Environmental Rulemaking in Indiana: The Impact of the Substantial Difference Requirement on Public Input

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I. Introduction

The rules adopted by Indiana's environmental boards are of major importance to both the regulated community and the public at large. It is through these rules that programs authorized by statutes such as the federal Clean Air Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act are implemented at the state level.[1] It is also through these rules that state programs with no current federal involvement, such as those concerning the management of solid (nonhazardous) waste, are put into operation.

Rulemaking in Indiana is a legislative process. As such, the public input of information from the broadest base possible prior to the shaping of the final language of the rule is essential.[2] However, for the reasons described in this Article, the environmental boards frequently may be reluctant to publish the text of a proposed rule and to schedule it for public hearing and comment until the language of the rule has been finalized. After such publication, the boards may hesitate to change a proposed rule because such change may necessitate another round of rulemaking. Thus, the prepublication rule development stage takes on major significance; it may become the stage in the rulemaking process in which public input is the most effective. When that is the case, it is essential that the prepublication rule development process be open, rather than selective.

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1. 42 U.S.C.A. §§ 7401-7642 (West 1983); 42 U.S.C.A. §§ 300f to 300n-6 (West 1982); 42 U.S.C.A. §§ 6901-6907 (West 1983). "These acts and their reauthorization amendments contain a unique partial preemption scheme which environmental enforcement agents refer to as primacy. This technique attempts to encourage states to implement the provisions of the acts by applying for primary enforcement responsibility. In order to receive this delegation of authority (or authorization), state laws [rules] must be at least as stringent as the applicable federal statutes [regulations]." Lester, *Implementation of the Resource Conservation and Recovery Act of 1976: The Role of the States*, The Book of the States 406 (1988-89).

2. *See* Brown, *The Overjudicialization of Regulatory Decisionmaking*, 5 Nat'l Resources & Env't 20 (1990).

II. The Procedural Process of Environmental Rulemaking

A. The Statutory Framework

1. The Environmental Rulemaking Entities.—In 1985, the Indiana General Assembly created a separate state environmental agency, the Indiana Department of Environmental Management, repealed the three then-existing environmental boards, and replaced them with the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board.[3] Each Board was granted rulemaking authority by statute:[4]

> The [air pollution control] board shall adopt rules under IC § 4-22-2 consistent with the general intent and purposes declared in section 1 of this chapter [Indiana Code sections 13-1-1-1 to 13-1-1-24] and necessary to the implementation of the Federal Clean Air Act (42 U.S.C. 7401 et seq.), as amended.[5]

> The [water pollution control] board shall adopt rules for the control and prevention of pollution in waters of this state with any substance which is deleterious to the public health or to the prosecution of any industry or lawful occupation, or whereby any fish life or any beneficial animal life or vegetable life may be destroyed or the growth or propagation thereof prevented or injuriously affected. The board may adopt rules under IC § 4-22-2 that are necessary to the implementation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), in effect January 1, 1988, and the Safe Drinking Water Act (42 U.S.C. 300f et seq.), in effect January 1, 1988, except as provided in IC 13-8.[6]

> [The solid waste management board shall] adopt rules under IC 4-22-2 to regulate solid and hazardous waste and atomic radiation in Indiana, including rules necessary to the implementation of the Federal Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.), as amended . . . .[7]

The Department of Environmental Management itself was granted no rulemaking authority in the authorizing statute. Rather, its responsibilities were made executive in nature:

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3. Act of Apr. 19, 1985, Pub. L. No. 143-1985, 1985 Ind. Acts 1074.

4. The following is not intended to be an exhaustive listing of the statutory provisions granting rulemaking authority to the environmental boards.

5. Ind. Code § 13-1-1-4(c) (1988).

6. *Id.* § 13-1-3-4(a).

7. *Id.* § 13-1-12-8(a)(1).

> The department shall assure accomplishment of the comprehensive, long-term programs established by the boards.[8]
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> The department shall procure compliance with standards and rules adopted by the boards.[9]
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> The department shall follow the operating policies established in rules adopted by the boards.[10]
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> The commissioner shall enforce rules consistent with the purposes of IC 13-1-1, IC 13-1-3, IC 13-1-5, IC 13-1-5.5, IC 13-1-5.7, IC 13-1-12, and IC 13-9-30.[11]

2. Statutory Rulemaking Authority.—The general statutory framework for rulemaking in Indiana, applicable to all state agencies, is set out at Indiana Code section 4-22-2. These requirements, plus supplemental requirements found in the environmental management law at Indiana Code section 13-7-7, govern rulemaking by the three environmental boards.[12]

