

Clean Air Act Amendments Leave Small Business Up In The Air

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The Clean Air Act Amendments of 1990 (Amendments) — the first major federal air initiative in thirteen years — have set in motion new environmental rules and programs that will change the way America does business.¹ The Amendments will cost the nation billions of dollars² and will keep the United States Environmental Protection Agency (EPA) busy writing new rules for years. The Amendments will address acid rain, ozone depletion, the greenhouse effect, and a number of other vexing pollution problems, and will leave small businesses gasping for breath as they try to comply for the first time with federal air pollution control requirements. Small companies will have to consider conducting emission inventories, installing air pollution control devices, changing their materials and processes, applying for permits, and completing paperwork to comply with new rules. Many more clients will need legal advice on air compliance issues.

I. AIR

The 1990 Clean Air Act Amendments consist of eleven separate titles.³ Collectively, the Amendments require EPA to promulgate some 175 new regulations, 30 guidance documents, and 23 reports. The agency must also establish a number of panels and initiate a variety of research

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1. The breadth of the Clean Air Act Amendments and their implementing regulations has evoked an array of superlatives. See, e.g., *Air Pollution: Focus Turns to Clean Air Act Regulations*, Env't Rep. (BNA) at S-5 (Jan. 16, 1992) ("controversial and far reaching"); Ralph Hall, *What Do The 1990 Clean Air Act Amendments Mean For Indiana Business?*, OUTLOOK, Aug.-Sept. 1991, at 19 ("massive piece of legislation"; "compared in complexity to the entire Internal Revenue Code"; "will have a profound impact on business and on the regulatory agencies"); David A. Wollin, *Air-Toxics Laws Force Industries to Plan Ahead*, NAT'L L.J., May 13, 1991, at 25 ("one of the most comprehensive environmental statutes in decades").

2. EPA says that the Clean Air Act Amendments will actually stimulate the nation's economy by spurring growth in the air pollution control industry. See Env't Rep. (BNA) at AA-1 (Jan. 16, 1992) (according to EPA the Amendments will create 60,000 new jobs by the year 2000).

3. See Pub. L. No. 101-549, 104 Stat. 2399 (1990).

projects.⁴ Small businesses that do not plan ahead may be overwhelmed by the crush of new requirements. This Article will provide a summary of the law's goals and most significant features.

A. Ozone Depletion

The loss of protective ozone in the upper atmosphere over many parts of the world is a major human health and environmental concern.⁵ The United Nations and the World Meteorological Organization have determined that damage to the ozone layer is accelerating and that heavily populated parts of the world, including portions of the United States, are at risk.⁶

To combat ozone depletion, Title VI of the Clean Air Act Amendments imposes dramatic cuts on the production and use of the most potent ozone depleters, such as chlorofluorocarbons, which are widely used in refrigeration and air conditioning and as solvents and aerosol propellants.⁷ This is consistent with the Montreal Protocol, a treaty that has been signed by the United States and seventy-three other countries.⁸ Carbon tetrachloride, one of the most widely used solvents in the nation, must be cut by 1995 to fifteen percent of the amount used in 1989 and entirely phased out by the end of the decade.⁹ Other depleters must be reduced along a more gradual schedule, but must still be eliminated by the year 2000.¹⁰ EPA has discretion to accelerate the phase-out if the Montreal Protocol is modified to require faster reductions.¹¹ While the

4. *Id.*

5. Shirish Date, *Northern Ozone Hole May Open Up*, INDIANAPOLIS STAR, Feb. 4, 1992, at A1.

6. *New Studies Show Extended Damage to Ozone Layer*, INDIANAPOLIS STAR, Oct. 25, 1991, at A1, A8 [hereinafter *New Studies*].

7. The use or production of other ozone depleting chemicals, such as halons, carbon tetrachloride, and methyl chloroform, will also be phased out under Title VI. 42 U.S.C.A. § 7671c(a) (West Supp. 1991).

8. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1544 (entered into force Jan. 1, 1989).

9. The chemical company E.I. du Pont de Nemours, the world's largest producer of chlorofluorocarbons (CFC), has pledged to halt production of CFCs by 1997, three years ahead of schedule. The company also pledged to speed the phase-out of substitutes that are less destructive than CFCs but are still capable of damaging the ozone layer. See *New Studies*, *supra* note 6, at A8.

10. Hydrochlorofluorocarbons (HCFCs) can continue to be produced and used, but new uses of HCFCs are banned by January 1, 2015, unless the chemicals are used, recovered, and recycled, used as a feedstock, or used as a refrigerant in appliances manufactured before the year 2020. Production of HCFCs will be frozen in the year 2015 and gradually phased out by the year 2030. See 42 U.S.C.A. § 7671d(a) (West Supp. 1991).

11. *Id.* § 7671e(a).

phase-out is under way, companies may produce or use a different mix of ozone depleting substances or they may trade production or consumption allowances with other companies, *provided* that the change results in greater total reductions for each substance than would otherwise be achieved.¹²

Meanwhile, Title I of the Clean Air Act Amendments imposes new restrictions on the emission of photochemically reactive volatile organic compounds (VOCs) and nitrogen oxides (NO_x-s), both of which are believed to contribute to the formation of ozone in the air people breathe. Ozone close to the earth can initiate damage to lungs, trees, crops, and materials. Regions of the country that have not attained the national ambient air quality standard for ozone must cut VOCs and NO_x emissions until the standard is met.¹³ Each region's compliance deadline depends on the seriousness of the ozone problem. For example, Lake and Porter counties, which have been graded "serious," must achieve "attainment" status by 1999.¹⁴ Clark and Floyd counties are "moderate" and have until 1996 to reach attainment.¹⁵ Marion, Vanderburgh, St. Joseph, and Elkhart counties, which are rated "marginal," have until 1993.¹⁶ All other Indiana counties already are at attainment levels.

If the counties ranked "marginal," "moderate," or "serious"¹⁷ fail to meet their attainment deadlines, then those counties can get bumped up to the next higher classification (e.g., "marginal" gets moved to "moderate," "moderate" to "serious," "serious" to "severe," and so forth). This means that VOC emitters in those regions must achieve even more stringent limitations. Achieving attainment status under the current deadlines will be difficult. Meeting stepped-up requirements will be even more difficult if a county is bumped up into a higher classification. Some observers predict that current "marginal" and "moderate" ozone nonattainment areas will eventually be bumped up to the "serious" nonattainment category by virtue of their inability to meet the compliance deadlines even though these areas are close to attainment.¹⁸

B. Acid Rain

Title IV of the Clean Air Act Amendments seeks to reduce acid rain by cutting sulfur dioxide (SO₂) and NO_x emissions from coal-fired

12. *Id.* § 7671f.

13. *Id.* § 7511a.

