damages are taking center stage in current hazardous waste cleanup actions under CERCLA,[316] the Indiana judiciary's analysis in *Ridenour v. Furness*[317] is instructive. This case is but a part of a multi-year saga that has taken place in Indiana between the director of the State Department of Natural Resources (DNR) and commercial perch fishermen of Lake Michigan. In the dispute that led to the appellate court opinion at bar, the fishermen successfully enjoined the DNR's enforcement of an administrative ban on gill nets.[318] On appeal, the DNR prevailed and the injunction against enforcing the gill net ban was dissolved.[319]

The DNR filed a new application in the trial court which sought "to recover damages it [had] suffered because of the erroneous injunction."[320] In particular, "the DNR sought damages for the value of the salmon and trout incidentally caught and destroyed by those fishermen who continued to fish with gill nets during the period of the erroneous injunction."[321] Moreover, "the DNR sought as damages the amount of

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313. *Id.* at 2096.
314. *Id.*
315. *Id.* at 2098.
316. *See, e.g.*, Ohio v. Interior Dep't, 880 F.2d 432 (D.C. Cir. 1989).
317. 546 N.E.2d 322 (Ind. Ct. App. 1989).
318. *Id.* at 324.

> Gill fishing nets are commonly deployed by commercial fishermen in order to catch perch fish. A gill net also incidentally catches a variety of other fish as well, however. Following several years of study DNR fisheries biologists concluded that immature chinook salmon and lake trout dominated the catch of fish incidentally caught and destroyed in the gill nets utilized by commercial perch fishermen. As a result of the monitoring studies, the DNR promulgated an emergency order . . . temporarily banning the use of gill fishing nets by commercial fishermen. . . .

Id.

319. *Id.* (explaining the procedural history of the case).
320. *Id.*
321. *Id.*

profits on the harvest of perch fish earned by the fishermen while under the protection of the injunction."[322] After entering a partial summary judgment against DNR on the perch profit element of damages, the trial court heard evidence at a bench trial on the issue of the damages sustained from the incidental catch of sport fish. On the basis of hatchery production cost testimony and estimated mortality of the sport fish, the trial court assessed natural resources damages in the amount of $1,906.16.[323]

The DNR argued three issues on appeal: first, whether the trial court correctly assessed damages for the sport fish destroyed during the period of the erroneous injunction; second, whether the DNR is entitled to recover fishermen's profits on the perch harvest during the erroneous injunction; and, third, whether the trial court erred in failing to apportion damages between the fishermen.[324]

a. Destruction of sport fish

Observing that "damages for the total destruction of personal property [including animals] are measured by the fair market value of the property at the time of the loss,"[325] the court of appeals recognized that a problem exists when no market value exists for the property destroyed.[326] Analogizing the matter of unlawful destruction of sport fish to a litigant who suffered a wrongful imposition of an injunction for harvesting a wheat crop,[327] the court held that the lower court failed to take into account the fish's "development time." Accordingly, the court expanded the DNR's scope of damages to encompass feeding costs in raising fish in a hatchery until they reached a ten to fourteen-inch size.[328] The court specifically noted that its holding does not suggest that the cost of ecological protection of the fish habitat is a measurable element of damage or that it may be computed as part of DNR's recoverable damages.[329]

b. Perch

The court of appeals disagreed with the trial court's conclusion that "profits earned from the catch of perch were not an element of damages recoverable by the DNR for having been wrongfully enjoined."[330] An-

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322. *Id.*
323. *Id.* at 325.
324. *Id.*
325. *Id.* (citations omitted).
326. *Id.* at 326.
327. *Id.* (citing Ross v. Felter, 71 Ind. App. 58, 123 N.E. 20 (1919)).
328. *Id.* at 327.
329. *Id.* at 327 n.3.
330. *Id.* at 327.

ticipating the Indiana Supreme Court's decision in *Ralston v. Lake Superior Court*,[331] the court analyzed the issue as follows:

> [F]ishermen have no constitutional or statutory right to the fish in the Indiana waters of Lake Michigan. Rather, fishermen can fish in Lake Michigan only by virtue of annual licenses bestowed by the DNR. . . . There is indication that the commercial fishermen could have caught some perch through the use of alternative fishing methods. Thus, the damages recoverable by the DNR would be the difference in profits the fishermen received for the perch harvested with the use of gill nets and the profits the fishermen could receive for the perch harvested using alternative fishing methods and technology. The fishermen would be entitled to diminish the amount of damages recoverable by the DNR, however, only if they come forward with information that they could have legitimately captured some perch through the use of equipment other than the gill nets and the profits they would have derived therefrom.[332]

c. Apportionment

Finally, the appellate court reversed the trial court's holding of joint and several damages. The court noted that "the damages caused by each defendant can be ascertained without difficulty," and that the "trial court erred in failing to apportion the award of damages between the fishermen."[333]

2. *Commercial Fishermen Possess No Property Rights in Fish Which Vest Them With Standing to Seek Injunction Against DNR's Gill Net Fishing Regulations.* — In *Ralston v. Lake Superior Court*[334] — a case related to *Ridenour v. Furness*[335] — the Indiana Supreme Court reviewed a continuing dispute between commercial fishermen and the DNR regarding a past gill net order.[336] The court noted that the trial court erred in holding the DNR director in contempt for not following a prohibitory injunction restraining enforcement of a 1983 emergency gill net regulation because the matter became moot when the DNR regulation expired at the end of 1983.[337] The supreme court then articulated and

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331. 546 N.E.2d 1212 (Ind. 1989).
332. *Ridenour*, 546 N.E.2d at 327-28 (citation omitted).
333. *Id.* at 328.
334. 546 N.E.2d 1212 (Ind. 1989).
335. 546 N.E.2d 322 (Ind. Ct. App. 1989).
336. *Ralston*, 546 N.E.2d at 1214.
337. *Id.*

reinvigorated a long-dormant principle that should discourage the proliferation of lawsuits by commercial fishermen against the DNR. According to the court: "[The fisherman] possessed no property right that vests him with standing to seek an injunction against the Department's regulations. He has no property interest in the fish. The fish belong to all the people."[338]

IV. Conclusion: A View Toward the Future

In sum, Indiana lawmakers, joined by state and federal judges, have crafted numerous important policy changes in environmental law during the review period. Based on past developments, the following trends in Indiana law and policy are probable.

1. Solid waste management and planning will cause major disruptions and costs to Indiana's local governments. Given the natural inclination to avoid doing what one does not have to do, it seems likely that several solid waste planning districts will delay implementing needed changes in solid waste facilities, taxes, and recycling policies. Therefore, the problem will likely be shifted back to the General Assembly within the next few years. The General Assembly will probably respond with mandatory recycling, required waste reduction, and landfill bans, continuing the evolution of solid waste planning in the state.

2. Political pressure on Congress will likely persist for passage of federal legislation allowing states to limit or ban certain categories of interstate waste. Without the ability to bar or control interstate waste shipments, states such as Indiana will be frustrated in effective solid waste planning and management due to uncertainties caused by fluctuations in the type and quantity of solid waste coming into the state from beyond its borders.

3. Toxic tort lawsuits will continue to befuddle the courts. Until the legislature decides to regulate personal and property injuries caused by exposure to toxic substances, courts will have to decide whether exposure to insidious, and often unseen, substances over long periods of time are actionable under traditional common law theories. In a related way, courts will be increasingly asked to meld common law compensatory remedies with legislatively sanctioned judicial remedies for cleanup of abandoned hazardous waste sites. Legislative change at the state or federal levels may have a significant impact on this area of the law.

4. The Indiana judiciary will be asked to apply the public trust doctrine to the state's water-related natural resources such as sand, lakebed, and other resources. In support of this argument, the courts

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338. *Id.* (citing Smith v. State, 155 Ind. 611, 58 N.E. 1044 (1990)).

will be presented with persuasive authority from other jurisdictions that have adopted the public trust doctrine.[339]

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339. Public trust law recognizes that "some types of natural resources are held in trust by government for the benefit of the public. These resources are protected by the trust against unfair dealing and dissipation, which is classical trust language suggesting the necessity for procedural correctness and substantive care." The first steps in analysis "require an understanding of what public resources are committed perpetually to what public uses."

RODGERS, *supra* note 1, at 158 (footnotes omitted). *See generally* Note, *Indiana's Lake Michigan Shoreline: Recommended Shoreland Regulations for a Valuable Natural Resource*, 25 VAL. U.L. REV. 99 (1990).