In general, under Indiana Code section 4-22-2, a proposal for a new rule *initially becomes public* when the agency with rulemaking authority (which is, for the purposes of this Article, the "board") notifies the public of its intent to adopt a rule: (1) by publishing notice of a public hearing in one newspaper of general circulation in Marion County, and (2) by publishing notice of a public hearing and the full text of the agency's proposed rule in the *Indiana Register*. All of the publication requirements must be met at least twenty-one days before the date of the public hearing.[13] As for the public hearing itself:

> The agency may conduct the public hearing in any informal manner that allows for an orderly presentation of comments and avoids undue repetition. However, the agency shall afford any person attending the public hearing an adequate opportunity to comment on the agency's proposed rule through the presentation of oral and written facts or argument.[14]

Indiana Code section 13-7-7-4 imposes three additional requirements at this point in the environmental rulemaking process. Hearings on substantive proposed rules with state-wide impact are to be held in more than one place, and, in addition to the Marion County notice, newspaper notice at least twenty-one days prior to the scheduled hearing is required to be

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8. *Id.* § 13-7-3-4.
9. *Id.* § 13-7-3-5.
10. *Id.* § 13-7-3-11.
11. *Id.* § 13-7-3-12.
12. *Id.* § 13-7-7-1(a). "The boards may adopt, repeal, rescind, or amend rules and standards by proceeding in the manner prescribed in IC 4-22-2." *Id.*
13. *Id.* § 4-22-2-24.
14. *Id.* § 4-22-2-26(c).

given in a newspaper of general circulation in any other area of the state where a hearing is to be held.[15] All hearings on proposed rules are to be open to the public, any person is to be provided a reasonable opportunity to be heard with respect to the subject of the hearing, all testimony is to be recorded, and the transcript of the hearing and any written submissions must be open to public inspection and copying.[16] Finally, any interested person is to be given written notice of the action of the board with respect to the subject of the hearing.[17]

The general statute, Indiana Code section 4-22-2-15, does not limit performance of the *preliminary* steps in the rulemaking process to the agency charged with rulemaking authority. Rather, it provides:

> Any rulemaking action that this chapter allows or requires an agency to perform, other than final adoption of a rule . . ., may be performed by an individual or group of individuals with the statutory authority to adopt rules for the agency, a member of the agency's staff, or another agent of the agency. Final adoption of a rule . . . may be performed only by the individual or group of individuals with the statutory authority to adopt rules for the agency.

In addition, Indiana Code section 13-7-7-1(c) provides:

> A board may designate by resolution a single member of the board, or any other individual, to hold a hearing on behalf of the board on any proposed rule. A person conducting a hearing under this subsection shall report to the board his findings and recommendations, and the appropriate order thereon shall be entered by the board after review of those findings and recommendations.[18]

Once the public hearing has concluded and the rule proposal is to be considered for final adoption, the general rulemaking statute provides:

> [T]he individual or group of individuals who will finally adopt the rule under section 29 of this chapter shall fully consider

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15. *Id.* § 13-7-7-4(a). Note that this section requires that "the department" give notice, while Indiana Code § 4-22-2-24(b) places this responsibility on the "agency" that is charged with rulemaking authority.

16. *Id.* § 13-7-7-4(b).

17. *Id.* § 13-7-7-4(c).

18. Failure of the environmental board to comply with the procedural requirement of Indiana Code § 13-7-7-1(c) that the board representative presiding at the public hearings report his findings and recommendations to the full board prior to board adoption of the rule caused the Indiana Court of Appeals to invalidate the rule at issue in Indiana Envt'l. Mgmt. Bd. v. Indiana-Kentucky Elec. Corp., 181 Ind. App. 570, 393 N.E.2d 213 (1979).

> comments received at the public hearing required by section 26 of this chapter and may consider any other information before adopting the rule. Attendance at the public hearing or review of a written record or summary of the public hearing is sufficient to constitute full consideration.[19]

Except for consideration of the public comments, and of any comments or alternatives suggested by the state department of commerce,[20] the general rulemaking statute imposes no further obligations on the agency prior to final adoption.

> Unless required by statute to consider specific factors, make written comments or findings of fact, or otherwise state the basis or purpose of its rule, any agency may adopt a rule without declaring:
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> > (1) the facts or argument on which the agency has based the rule; or
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> > (2) the purposes that the agency intends to accomplish by adopting the rule.[21]

The environmental boards, however, are required by statute at Indiana Code section 13-7-7-2(b) to take certain specified factors into account:

> In adopting rules and establishing standards, a board shall take into account:
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> > (1) all existing physical conditions and the character of the area affected;
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> > (2) past, present, and probable future uses of the area, including the character of the uses of the surrounding areas;
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> > (3) zoning classifications;
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> > (4) the nature of the existing air quality or existing water quality, as the case may be;
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> > (5) technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality; and

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19. IND. CODE § 4-22-2-27 (1988).