14. *See id.* § 7511(a)(1).

15. *See id.*

16. *See id.*

17. There are no "serious," "severe," or "extreme" ozone nonattainment areas in Indiana.

18. *See* Mel Schulze, *Inconsistencies and Other Drafting Problems in the 1990 Clean Air Act Amendments*, 6 NAT. RESOURCES & ENV'T, Fall 1991, at 40, 40-42.

electric generating stations located mainly in the East and Midwest.¹⁹ The goal is to limit SO₂ emissions to ten million tons below 1980 levels from all sources.²⁰ NO_x emissions are to be reduced to two million tons below 1980 levels.²¹

Title IV should be interesting to nonutility lawyers because of the way the new law works. Instead of imposing emissions limits through permits, which is the way pollution laws traditionally work, Title IV uses market-based "air emissions trading," a potentially exciting idea in environmental regulation. Under the new law, industrial sources will receive "allowances" to emit SO₂ based on their past fossil fuel consumption and the emissions rate allowed.²² An "allowance" is an authorization to emit one ton of SO₂.²³ The allowances can be "spent" by businesses to cover current emissions, saved in an allowance "bank" for future use, or sold to other businesses within the same general geographic area. Companies can earn extra allowances by undertaking conservation measures, switching their processes, or shutting down a facility to reduce overall air emissions below the legal limits.²⁴ The idea behind emissions trading is to reward companies that burn clean fuel or use efficient control technology, or that otherwise "overcontrol," by enabling them to sell some of their allowances to other companies. Also, by purchasing or saving allowances, companies can plan for growth and expand their operations. The companies can implement control options that are the most cost-effective and feasible and may choose, within limits, their own compliance schedule.²⁵

19. The National Acid Precipitation Assessment Program, established by Congress in 1980 to conduct a study of acid rain and its relation to sulfur dioxide and nitrogen oxide, has found that electric utility coal-fired generating plants generate 70% of the 23 million tons of sulfur dioxide emissions in the United States. About 2% of the utility plants account for 68% of the total. See James A. Holtkamp, *EPA Issues Emissions Allowances*, NAT'L L.J., May 13, 1991, at 19, col. 4.

20. 42 U.S.C.A. § 7651(b) (West Supp. 1991).

21. *Id.*

22. *Id.* § 7651c(a).

23. *Id.* § 7651a(3).

24. Indiana law already provides for emission "offsets" in nonattainment areas, so the Title IV approach to SO₂ emissions is not entirely novel. See IND. ADMIN. CODE tit. 326, r. 2-3-1 to -3 (Supp. 1991). Certain Title IV features, such as the requirement that EPA establish an allowance auction system, are new, however, and are worth watching to see how well they help companies achieve compliance while managing their resources.

25. The biggest SO₂ polluters must comply with Phase I of the new Title IV emission limits by 1995. 42 U.S.C.A. § 7651c(a) (West Supp. 1991). In Phase II, which begins in the year 2000, the emissions limits will get even tighter on big polluters and limits will also be imposed on smaller, cleaner plants. The goal is to reduce national SO₂ emissions to 8.9 million tons per year, *id.* § 7651b(a), although "bonus allowances" permitting extra emissions may be granted to companies in states with low SO₂ levels to

C. Air Toxics

Of all the Clean Air Act titles, Title III may have the most profound financial and environmental impact. In Title III, Congress listed 189 ubiquitous industrial chemicals that it considered especially dangerous and declared that companies emitting these air toxics must adopt tough new pollution control technologies.²⁶ The 189 chemicals are produced or used by small businesses as well as big ones. Tens of thousands of companies not traditionally heavily regulated, such as dry cleaners, body shops, paint shops, printers, and even bakeries, eventually will be required to change their processes or substitute new materials, or they will be required to install expensive new emissions controls.

The emissions limits will be achieved in two phases. First, "major" air pollution sources²⁷ will be required to install state of the art air pollution control equipment (or switch to less polluting processes or materials) known as the Maximum Achievable Control Technology (MACT).²⁸ MACT is the type of control needed to attain the emissions reductions deemed achievable by EPA considering, among other things, the cost of achieving the reduction, energy costs, and any non-air quality and environmental impacts that the new technology may have.²⁹ Second, EPA will be required to examine the residual risks remaining after the new control technologies are in place. Significant health risks could

accommodate growth or to companies that have experienced increased use in the last five years. *Id.* § 7651b(a)(1).

26. *Id.* § 7412(b)(1), (c)(2).

27. A "major" source can actually be a small company and is defined as any stationary source (or group of sources) within a contiguous area and subject to common control with the potential to emit (considering pollution controls) 10 tons per year of a single listed pollutant or 25 tons per year of any combination of listed pollutants. *Id.* § 7412(a)(1). Prior to Title III, the Clean Air Act focused on truly major air pollution sources capable of emitting more than 100 tons per year. The new definition of "major" sources illustrates the switch in the federal government's focus from big business to small business.

28. *Id.* § 7412(d)(2).

29. *Id.* For new major sources, MACT shall be deemed to be no less stringent than the emission control that actually has been achieved by the best controlled similar air pollution source in the same category of business. *Id.* § 7412(d)(3). For existing major sources, MACT shall be deemed to be no less stringent than: (a) the average emissions limit achieved by the best performing 12% of the existing sources in the same category of business (for categories having 30 or more air pollution sources) or (b) the average emissions limit achieved by the best performing five sources (for categories with fewer than 30 sources). *Id.*

Minor or "area" sources, i.e., sources that emit less than the 10/25 tons per year threshold, will also have to cut back on emissions to attain "Generally Achievable Control Technologies," or GACT, although EPA retains the discretion to impose stricter MACT standards. *Id.* § 7412(d)(5).

remain even after full implementation of the MACT standards and may warrant tighter controls. If so, EPA must develop stringent health-based limits on the 189 air pollutants to protect public health with an ample margin of safety.³⁰

Once MACT standards are promulgated, existing sources emitting air toxics will have three years to achieve the emission limitations. The first forty categories of sources to come under regulation, whose MACT standards are scheduled to be announced in November 1992, must comply by November 1995.³¹ New sources, ones on which construction or reconstruction³² commenced after the adoption of a MACT standard applicable to the source, must comply before beginning operations.³³ However, new sources beginning construction or reconstruction after a MACT standard is proposed, but before the standard is finally promulgated, get a break. Congress sought to avoid unfair surprises caused by the unexpected promulgation of a final standard that is stricter than the proposed standard. Businesses caught in this position will have the full three years after the date of promulgation to comply, but only if the source complies with the proposed standard during the three-year period.³⁴

The general rule, that a new air toxics source must comply with MACT immediately and that an existing source must comply within three years from the date the applicable standard is promulgated, is subject to a number of exceptions. Companies planning their air toxics compliance strategy should be aware of the opportunities the exceptions create.

30. *Id.* § 7412(f)(2)(A).

31. *Id.* § 7412(i)(3)(A).

32. Title III does not define "reconstruction." Presumably, EPA's historic definition will apply. That definition requires that a reconstructed source comply with new source rules if the cost of reconstruction exceeds one half of the fixed capital cost of constructing an entirely new source. See 40 C.F.R. §§ 51.301, 60.15, 60.383 (1991).

33. 42 U.S.C.A. § 7412(i)(1) (West Supp. 1991).

34. The new source exception does not take into account the fact that the design and financing for a project usually is completed long before construction commences. Thus, if a project is conceived, planned, and designed before any new emission standard is proposed, and construction on the project begins after an emission standard is proposed, and the final rule is as strict as the proposed one, the new source must comply right away even if compliance requires a complete revision of the construction design. Also, the three-year extension has been criticized on the ground that it does not account for long-term construction projects that may begin long before a proposed emission standard and which cannot be completed until after the final standard is promulgated. Those sources will be treated as an existing source and must comply within three years of final promulgation of the emission standard, even though compliance may require interrupting construction to redesign the project so it can meet the compliance deadline.

First: Under EPA's proposed "early reductions program," an existing source which demonstrates that it has achieved a ninety percent or more reduction³⁵ in emissions of hazardous air pollutants (ninety-five percent for particulates) will be issued a permit by EPA that allows the source to meet an alternative emissions limit provided that the emission reduction was achieved prior to proposal of the MACT standard.³⁶ EPA is strongly promoting this program. In the preamble to the proposed rules explaining how the program would work, EPA emphasized that companies "can realize benefits from participating in the early reduction program by obtaining more time to develop strategies for compliance with MACT standards" and by being able to choose the means by which they reduce their air toxics emissions.³⁷

EPA proposed a flexible definition of the term "source" for purposes of the early reduction option. A "source" may be less than the entire company and may consist only of certain smokestacks, vents, storage tanks, or other emission points, provided that the emission points have some functional or geographical relationship to one another.³⁸ A company that can make a ninety percent reduction in emissions from some logical grouping of emission points could be eligible for a six year compliance extension as to that "source," even though the company has not cut total facility emissions by ninety percent.³⁹

A company cannot, however, reduce its air toxics by ninety percent or more while still emitting comparatively undiminished quantities of so-called "high risk" pollutants, such as benzene, asbestos, dioxins, and furans. EPA proposed a list of thirty-five such high risk air toxics.⁴⁰ Companies that achieve a ninety percent or more reduction in overall air toxics will have to show that the ninety percent reduction also applies to any high risk chemicals the company may be emitting.⁴¹ The high

35. The voluntary reduction must be based on verifiable and actual emissions in a base year. 42 U.S.C.A. § 7412(i)(5)(C) (West Supp. 1991). In most cases, the base year will be 1987 unless emissions that year were artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. *Id.* In other words, the base year emissions should represent, as accurately as possible, actual emissions during a normal year of operation.

36. *Id.* § 7412(i)(5)(A). For the first 40 categories of sources, for which MACT is scheduled to be promulgated by November 1992, the deadline for achieving the 90% voluntary reduction may already have lapsed by the time this Article is published. *Id.* § 7412(i)(5)(B).

37. National Emission Standards for Hazardous Air Pollutants for Source Categories, 56 Fed. Reg. 27,338, 27,339 (1991) (to be codified at 40 C.F.R. § 63).

38. 56 Fed. Reg. 27,338, 27,366 (1991) (to be codified at 40 C.F.R. § 63.73(a)(1)-(5)).

39. *Id.* at 27,365 (to be codified at 40 C.F.R. § 63.72(a)).

40. *Id.* at 27,367 (to be codified at 40 C.F.R. § 63.74(e)(4)).

41. *Id.* at 27,366-67 (to be codified at 40 C.F.R. § 63.74(g)).

risk chemicals are weighted according to their carcinogenicity or toxicity. That way, if a company cannot afford to cut all its high risk air toxics by ninety percent, which may be the case when only trace quantities of a high risk chemical are being emitted, the company may be able to offset the shortfall by achieving extra reductions in another air toxic.⁴² The goal is to ensure that companies reduce all their air toxic emissions while allowing offsets of higher risk against lower risk pollutants based on the relative toxicity of the pollutants involved.

Second: An existing source that achieves the voluntary reduction described above *after* proposal of the applicable MACT standard, but *before* January 1, 1994, may be issued the six year alternative emission limit provided the source makes an enforceable commitment to achieve the reduction before proposal of the standard. An "enforceable commitment" means a statement to EPA explaining the company's intent and setting forth how the company will achieve the reductions before January 1, 1994.⁴³ The description of the planned reduction measures does not have to be followed exactly, but the plan must be "in sufficient detail to demonstrate that the source owner or operator has given serious consideration to real emission reduction measures."⁴⁴

Third: As discussed above, a new source that begins construction or reconstruction after an applicable MACT standard is proposed, but before the standard is promulgated, is not required to comply with the promulgated standard until three years after the date of promulgation, provided that the proposed standard is met during the three year extension.⁴⁵ The promulgated standard must be more stringent than the proposed standard.⁴⁶

42. The weighting factors specify the equivalent offsets for trading among the listed carcinogens. Consider, for example, the example given in the preamble to EPA's proposed early reduction program rule of a source emitting one ton of hydrazine, with a weighting factor of 100, that wishes to participate in the program but cannot achieve a full 90% reduction in hydrazine emissions. Under the proposed system, the source has the option of offsetting this shortfall by achieving greater than necessary reductions of another air toxic. If the actual hydrazine reduction was 0.8 tons (80%) and the source also emitted 40 tons of benzene, the hydrazine shortfall of 0.1 ton (the difference between the actual reduction and 90%) could be offset by reductions in benzene of 0.1 ton X 100/10 (the ratio of the weighting factors for hydrazine and benzene), or 1.0 ton. In other words, it would take an additional one-ton reduction in benzene emissions to offset the inability to reduce the hydrazine emissions by an extra 0.1 ton, and it would take 10 tons of additional reductions of an air toxic with a weighting factor of 1 to offset the 0.1 ton shortfall in hydrazine reductions. See 56 Fed. Reg. 27,338, 27,335 (1991).

43. 56 Fed. Reg. 27,338, 27,368 (1991) (to be codified at 40 C.F.R. § 63.75(a)(b)(iv)).

44. 56 Fed. Reg. 27,339, 27,356-27,357 (1991).

45. See *supra* note 34 and accompanying text.

46. 42 U.S.C.A. § 7412(i)(2)(A) (West Supp. 1991).