20. *Id.* § 4-22-2-28. "[T]he agency that intends to adopt the proposed rule shall respond in writing to the department of commerce concerning the department's comments or suggested alternatives before adopting the proposed rule . . . ." *Id.*

21. *Id.* § 4-22-2-30.

> (6) economic reasonableness of measuring or reducing the particular type of pollution.
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> The boards shall take into account the right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.[22]

The Indiana Court of Appeals has held that the failure of an environmental board to make a showing that it took into account the factors required by Indiana Code section 13-7-7-2(b) before adopting a rule will invalidate the rule.[23]

When adopting a rule, the following options are authorized by Indiana Code section 4-22-2-29(a): (1) The agency may adopt a rule that is *identical* to the proposed rule published in the *Indiana Register*; (2) the agency may adopt, in one or more actions, a rule or rules that consolidate part or all of two or more proposed rules published in the *Indiana Register*; or (3) the agency may adopt a revised version of a proposed rule published in the *Indiana Register*, and include provisions that did not appear in the published version. However, all of these options are limited by the language of subsection (b) of section 29:

> An agency may not adopt a rule that *substantially differs* from the version or version of the proposed rule or rules published in the Indiana Register . . . .[24]

After final adoption of a proposed rule by an agency, the rule is to be submitted to the attorney general for approval. The attorney general shall then review the rule for legality.[25] The attorney general has forty-

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22. *Id.* § 13-7-7-2(b).

23. Indiana Envt'l Mgmt. Bd. v. Indiana-Kentucky Elec. Corp., 181 Ind. App. 570, 393 N.E.2d 213 (1979).

> Recognizing that words are little creatures waiting to do their master's bidding in a given context, it is our duty to ascertain the meaning intended by the legislature in requiring that certain factors be "taken into account" before any regulations could be promulgated. Attributing to the phrase "taking into account" its plain, ordinary and usual meaning we must construe the legislative intent to be that the [board] is required to supply meaningful supporting data concerning the relevant factors listed so that the courts and interested parties may be informed of the basis of the [board's] action in taking "into account" the factors listed in the statute. Our use of the word "data" (rather than findings) in describing the relevant factors to be stated is intended to be in the broadest sense possible, including information in whatever form may be available.

Id. at 576, 395 N.E.2d at 219.

24. IND. CODE § 4-22-2-29(b) (1988) (emphasis added).

25. *Id.* §§ 4-22-2-31, -32(a).

five days after receipt of a rule to approve or disapprove the rule.[26] The attorney general may disapprove or return the rule if it does not comply with the requisite format requirements.[27] Otherwise, the attorney general may disapprove a rule under Indiana Code section 4-22-2-32 only if it:

(1) has been adopted without statutory authority;
(2) has been adopted without complying with this chapter;
(3) *substantially differs* from the proposed rule or rules published [in the *Indiana Register*] on which the adopted rule is based; or
(4) violates another law.[28]

If the attorney general takes no action within forty-five days of receipt, the rule is "deemed approved" and the agency may submit it to the governor.[29]

The factors to be taken into consideration by the attorney general in determining "substantial difference" are set out at Indiana Code section 4-22-2-32(b):

> In the review, the attorney general shall determine whether the rule adopted by the agency . . . *substantially differs* from the proposed rule or rules published [in the *Indiana Register*] on which the adopted rule is based. The attorney general shall consider the following:
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> (1) The extent to which all persons affected by the adopted rule should have understood from the published rule or rules that their interests would be affected.
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> (2) The extent to which the subject matter of the adopted rule or the issues determined in the adopted rule are different from the subject matter or issues that were involved in the published rule or rules.
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> (3) The extent to which the effects of the adopted rule differ from the effects that would have occurred if the published rule or rules had been adopted instead.

Once the attorney general approves the rule, or after the rule is considered to be deemed approved by the passage of the forty-five day period, the agency may submit the rule to the governor.[30] The governor may approve or disapprove the rule with or without cause.[31] The governor

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26. *Id.* § 4-22-2-32(f).
27. *Id.* § 4-22-2-32(d).
28. *Id.* § 4-22-2-32(c) (emphasis added).
29. *Id.* § 4-22-2-32(f).
30. *Id.* § 4-22-2-33.
31. *Id.* § 4-22-2-34.

has fifteen days to act, but may take thirty days if the governor timely files the requisite statement with the secretary of state. "If the governor neither approves nor disapproves the rule within the allowed period, the rule is deemed approved, and the agency may submit the rule to the secretary of state without the approval of the governor."[32] Once the rule has been accepted for filing by the secretary of state, it takes effect thirty days from that date and time, unless a later effective date is established under Indiana Code section 4-22-2-36.[33]

Failure to comply with the procedural requirements of Indiana Code section 4-22-2 will render a rulemaking action invalid.[34] Failure to complete the process within a one-year period, measured from the time of publication of the proposed rule in the *Indiana Register* to the time the rule is approved or "deemed approved" by the governor, will render a proposal ineffective.[35]

B. Additions to the Statutory Framework for Rulemaking

Compliance with the above-described statutory procedural framework for environmental rulemaking is but the first step in a far more complicated process in Indiana, a process that has been supplemented by requirements imposed by legislative deadline, by executive order, by agency rule, and by agency practice.