Fourth: If an existing source has installed pollution control equipment complying with the Clean Air Act's Best Available Control Technology (BACT) requirements⁴⁷ or the technology required to meet the Lowest Achievable Emission Rate (LAER),⁴⁸ then the source's compliance date is extended for five years from the date on which BACT or LAER was installed or the reductions achieved.⁴⁹ This exemption acknowledges that BACT and LAER result in substantial emission reductions and that immediately requiring any additional reductions would be unfair.

Fifth: The President may exempt any stationary source from any standard or limit if he concludes that the necessary technology is not available and it is in the interest of national security to grant the exemption.⁵⁰ This exemption may be for one or more periods of no more than two years each. Each such exemption must be reported to Congress.

Sixth: EPA or a state may issue a permit that grants a one year extension if the extension is necessary for the installation of controls.⁵¹

Seventh: If EPA fails to promulgate a MACT standard for more than eighteen months after the deadline for the standard, then Title III's "hammer provisions" will be triggered.⁵² Each source in the designated category must stop emitting air toxics unless it or the state or local air pollution authorities establish a site-specific standard in a permit application.⁵³ This statutory "hammer" is designed to minimize the possibility that EPA will fail to meet the established deadlines. The permit issued must contain emission limits that are determined to be equivalent to the technology-based standards that EPA would have applied had it met its deadline or a standard reflecting a ninety percent reduction in emissions (ninety-five percent for particulates).⁵⁴

Title III addresses a number of other pollution issues. For example, Title III requires EPA to promulgate a list of 100 substances that are

47. BACT is part of the Clean Air Act's Prevention of Significant Deterioration program. *Id.* § 7479(3).

48. 42 U.S.C. § 7501(3) (1988). LAER also applies to new pollution sources in regions that have not achieved national ambient air quality standards. 42 U.S.C.A. § 7412(d)(3)(A) (West Supp. 1991).

49. *Id.* § 7412(i)(6).

50. *Id.* § 7412(i)(4).

51. *Id.* § 7412(i)(3)(B).

52. *Id.* § 7412(j)(2).

53. *Id.*

54. The failure by EPA to promulgate a standard on time is not treated in Title III as a compliance deadline exemption, but the effect is the same. The compliance deadline extends from three years after the deadline for promulgation of a standard to up to three years after the date of permit issuance, which gives a source an extra 18 months to comply. *Id.* § 7412(j)(5).

expected or reasonably may be anticipated to cause death, injury, or serious adverse effects to humans or the environment.⁵⁵ At the same time, EPA must establish a "threshold quantity" for each listed substance.⁵⁶ Companies with more than a threshold quantity eventually will have to prepare and implement a risk management plan to prevent accidental releases.⁵⁷ The list of 100 substances is scheduled to be promulgated by November, 1992, and the rules explaining what a risk management plan must contain are scheduled to be promulgated by November, 1993.⁵⁸ Companies will have three years from that date to write their plans and register them with EPA and the Indiana Department of Environmental Management (IDEM) by November 1996.⁵⁹

D. Air Permits

Among the most controversial parts of the Clean Air Act Amendments are the Title V requirements for states to develop new programs for issuing operating permits to major stationary air pollution sources, including sources emitting air toxics under Title III.⁶⁰ The goal is to streamline and simplify air pollution control and to give EPA a greater role in monitoring and enforcing compliance efforts.⁶¹ EPA praises Title V for vastly clarifying what will be expected of each air permittee, which should translate into better compliance. Critics, however, warn that the program is too ambitious and will swamp EPA and state regulators in paperwork.⁶² Industry groups have complained that the new system will be doubly bureaucratic because permit applications and revisions now must be reviewed at the state and federal levels.⁶³ Environmental groups

55. *Id.* § 7412(r)(3).

56. *Id.* § 7412(r)(5).

57. *Id.* § 7412(r)(7)(B)(ii).

58. *Id.*

59. *Id.* § 7412(r)(7)(B)(iii).

60. *Id.* §§ 7661-7661f

61. Instead of having to look among numerous provisions of state and federal regulations for applicable emission limits and monitoring, recordkeeping, and reporting requirements, each company's obligations will be embraced in a single permit. In Indiana, this means sources generally will have longer, more detailed air permits than under the former Clean Air Act.

62. See Francis S. Blake & Shannon S. Wagner, *CAA Permit Plan Requires Flexibility*, ENVTL. PROTECTION, March 1991, at 20, 24.

63. States will continue to have responsibility for developing State Implementation Plans (SIPs) which will define the overall strategy in each state for achieving national ambient air quality standards. 42 U.S.C. § 7407(a) (1988). Under Title V, all applicable requirements of a SIP will be embodied in the operating permit of each source, which will be enforceable by the state and by EPA. 42 U.S.C.A. § 7661c(a) (West Supp. 1991). This means that whenever the SIP changes, a change may be required in a source's permit and vice versa. Blake & Wagner, *supra* note 62, at 20.

complain that the requirement for states to act on complete permit applications within eighteen months may be too short to provide meaningful review and public input.⁶⁴

As of this writing, conflicts in and out of government over Title V, and in particular over the amount of public comment that should be allowed on permit applications, have deadlocked EPA's ability to draft implementing rules. So far, EPA has issued only a proposed air permit rule even though the final rule was to have been promulgated by November 1991.⁶⁵ The delay has worried state officials who are required by statute to submit their proposed permit programs to EPA for review by November 1993.⁶⁶ Once a state's program is approved, air pollution sources have one year to file their permit applications.⁶⁷ Because virtually everyone subject to an air pollution emissions limit will be required to apply for a permit, including small business "area" sources that emit air toxics controlled under Title III, EPA has proposed deferring coverage of all "non-major" sources for five years from the date a state's permit program receives EPA approval.⁶⁸

For industry, one of Title V's interesting features is the new air pollution "permit shield."⁶⁹ This provision establishes that a permit shall be the comprehensive statement of the permittee's obligations under the Clean Air Act.⁷⁰ The permittee need look no further than the permit itself to know what is expected. Permit compliance will protect the permittee from enforcement of Clean Air Act requirements, provided that the permit addresses those requirements.

EPA seems to favor the permit shield and wants to use the device to help stabilize the permit process and give greater certainty to the regulated community. EPA's proposed rule, however, could limit the effectiveness of the shield. For example, the proposed rule provides for reopening a permit for cause, such as when a "material mistake" has been made in establishing emissions limits or other requirements of the

64. See *Air Pollution: Focus Turns to Clean Air Regulations*, Env't Rep. (BNA) at 5-5 (Jan. 16, 1992).

65. 56 Fed. Reg. 21,712 (1991) (to be codified at 40 C.F.R. § 70).

66. 42 U.S.C.A. § 7661a(d)(1) (West Supp. 1991).