1. By Legislative Deadline.—Recent legislative environmental enactments not only have required the adoption of rules, but have established deadlines for board action. For example, Public Law 168-1989, Section 3, provides in relevant part:

> (a) The water pollution control board shall adopt the initial rules required under IC 13-7-26-6, as added by this act [rules establishing ground water quality standards], before July 1, 1990.

Such legislatively imposed deadlines often turn out to provide an unrealistically short time frame for board rulemaking. However, no penalties have been provided by the General Assembly for failure to meet the legislative deadlines.[36]

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32. *Id.*
33. *Id.* §§ 4-22-2-35, -36, -39.
34. *Id.* § 4-22-2-44.
35. *Id.* § 4-22-2-25.
36. Compare the action of Congress, which has imposed self-enforcing statutory timetables upon the Environmental Protection Agency (EPA) for the adoption of regulations via the statutory "hard hammer" and "soft hammer" provisions included in the Hazardous and Solid Waste Amendments of 1984 (HSWA) (Pub. L. No. 98-616 (1984) (codified as amended at 42 U.S.C. § 6924)). An example of the "soft hammer" can be found in HSWA's land disposal restrictions (the "land bans") at § 3004(g)(6)(A), under which hazardous wastes may continue to be land disposed after a specified date

2. By Executive Order.—Soon after he took office, Governor Evan Bayh issued an executive order which required that:

> Prior to the submission of any rule to the Revisor of Rules of the Code Revision Division of the Legislative Services Agency for publication in the Indiana Register, each State Agency (as defined in I.C. 4-22-2-3(a)) shall submit the proposed rule to the Indiana State Budget Agency, together with a written statement setting forth such State Agency's calculation of the estimated fiscal impact of such rule on State and local government in sufficient detail to permit the director of the Budget Agency to evaluate the accuracy of the calculation and the appropriateness of the methodology used in making such calculation. The director of the Budget Agency must approve such proposed rule prior to submission for publication under I.C. 4-22-2 . . . .[37]

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even if the EPA has failed to promulgate the requisite regulations, but only with additional statutory restrictions. An example of the "hard hammer" follows at § 3004(g)(6)(C): after the passage of an additional period of time, if the EPA has still failed to promulgate the requisite regulations, "such hazardous waste shall be prohibited from land disposal."

Note also that the EPA may impose rulemaking timetables upon the states.

37. Exec. Order No. 2-89, 12 Ind. Reg. 1466 (1989). Compare the federal Paperwork Reduction Act, 44 U.S.C. § 3501 (1988), and presidential Exec. Order No. 12291, 46 Fed. Reg. 13193 (1981), both of which require submission of EPA regulations to the Office of Management and Budget (OMB) for review. The Paperwork Reduction Act requires the OMB to approve the information collection requirements of a rule. Executive Order No. 12291

> requires EPA to assess the effect of Agency actions during the development of regulations. Such an assessment consists of a quantification of the potential costs, economic impacts, and benefits of a rule, as well as a description of any beneficial or adverse effects that cannot be quantified in monetary terms. In addition, Exec. Order No. 12,291 requires that regulatory agencies prepare a regulatory impact analysis (RIA) for major rules.

55 Fed. Reg. 11850 (1990). *See Examining the Reagan Administration's 'Proudest Achievement,'* The Washington Post, Oct. 10-16, 1988, at 33 (Nat'l Weekly ed.):

> [Reagan] signed two executive orders that were to dramatically shift the balance of political power from the various agencies responsible for drafting and enforcing federal regulations to the White House.
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> The first order gave the Office of Management and Budget the power to veto or delay regulations proposed by individual agencies, and required the agencies to submit an economic impact statement for all new regulations showing that the benefits outweighed the costs. The second order set up a task force headed by Vice President Bush to oversee the administration's deregulation efforts.
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> Another major weapon that appeared in Reagan's deregulation arsenal was the Paperwork Reduction Act ironically, pushed through Congress by the Carter administration, which placed OMB at the center of all regulatory

Thus, the agency may not notify the public of its intent to adopt a rule by publishing notice of public hearing and the full text of the proposed rule in the *Indiana Register*, as provided in Indiana Code section 4-22-2, *unless and until* the director of the State Budget Agency, or the director's delegatee, has approved the proposed rule.

Section 3 of the executive order permits the "director of the Budget Agency [to] delegate his authority to approve or disapprove rules under this Executive Order." Neither the attorney general nor the governor has been granted *statutory* authority to delegate his or her rulemaking responsibilities. Furthermore, unlike the *limited* authority granted by statute to the attorney general to disapprove a rule, under the executive order the budget director needs no justification for a failure to approve a rule. Finally, although under the rulemaking statute inaction by either the attorney general or the governor will lead to the rule being "deemed approved" after the passage of a specified period of time, the executive order sets no time limits on the period during which the budget director may act. Thus, under certain circumstances, the attorney general or governor may *act* to disapprove a rule. The budget director, however, need take no action to disapprove a rule; under the executive order, a rule will be published in the *Indiana Register* only if the budget director takes action to approve it.

3. By Agency Rule.—Indiana Code section 4-22-2-43(b) permits an agency to "adopt rules under this chapter to supplement the procedures in this chapter for its own rulemaking actions."[38] None of the three environmental boards currently has such rules.

4. By Agency Practice.—Under the statutory framework as outlined, rulemaking need not be a lengthy process. An environmental board could publish a proposed rule in the *Indiana Register*, personally hold the mandatory public hearing or hearings at least twenty-one days later, make

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decisions. The law charges the budget office with making sure federal agencies do not create unnecessary paperwork.

See also White House Backs Out of Deal Limiting OMB Authority Over EPA Rules, 11 INSIDE E.P.A. WEEKLY REP. 1, 7 (June 15, 1990):

> The battle over OMB's authority is being fought in the context of the reauthorization of the Paperwork Reduction Act (PRA), which centralizes paperwork oversight at OMB. Reauthorization bills approved by committees in both the chambers of Congress this year include language aimed at limiting 1983 Executive Orders that require all federal agencies to submit their regulations to OMB for cost-benefit review before they are promulgated. The PRA requires only that OMB ensure that paperwork is not duplicative or overly burdensome to the public. The two Executive Orders in question are 12291, which requires agencies to submit all major rules for OMB clearance; and 12498, which requires annual submissions of proposed regulatory activities.

38. IND. CODE § 4-22-2-43(b) (1988).

decisions at a meeting at the conclusion of the hearings, and then either approve the proposal and send it on to the attorney general, or, if the board elected to make changes that would necessitate another public hearing under Indiana Code sections 4-22-2-29 and 4-22-2-36, send the revised draft back to the *Indiana Register* for republication.

However, such an approach would stand at odds with the reality of the complex nature of major environmental proposals and the intricate mix of interests impacted by these proposals. A number of still-evolving informal processes have been devised in efforts to address this reality. These processes supplement the statutory procedural framework at several points.

Indiana Code section 4-22-2-23 permits a board, before or after public notification of a proposed rulemaking, to solicit comments from all or any segment of the public:

> Before or after an agency notifies the public of its intention to adopt a rule under section 24 of this chapter [i.e. by publication in the *Indiana Register*], the agency may solicit comments from all or any segment of the public on the need for a rule, the drafting of a rule, or any other subject related to a rulemaking action. The procedures that the agency may use include the holding of conferences and the inviting of written suggestions, facts, arguments, or views. An agency's failure to consider comments received under this section does not invalidate a rule subsequently adopted.[39]

In practice, this informal prepublication rule development process has been conducted by the Indiana Department of Environmental Management (IDEM), has been initiated prior to the submission of a rule proposal to an environmental board, and has generally followed one of three models.

a. First model

IDEM prepares the draft rule entirely in-house, then presents it to the appropriate environmental board for consideration.

b. Second model

IDEM, after preparing a working draft of a rule, or with nothing yet on paper, directly solicits input from representatives of groups it believes

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39. Note Indiana Code § 4-22-2-17(a), which provides: "IC 5-14-3 [the access to public records law] applies to the text that an agency intends to adopt from the earlier of the date that the agency takes any action under section 24 of this chapter [notice and publication in the *Indiana Register*], otherwise notifies the public of its intent to adopt a rule under any statute, or adopts the rule." *See also* IND. CODE § 4-22-2-16, regarding the applicability of the Open Door Law (IND. CODE § 5-14-1.5 (1988)).

to be knowledgeable or interested in the subject matter under consideration. IDEM may work one-on-one with various interested persons, or may assemble *ad hoc* working groups. The process, however, is not public, and there is no opportunity for general public involvement, or involvement from interested individuals or groups of which IDEM is unaware, or which IDEM does not choose to involve in the development process. When the process is completed, IDEM presents the proposal to the appropriate environmental board for consideration.

c. Third model

IDEM solicits public input on a specific issue, prior to, or as part of the process of, rule development. This solicitation is accomplished by public notification in various newspapers and in the *Indiana Register's* section on "Other Notices,"[40] and somewhat parallels the advance notice of rulemaking procedure at the federal level. Informal public meetings are held and written public comments also are solicited. Again, when the rule development process is completed, IDEM presents the proposal to the appropriate environmental board for consideration.