67. *Id.* § 7661a(c).

68. 56 Fed. Reg. 21,712, 21,770 (1991) (to be codified at 40 C.F.R. § 70.3(b)(1)). Non-major sources in nonattainment areas, however, must seek a permit within one year after a state's program is approved, unless the state makes a showing that deferral of the permit will not hinder the state's ability to meet its obligations under the Clean Air Act. *Id.* (to be codified at 40 C.F.R. § 70.3(b)(2)).

69. The permit shield provision, 42 U.S.C.A. § 7661c(f) (West Supp. 1991), is modeled on similar "shield" authorities under the Resource Conservation & Recovery Act, 40 C.F.R. § 270.4(a) (1991), and the Clean Water Act, 33 U.S.C. § 1342(k) (1988).

70. 42 U.S.C.A. § 7671c(f) (West Supp. 1991).

permit,⁷¹ when EPA determines that the permit must be revised to assure compliance with the Clean Air Act,⁷² or when a "substantial error" has been made in permit processing or data submittal whose correction cannot wait until renewal.⁷³ Moreover, EPA suggested in the preamble to the new rule that the permit shield must be expressly invoked in a Title V permit and does not automatically apply.⁷⁴ EPA also stated that "if any applicable requirements were omitted from the permit during the permit issuance process (i.e., not addressed as opposed to misinterpreted), the source will not be shielded from enforcement of those requirements."⁷⁵

II. SOLID AND HAZARDOUS WASTE

A major legislative initiative focuses on decreasing or eliminating the flow of out-of-state solid waste into Indiana landfills. Indiana enacted new measures imposing fees on out-of-state waste,⁷⁶ requiring waste facility operators to show "good character" before getting a permit,⁷⁷ restricting vehicles used to transport waste from backhauling most types of non-waste cargo,⁷⁸ and requiring brokers, transfer station managers, and transporters of out-of-state waste to post a surety bond and consent to appointment of the Indiana Secretary of State as agent for purposes of service of process.⁷⁹ The Indiana General Assembly also enacted a variety of measures to supplement the far-reaching solid waste planning scheme created in 1990, including restricting membership on Indiana's new solid waste management advisory committees to persons unconnected to the solid waste management industry.⁸⁰

Not all the recent laws have survived judicial scrutiny. One court dealing with out-of-state waste held that Indiana's initial effort to impose differential fees on imported waste violated the Commerce Clause of the United States Constitution.⁸¹ Meanwhile, the Indiana "good character" statute, which requires solid or hazardous waste permit applicants and related persons or affiliates to submit an elaborate array of information to the Indiana Department of Environmental Management (IDEM),

71. 56 Fed. Reg. 21,712, 21,778 (1991) (to be codified at 40 C.F.R. § 70.7(g)(iii)).

72. *Id.* (to be codified at 40 C.F.R. § 70.7(g)(iv)).

73. *Id.* at 21,744.

74. *Id.*

75. *Id.*

76. IND. CODE § 13-9.5-5-1 (Supp. 1991).

77. *Id.* §§ 13-7-10.2-1 to -8.

78. *Id.* § 13-7-31-13.1.

79. *Id.* § 13-7-10.5-15.

80. *Id.* §§ 6-2.1-3-33, 13-9.5-2-10, 13-9.5-3-4.

81. *Government Suppliers Consol. Servs., Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990).

is under attack in a lawsuit filed in the Marion County Superior Court.⁸²

A. Crackdown On Out-of-State Waste

Indiana's campaign against out-of-state waste is nearly three years old. In October 1989, Governor Evan Bayh and IDEM made the limitation or elimination of out-of-state waste a top priority.⁸³ In 1990, the General Assembly responded to the Governor's call for new legislation and enacted House Enrolled Act 1240 which places special requirements on waste originating from outside Indiana.⁸⁴ The law required transporters of solid waste from out-of-state to certify where the waste came from,⁸⁵ to provide certificates from health officials in the state of origin stating whether the waste shipment contained any hazardous waste,⁸⁶ and to impose extra charges on the shipments.⁸⁷

The new law promptly came under attack as an infringement of the Commerce Clause of the United States Constitution.⁸⁸ In *Government Suppliers Consolidating Services, Inc. v. Bayh*,⁸⁹ Judge John D. Tinder of the United States District Court for the Southern District of Indiana struck down the challenged provisions and permanently enjoined the state from enforcing the requirements.⁹⁰ The court noted speeches by Governor Bayh requesting legislation to stop "the tidal wave of out-of-state trash" allegedly threatening the state, as well as published statements by IDEM's commissioner concerning the "recently accelerated influx of out-of-state waste into Indiana" and warning that "[w]e cannot allow Indiana to become the dumping ground for the nation's garbage."⁹¹ Those statements, among other factors, convinced the court that Indiana

82. *Chemical Waste Management of Ind., Inc. v. IDEM*, No. 49D0129201-CP-0009 (filed Jan. 6, 1992). The lawsuit challenges the retroactive application of the disclosure requirements to pending permit applications under IND. CODE § 13-7-10.2-3(b) (Supp. 1991). At the time of this writing, plaintiff's motion for summary judgment was pending before the court.

83. The limited capacity of Indiana's existing landfills, the rapid changes in the solid waste handling and disposal industry, and the defects in Indiana's existing laws and regulations governing the transportation, processing, and disposal of solid waste require a comprehensive review of Indiana's laws regulating solid waste and Indiana's plans for managing its solid waste for years to come. Exec. Order No. 89-17 (Nov. 9, 1989) (on file with the author).

84. Pub. L. No. 10-1990 (1990).

85. IND. CODE § 13-7-22-2.7(c)(9) (Supp. 1991).

86. *Id.* § 13-7-22-2.7(c)(2).

87. *Id.* § 13-9.5-5-1.

88. The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

89. 753 F. Supp. 739 (S.D. Ind. 1991).

90. *Id.* at 766-80.

91. *Id.* at 746-47.

officials responsible for setting the state's solid waste policy shared "an objective of limiting, or perhaps eliminating, the deposition of out-of-state trash in Indiana."⁹²

The court noted, however, that mere bias against interstate shipments of trash, which since 1978 have been held by the United States Supreme Court to be an article in commerce subject to Commerce Clause protection,⁹³ does not necessarily violate the Constitution because improper motives cannot invalidate an otherwise valid law.⁹⁴ The court also accepted the state's position that the extra fee on out-of-state trash shipments and the health certificate requirement advanced legitimate local interests, such as promoting the health and safety of the people, prolonging the life of Indiana's landfills, and reducing the amount of infectious or hazardous waste illegally dumped into sanitary landfills.⁹⁵ Yet, the court was troubled by the state's decision to consistently burden waste from out-of-state, rather than pursue its asserted goals through nondiscriminatory means.⁹⁶ For example, the state could have imposed fees on in-state and out-of-state trash and just as effectively stemmed the flow of waste into scarce landfill space. The state could have required health officer certificates for in-state and out-of-state trash and just as effectively established that waste loads were free from hazardous wastes.⁹⁷ Judge Tinder added that "[h]owever noble and popular" the challenged statutes seemed to be, they had to give way to constitutional limits on legislation opposing interstate commerce.⁹⁸ The court concluded by stating:

The same protection that the commerce clause gives to the citizens of other states who feel the need to import waste into Indiana protects Indiana citizens when they export hazardous waste to other states. Those provisions will protect future generations of Hoosiers should they find the need to export even solid municipal waste to another state.⁹⁹

In the wake of Judge Tinder's decision, the Indiana General Assembly sought to cure the constitutional defects in a new set of laws opposing

92. *Id.* at 767.

93. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

94. *Government Suppliers Consol. Servs., Inc. v. Bayh*, 753 F. Supp. 739, 767-68 (S.D. Ind. 1991).

95. *Id.* at 767.

96. *Id.* at 774.

97. The court held that the requirement of Indiana Code § 13-7-22-2.7(c)(1), that trash haulers identify the county or state where trash loads originated, advanced no plausible legitimate interest at all, or did so only slightly, and did not justify its excessive burden on interstate commerce. *Id.* at 776-77.

98. *Id.* at 780.

99. *Id.*

out-of-state waste. House Enrolled Act 1585 imposes a special fee on out-of-state wastes, but the fee will be no more than necessary to offset extra costs incurred in Indiana due to the importation of the waste.¹⁰⁰ The fee, approximately two dollars per ton of waste, will be distributed to local government units and to the state hazardous substances response trust fund.¹⁰¹ House Enrolled Act 1716 revised the unconstitutional hauler certification requirements by providing that the certification shall be based on weight, not volume, and need not be made under oath or affirmation subject to penalties for perjury.¹⁰² The hauler certificates must be retained for one year by the disposal facility operator, and the operator must inform IDEM quarterly of the origin of the incoming waste.¹⁰³ Although the new laws may resolve some of Judge Tinder's criticisms,¹⁰⁴ the plaintiffs in *Government Suppliers* are now challenging the new laws in another lawsuit in the district court and are raising fresh Commerce Clause objections.¹⁰⁵

Meanwhile, Indiana courts have confronted out-of-state trash in a different context. In *National Salvage & Service Corp. v. Commissioner of IDEM*,¹⁰⁶ the Indiana Court of Appeals upheld a permanent injunction against an Indianapolis business engaged in unloading shipments of baled solid waste from train cars to trucks.¹⁰⁷ The rail shipments of waste originated from out of state. IDEM sued to enjoin the business¹⁰⁸ on the ground that the defendant's off-loading operation was a "solid waste

100. IND. CODE § 13-9.5-5-1(b) (Supp. 1991).

101. *Id.* § 13-9.5-5-1(c).

102. *Id.* § 13-7-22-2.7(c).

103. *Id.*

104. For example, House Enrolled Act 1240 does not require differential fees charged on out-of-state waste to be directed toward eliminating hazardous wastes from sanitary landfills. The new law expressly provides that some or all of the out-of-state waste fees can go to the state's hazardous substances response trust fund. *Id.* § 13-9.5-5-1(c).

105. *Government Suppliers Consol. Servs., Inc. v. Bayh*, No. IP 91-899 (S.D. Ind. 1991). On February 5, 1992, Judge Larry J. McKinney of the United States District Court for the Southern District of Indiana held one provision of the challenged laws, Indiana Code § 13-7-10.5-15(1), which requires out-of-state waste operators to post a surety bond with the Indiana Secretary of State, to be in violation of the Commerce Clause. Judge McKinney upheld all other challenged provisions at issue in the lawsuit. On February 10, 1992, the Seventh Circuit granted plaintiffs' request for an injunction pending appeal against the enforcement of the challenged statutes. Oral arguments in the case were scheduled for April 27. *See Order* by the Seventh Circuit, No. 92-1318 (Feb. 10, 1992).

106. 571 N.E.2d 548 (Ind. Ct. App. 1991).

107. *Id.* at 559.

108. IDEM's complaint was brought pursuant to Indiana Code § 13-7-5-7, which empowers the IDEM commissioner to proceed in court to procure compliance with Indiana's environmental statutes and rules, and § 13-7-12-2, which empowers the commissioner to seek injunctions against any pollution source which presents an "imminent and substantial endangerment" to the health or livelihood of persons.

facility" that required a permit under IDEM's solid waste rules.¹⁰⁹

The court of appeals agreed that a permit was needed, but not for the reasons IDEM gave. Instead of finding the business to be a "solid waste facility,"¹¹⁰ the court held that it was a "transfer station"¹¹¹ and qualified as a "solid waste processing facility"¹¹² for which IDEM's rules required a permit, even though IDEM repeatedly had taken the position that the "transfer station" definition did not apply. In construing "transfer station," the court did not discuss IDEM's construction of the term, but instead relied upon a new Indiana statute, enacted after the onset of the litigation, which for the first time statutorily defined "transfer station" to mean "a facility where solid waste is transferred from a vehicle or container to another vehicle or container for transportation."¹¹³ The court of appeals stated that the new statute was a clarification of existing law, not a substantive change.¹¹⁴ The court held that it could use the legislature's "clarification" to ascertain the "legislative intent" of the IDEM rule defining "transfer station."¹¹⁵ Thus, the court adopted the statutory definition as the proper construction of the term.

The court of appeals held that the ambiguities it detected in IDEM's rules do not render the rules unconstitutionally vague.¹¹⁶ The court

109. See IND. ADMIN. CODE tit. 329, r. 2-2-1(b)(53) (Supp. 1991) (defining solid waste facility); *id.* r. 2-2-1(b)(41) (defining processing). IDEM read these two rules in combination and concluded that National Salvage was a solid waste processing facility for which a permit is required. *National Salvage & Servs. Corp. v. Commissioner of IDEM*, 571 N.E.2d 548, 554 (Ind. Ct. App. 1991).

110. The term "solid waste facility" is defined in IDEM's rules as a "solid waste facility in or upon the land into which solid waste is disposed." IND. ADMIN. CODE tit. 329 r. 2-2-1(b)(54) (Supp. 1991). There are three types of solid waste land disposal facilities: (1) construction/demolition sites; (2) restricted waste sites; and (3) sanitary landfills. *Id.* The court of appeals held that none of National Salvage's activities fell within these defined categories of disposal facilities. *National Salvage*, 571 N.E.2d at 554.