The environmental board itself may have little or no knowledge of the rule development taking place under models one and two until the resultant proposal is scheduled for board consideration, either "for discussion only" or "for preliminary adoption."[41]

Representatives of various interest groups may appear at the board meeting at which the proposal is considered, either to encourage adoption of the proposal, or to urge modifications to the proposed language prior

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40. *See, e.g.*, 13 Ind. Reg. 1346 (1990), in which IDEM gives notice of public meetings it has scheduled on the regulation of air toxics,

> IDEM intends to propose rules to the Air Pollution Control Board that will establish a regulatory program to limit exposure to Indiana citizens from certain hazardous air pollutants. The purpose of this notice is to provide information to the public on the necessity and contents of such a regulatory proposal and to announce that IDEM is seeking public input prior to proposing rules to the Board. Public meetings will be held throughout the State to discuss IDEM's proposals in the area of air toxics.

Id. See also 13 Ind. Reg. 968 (1990) (regarding "new procedures to develop NPDES permit limitations based on the revisions to 327 IAC 2-1"); 13 Ind. Reg. 969 (Feb. 1, 1990) (regarding "a new rule by which owners and operators of underground petroleum storage tanks may be entitled to reimbursement from the underground storage tank Excess Liability Fund for some costs of corrective action that are incurred as a result of a release from an underground storage tank").

41. The term "preliminary adoption" is commonly applied to the process of board approval of the text of a draft rule as the initial step in fulfilling the statutory requirement under Indiana Code section 4-22-2-24 (notifying the public of "its intention to adopt a rule" by publication of notice of public hearings and the full text of the proposed rule in the *Indiana Register*).

to preliminary adoption, or to urge the board to direct the IDEM staff to do further work on the proposal before preliminary adoption. Unfortunately, if the proposal was developed under models one or two, those who have not been included in the informal rule development process may not be present because they are unaware that consideration of a proposal affecting their interests is taking place. Or, if they are present, they may not have had the opportunity to prepare effective testimony for the board to consider. Notice of a board meeting need be posted only "forty-eight (48) hours before the meeting."[42] The board agenda, which may be the only notice that preliminary adoption of a proposed rule is being considered, need be posted only "at the entrance to the location of the meeting prior to the meeting."[43] Finally, in some cases, copies of the text of the proposal may not be generally accessible during the course of the board deliberations to those who were not a part of the initial rule development process.

The board may vote to preliminarily adopt the rule and to schedule it for publication and public hearings. Or it may direct staff to informally meet with various interest groups to try to reach an accommodation between the differing positions that have been communicated to it. Or it may direct that a more formal working group representing the various interests be formed to meet and come up with recommended language. Other variations may occur because none of this pre-publication process is governed by statute. Even after initial board involvement, IDEM has not considered pre-publication rule development to be covered by the Open Meetings Law.[44]

Following preliminary adoption of the text of a proposed rule by an environmental board, notice and publication, and the public hearings, the hearing officer will prepare written findings and recommendations for the full board's consideration.[45] As a result of the oral and written comments received on the proposed rule, the hearing officer may recommend changes to the language of the proposal prior to final adoption by the board.

At the board meeting considering final adoption of a proposed rule, after the report of the hearing officer, it is the general practice of the environmental boards to again hear public comment on the proposal. Based upon the report of the hearing officer and the testimony received,[46] the

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42. IND. CODE § 5-14-1.5-5 (1988).
43. *Id.* § 5-14-1.5-4.
44. *Id.* § 5-14-1.5.
45. *See supra* note 18.
46. Indiana Code § 4-22-2-27 provides in relevant part: "The individual or group of individuals who will finally adopt the rule under section 29 of this chapter shall fully consider comments received at the public hearing required by section 26 of this chapter *and may consider any other information* before adopting the rule" (emphasis added).

board has the option of voting to adopt the language of the proposed rule as published in the *Indiana Register*, to adopt the published language with specific modifications, or to send the proposal back to IDEM for further work, or to reject or table the proposal.