111. A "transfer station" is a facility "at which solid waste is transferred into larger capacity vehicles." IND. ADMIN. CODE tit. 329 r. 2-2-1(b)(58) (Supp. 1991). The unloading of baled waste from rail cars onto trucks involves moving waste into smaller capacity vehicles, and IDEM acknowledged that National Salvage could not be a transfer station for that reason. *National Salvage*, 571 N.E.2d at 554-55.

112. See IND. ADMIN. CODE tit. 329 r. 2-2-1(b)(55) (Supp. 1991) (defining "solid waste processing facility" as a solid waste facility upon which is located at a: (1) solid waste incinerator; (2) transfer station; (3) solid waste baler; (4) solid waste shredder; (5) resource recovery system; (6) composting facility; or (7) garbage grinding facility).

113. IND. CODE § 13-7-1-24.5 (Supp. 1991).

114. The statutory definition of "transfer station" was included in Public Law 19-1990, which expressly stated at § 41 that the definition clarified existing law. Act of Mar. 20, 1990, Pub. L. No. 19-1990, § 41.

115. *National Salvage & Serv. Corp. v. Commissioner of IDEM*, 571 N.E.2d 548, 555 (Ind. Ct. App. 1991).

116. *Id.* at 556.

characterized IDEM's permit requirements as an "economic regulation," for which crystal clarity is not essential, despite the substantial civil penalties sought by IDEM against National Salvage and the fact that criminal penalties also are provided by statute.¹¹⁷ National Salvage petitioned for transfer of the case to the Indiana Supreme Court. The supreme court heard scheduled oral arguments in the case in March and voted 3-2 to deny transfer. A petition for certiorari to the United States Supreme Court was under consideration as of this writing.

Indiana's campaign against out-of-state waste is filling Title 13 of the Indiana Code with new provisions and is imposing burdens on small waste companies. Every vehicle hauling municipal waste now must be registered with IDEM.¹¹⁸ Waste haulers cannot use a new trash truck until it is registered with IDEM.¹¹⁹ Each solid waste transporter, broker, and transfer station must submit "good character" disclosures and receive an acknowledgement number to be able to operate.¹²⁰ Waste tire handlers must now ensure that they obtain proper prior approvals before they transport, cut up, or store waste tires.¹²¹ Haulers of solid waste must ensure that they are carrying and must be able to present the correct waste manifests to dispose of their loads.¹²²

Further, waste operators must submit an array of reports to regulators. Monthly special waste reports are required.¹²³ Haulers must provide reports of waste taken out of state¹²⁴ and certificates as to the origin of waste.¹²⁵ In addition, quarterly reports are required by IDEM's scales rule.¹²⁶ The Indiana Department of Revenue and each solid waste management district imposing a tax on solid waste require monthly reports.¹²⁷ Waste tire transporters must submit copies of all manifests to IDEM within thirty days of receipt.¹²⁸ These new and sometimes conflicting and overlapping reporting requirements, manifesting requirements, permits, and registrations have caused big effects on small com-

117. *Id.* at 555.

118. IND. CODE § 13-7-31-8 (Supp. 1991).

119. *Id.* §§ 13-7-31-8.2, -13.3.

120. *Id.* § 13-7-10.5-11.

121. *Id.* § 13-7-23-6.

122. There are separate requirements for special waste manifests, IND. ADMIN. CODE tit. 329, r. 2-21-1 to -16 (Supp. 1991); infectious waste transportation records, *id.* tit. 410, r. 1-3-1 to -29; hauler certifications of origin, IND. CODE § 13-9.5-11-1 (Supp. 1991); municipal waste manifests, *id.* § 13-7-31-12; and waste tire manifests, *id.* § 13-7-23.2-13.

123. IND. ADMIN. CODE tit. 329, r. 2-21-15(c) (Supp. 1991).

124. IND. CODE § 13-9.5-11-2(b) (Supp. 1991).

125. *Id.* § 13-9.5-11-1(a).

126. IND. ADMIN. CODE tit. 329, r. 2-19-6 (Supp. 1991).

127. IND. CODE §§ 13-9.5-5-4(c), 13-9.5-7-3(c) (Supp. 1991).

128. *Id.* § 13-7-23.2-13(f).

panies that must now have at least one additional employee simply to track and follow the paperwork required to operate a waste business.

B. A Resolution to the Out-of-State Waste Issue?

Lawsuits challenging state statutes and rules that discriminate against out-of-state waste have raged in a number of states. The United States Supreme Court may soon delineate the permissible limits of state interference with interstate waste shipments.

Last summer, the Supreme Court of Alabama upheld a 1990 state law placing a base fee of \$25.60 per ton of hazardous waste on all commercial facilities and an extra fee of \$72 per ton on out-of-state hazardous waste and limiting the volume of hazardous waste that may be accepted in any one-year period at any commercial facility.¹²⁹ The only commercial hazardous waste facility in the state is Chemical Waste Management's facility in the city of Emelle. The \$72-per-ton fee was discriminatory on its face,¹³⁰ but the Alabama court held that the Emelle facility played such an important role in the national waste disposal effort that Alabama had a legitimate basis for concern and could permissibly curtail wastes flowing into the state. Meanwhile, the Eleventh Circuit Court of Appeals held that such concerns do not authorize Alabama to enact legislation that discriminates on the basis of the waste's state of origin.¹³¹ The United States Supreme Court has granted certiorari in Chemical Waste Management's appeal from the decision of the Alabama Supreme Court.¹³²

In Indiana, Governor Bayh and New Jersey Governor James Florio agreed last summer to reduce the flow of New Jersey solid waste into Indiana landfills, and a similar agreement was reached with New York Governor Mario Cuomo.¹³³ The out-of-state waste debate may be resolved through negotiations like these before a final solution is reached through litigation.

C. Hazardous Wastes

In the field of hazardous waste, the District Court for the District of Columbia invalidated two 1980 EPA rules that classified hazardous

129. *Guy Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991), *cert. granted*, 112 S. Ct. 964 (1992).

130. Chemical Waste Management also alleged that the base fee of \$25.60 per ton for all waste, regardless of the state of origin, excessively burdened interstate waste shipments even though the fee appeared neutral on its face.

131. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 723 (1990), *modified*, 924 F.2d 1001 (11th Cir. 1991).

132. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 964 (1992).

133. See Julie Sturgeon, *The Out-Of-State Trash Controversy*, INDIANAPOLIS C.E.O., January 1992, at 59-60.

waste as any material that is mixed with or derived from hazardous waste.¹³⁴ The rules prevented industry from evading hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) by simply mixing their wastes with other materials, but they also led to perverse results. Industry has been forced to handle and dispose of huge quantities of material that are classified as "hazardous" simply because small concentrations of the material were listed as a hazardous waste in EPA's regulations or because the material (such as certain types of incinerator ash) originated through the handling of a listed waste, even though taken as a whole the material is innocuous.