III. Public Input v. Substantial Difference: A Conundrum

Many proposed environmental rules presented to a board for final adoption are massive documents of great complexity. They have been subject to an extensive pre-publication rule development process, often extending back over many months or even years. The text published in the *Indiana Register* has been the subject of two or more public hearings. In addition to the oral testimony presented at those hearings, hundreds of pages of written comments not only discussing the public policy ramifications of the proposed rule — its probable impacts on industry, on the state's economy, and on public health and the environment — but also analyzing the technical aspects of the rule in great detail and pointing out errors, misconceptions, possible improvements, and unresolved problems, have been submitted to the hearing officer.

All of this material will be carefully studied by IDEM's technical staff, and written responses will be prepared to the comments, along with suggested findings and recommendations. These recommendations often will include revisions to the language of the proposed rule, made as the result of problems pointed out by the public comments. The hearing officer will include this material in his or her report to the board, and will note agreement or disagreement with the various suggested findings and recommendations.

At the board meeting when the proposed rule is eligible for final adoption, public testimony again will be permitted, although not required by statute.[47] Many representatives of affected parties or interest groups believe that the best way to influence the board's decision is to speak to the board members directly, rather than to rely on the hearing officer's report to convey their interest or concerns.

When the time comes for final adoption of a rule, if the board is convinced that changes should be made to the language of the proposal as published in the *Indiana Register*, the board may face an intricate and difficult problem — a conundrum. Among the choices the board may consider are the following:

(1) Finally adopt the rule without the changes.
(2) Adopt the rule with the changes, on the basis that the rule as adopted does not *substantially differ* from the proposed rule

47. *See supra* note 44 and accompanying text.

published in the *Indiana Register*.
(3) Make the changes to the rule, readopt it, and submit it again for public notice and hearings.
(4) Send the rule back to IDEM with direction to work out the problems and then to resubmit the revised version to the board for readoption, to be followed by public notice and hearings.

The board's decision turns on the question of whether the changes constitute a "substantial difference." As noted earlier, Indiana Code section 4-22-2-32 sets out the factors the attorney general "shall consider" in deciding whether a rule "substantially differs from the proposed rule or rules published [in the *Indiana Register*] on which the adopted rule is based."[48] First, the attorney general is to consider the extent to which persons affected by the adopted rule should have understood from the version published in the *Indiana Register* that their interests would be affected; second, "the extent to which the subject matter of the adopted rule or the issues determined in the adopted rule" differ(s) from the version published in the *Indiana Register*; and third, the extent to which the "effects of the adopted rule differ from the effects that would have occurred if" the version published in the *Indiana Register* had been adopted instead.[49]

The first and second factors clearly are due process standards. The rationale of the third factor can best be understood in light of the fact that the language of Indiana Code section 4-22-2-32(b)'s three factors duplicates that of section 3-107 of the Uniform Law Commissioners' Model State Administrative Procedure Act (1981) [1981 MSAPA].[50] Section 3-107 of the 1981 MSAPA is headed "Variance between Adopted Rule and Published Notice of Proposed Rule Adoption."

The "evils" to be prevented by the "substantial difference" language have been described by the chief drafter of the 1981 MSAPA provision as follows:

> Public participation in rule making is intended to assure agency accountability. It would be meaningless, however, if an agency were allowed to adopt a rule that had no substantial relationship to the rule originally proposed in the required published notice. Under those circumstances any agency could circumvent opposition to a proposed rule by intentionally omitting from its text, at the time it was initially published as a proposal, those portions that are likely to be controversial. Then, at the time of its adoption, the agency could rewrite the rule to incorporate the controversial provisions that would have provoked a public outcry had they

48. IND. CODE § 4-22-2-32 (1988).
49. *Id.* § 4-22-2-32(b).
50. *See* BONFIELD, STATE ADMINISTRATIVE RULE MAKING app. I (1986).

> been known at the time the rule was originally proposed. To avoid evasive tactics of this kind, an APA should establish some limits on the variance allowed between the text of a published proposed rule and the text of the rule that is actually adopted at the end of the rule-making proceeding.[51]

Certainly there is a large distance between the sort of evasive agency tactics described by Bonfield and corrections and improvements made to the text of a proposal as a result of public input. Bonfield himself notes:

> Agencies should not be required to publish entirely new notices of proposed rule adoption, and to allow additional public input, every time the input received as a result of a published notice of proposed rule adoption convinces them to modify a proposed rule in any fashion. If agencies were entirely prohibited from altering the text of a proposed rule at the time it was finally adopted without, in effect, starting a new rule-making proceeding, two undesirable consequences would occur. First, agencies would be discouraged from making desirable changes in their rule proposals on the basis of public input which would defeat one of the major purposes of the required rule-making procedures. Second, agencies proposing controversial rules would have to engage in rule-making proceedings that would continue endlessly, as new and valid criticisms of successive forms of the proposed rule caused the commencement of entirely new rounds of notice and comment.[52]

These have been, however, precisely the effects that section 3-107 of the Uniform Law Commissioners' Model State Administrative Procedure Act have imposed on the environmental rulemaking process in Indiana. The boards have been reluctant to preliminarily adopt a rule and put it out for public comment until they believe that the language has been finalized. Once public comment has been received, the boards have been reluctant to make changes in response to such comments because such changes may constitute a "substantial difference."

IV. The "Logical Outgrowth" Rule

The federal Administrative Procedures Act establishes the procedures for informal "notice and comment" rulemaking at the federal level.[53]

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51. Bonfield, *supra* note 50, at 232.

52. *Id.* at 233.

53. 5 U.S.C. § 553 (1988). Rules "required by statute to be made on the record after opportunity for an agency hearing" are governed by 5 U.S.C. §§ 556, 557. *Id.* § 553(c).

Section 553(b) provides that "general notice of proposed rulemaking shall be published in the Federal Register." The notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Section 553(c) states that after notice,

> the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of the basis and purpose.

In response to arguments that changes in a proposed rule require a new opportunity to comment, the federal courts have said that "an agency may make changes in its proposed rule on the basis of comments without triggering a new round of comments, at least where the changes are a 'logical outgrowth' of the proposal and previous comments."[54] The court in *Stoughton v. EPA* stated the rationale as follows:

> The statutory requirement of notice and the opportunity for comment on a proposed rule "does not automatically generate a new opportunity for comment" every time the Agency reacts to the comments. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C.Cir. 1973).
>
> As we have long recognized, "[a] contrary result would lead to the absurdity that the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Id.* at 632, n.51. If it were not possible for an agency to reexamine and even modify the proposed rule, there would be little point in the comment procedures. "The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency." *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Comm'n*, 650 F.2d 1235, 1249 (D.C.Cir. 1980), *cert.denied*, 451 U.S. 984 (1981).[55]

V. Conclusions and Recommendations

As stated at the beginning of this Article, the environmental boards frequently may be reluctant to publish the text of a proposed rule and

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54. Stoughton v. EPA, 858 F.2d 747, 751 (D.C. Cir. 1988) (citing NRDC v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988)); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). *See generally* Brennan, *EPA Rulemaking and Adequate Notice*, 5 Nat'l Resources & Env't 5 (1990).

55. *Stoughton*, 858 F.2d at 751-52.

to schedule it for public hearing and comment until the language of the rule has been finalized because the boards are hesitant to make changes to the proposed rule after such publication. The reason is that such change may be considered a substantial difference which necessitates another round of rulemaking. The result is that the pre-publication rule development stage takes on major significance; it may become the stage in the rulemaking process in which public input is the most effective. However, the pre-publication rule development process is not always open to the public, and "public" input is often selective public input because the statutory safeguards of Indiana Code section 4-22-2-24 do not apply. The ironical result is that at the point at which such safeguards do apply, the "substantial difference" provisions of the rulemaking statute operate to make the boards reluctant to take public input into account except under the most egregious circumstances.[56]

Two differing approaches might be taken in an effort to resolve this quandary. The first approach would involve legislative elimination of the substantial difference language in the statute, leaving it to the Indiana courts, when the proper case is presented to them, to devise a "logical outgrowth" test or some other standard.[57] The second approach would be for the environmental boards to acknowledge the reality that the substantial difference requirement has seriously weakened the effectiveness of the public hearing process, and for the boards to require that all future preliminary (pre-publication) rule development be made accessible to the general public. This could be accomplished by IDEM consistently following the third model, which, as described previously, involves the public in the rule development process at an early stage through notification in the *Indiana Register's* section on "Other Notices." It is acknowledged, however, that this solution would be at best only a "fix" to circumvent the difficulties

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56. This result conflicts directly with the purpose of the informal notice and comment rulemaking process, well stated in Dow v. Consumer Product Safety Commission, 459 F. Supp. 378, 390 (W.D. La. 1978),

> Informal rule-making has been heralded as one of the most successful innovations of administrative law. It is a truly democratic procedure and provides the agency with channels of information. It is fair to all parties and produces a record by which the courts and Congress can efficiently supervise agency action. Solicitation of comments is the basis of informal rule-making, because it is the means by which the public participates in the rule-making process. It is also an efficient channel through which experts in the field and those affected by the proposed rules can provide information which may have been overlooked by the agency, can point out the abstruse effects of the proposed rules, and can suggest alternatives.

Id. at 390.

57. A related option, of course, would be to replace the statutory substantial change test with a logical outgrowth test.

caused by the boards' well-founded reluctance to run afoul of the substantial difference prohibition of the rulemaking statute.