The court of appeals invalidated the "mixture" and "derived from" rules because of defects in EPA's rulemaking procedures.¹³⁵ EPA must publish proposed rules in advance of adoption so the public can read and comment on the agency's actions.¹³⁶ According to the court, the final "mixture" and "derived from" rules diverged too greatly from the proposed versions, which meant that the public did not have adequate notice and opportunity to comment upon the final rules.¹³⁷ EPA has sought reconsideration of the appellate court ruling.¹³⁸

If the decision stands, the hazardous waste field will be considerably narrowed until EPA properly promulgates new rules. Old enforcement actions for certain hazardous waste disposal violations may even be vacated. EPA is seeking clarification from the court that the ruling will apply only prospectively and will not affect judgments already entered involving enforcement of the "mixture" and "derived from" rules.

The effect of the decision in Indiana is unclear. IDEM has promulgated its own "mixture" and "derived from" rules,¹³⁹ presumably in compliance with Indiana's public notice requirements. The basis for these rules was Indiana's understanding that the "mixture" and "derived from" requirements were mandated by RCRA, but this has been cast into doubt. This issue may be litigated the next time IDEM attempts to enforce its "mixture" and "derived from" rules.

134. *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). The mixture rule provides that if a waste that appears on any of EPA's lists of hazardous wastes is mixed with any solid waste, the resulting mixture is subject to regulation as a hazardous waste, subject to certain exceptions. 40 C.F.R. § 261.3(a)(2) (1991). The "derived from" rule treats as hazardous any waste that results from the treatment, storage, or disposal of a listed hazardous waste, again with certain exceptions. *Id.* § 261.3(c)(2).

135. *Shell Oil Co.*, 950 F.2d at 747.

136. See 5 U.S.C. § 553(b) (1988).

137. *Shell Oil Co.*, 950 F.2d at 751.

138. 'Mixture,' 'Derived From' Rules Recommended for Improper Notice, *Env't Rep. (BNA)* at A-6 (Jan. 22, 1992). EPA has also promulgated interim final rules in response to the court's decision, which are identical to its original mixture and derived from rules. See 57 Fed. Reg. 7628-01 (1992) (to be codified at 40 C.F.R. pt. 261).

139. IND. ADMIN. CODE tit. 329, r. 3-3-3(a) (Supp. 1991).

III. WATER

One of the most important developments in water pollution control law occurred not in the courtroom, but by way of EPA regulation. On November 16, 1990, EPA issued a final rule regulating the discharge of stormwater under section 402 of the Clean Water Act.¹⁴⁰ The stormwater rules were the subject of much litigation and revision over the seventeen-year period beginning in 1973.

The new rule applies to municipalities of greater than 100,000 in population and certain industries that discharge stormwater either directly into the waters of the United States or into a separate stormwater sewer provided by a municipality.¹⁴¹ These generators of potentially contaminated stormwater are required to submit applications for their continued discharge of stormwater through a National Pollutant Discharge Elimination System (NPDES) permit.¹⁴²

The rule specifically identifies what kind of industrial discharger must obtain a stormwater NPDES permit.¹⁴³ Most of the affected industries are listed in the rule according to their standard industrial code. The rule, however, also applies to construction activity, the mining industry, the transportation industry, landfills, hazardous waste landfills or other treatment or storage facilities, and recycling facilities and electric utilities.¹⁴⁴ Many of these industries need only obtain a stormwater permit if they expose raw materials or finished products to the elements.¹⁴⁵ Other industries, such as lumber and paper mills, petroleum refineries, chemical companies, and steel, iron, or aluminum mills, must obtain a permit even if their raw materials or finished products are not exposed to the elements.¹⁴⁶

The rule also establishes three different permitting schemes by which applicants may obtain stormwater permits.¹⁴⁷ First, applicants can apply for an individual permit if the applicant submits its own information to obtain a permit unique to its facility, much like the kind of NPDES permit industrial dischargers now seek for their process wastewater.¹⁴⁸ This application must be filed by October 1, 1992.¹⁴⁹

140. 40 C.F.R. § 122.26 (1991).

141. *Id.* § 122.26(a)(1).

142. *Id.*

143. *Id.*

144. *Id.* § 122.26(b)(14).

145. *Id.*

146. *Id.*

147. *Id.* § 122.26(c).

148. *Id.* § 122.26(c)(1).

149. *Id.* § 122.26(e)(2).

The rule also provides that industrial dischargers can participate in a group application when the group has common characteristics that will enable EPA to process a core of information common to all of the applicants at the same time.¹⁵⁰ The group application is intended to reduce EPA's administrative burden and to reduce costs by allowing industry to share in sampling, reporting, and permit preparation costs. As of this writing, the deadline for forming a group has passed.¹⁵¹ EPA, however, will still consider an applicant's petition to join an existing group in certain instances.

The third permitting option provided under the rule allows an industrial discharger to file a "notice of intent" to be covered by a general permit instead of seeking either an individual or group permit.¹⁵² EPA or approved states have or soon will promulgate permits by rule that provide certain parameters for like-kind industrial dischargers. Under a general permit, a discharger need not provide initial sampling information to establish discharge limitations unique to its facility.¹⁵³ Limits are already imposed by the general permit. Indiana obtained authorization to issue general permits during the summer of 1991. As of this writing, Indiana is still in the process of promulgating those permits.

Although the stormwater regulation affects only the larger municipalities and certain industries, EPA may extend the regulation to smaller cities and commercial areas in the next few years. Consequently, stormwater permitting will remain a "new topic" for some time to come.

IV. WETLANDS

The development of federal wetlands law has been guided largely by the regulatory activities of four agencies: EPA, the Army Corps of Engineers (Corps), the Soil Conservation Service, and the Fish and Wildlife Service.¹⁵⁴ The Corps derives its power from section 404 of the

150. *Id.* § 122.26(c)(2).

151. *Id.* § 122.26(e)(2)(i) (applications were required to be submitted by Sept. 30, 1991).

152. *Id.* § 122.28.

153. *Id.* § 122.26(c)(2)(i)(D).

154. In Indiana, two state administrative agencies oversee the permitting of wetland alterations: IDEM and the Indiana Department of Natural Resources. IDEM was granted its wetlands permitting authority under the Clean Water Act, 33 U.S.C. § 1341 (1988), which requires that a water quality waiver be granted by the state before the Corps may approve a permit. DNR's wetland protection powers are derived solely from state law and are confined to the review of permits proposing the alteration of the shorelines of lake areas. IND. CODE § 13-2-11.1 (Supp. 1991). DNR plans to locate and map wetland areas on the shorelines of Indiana lakes to provide developers with a ready source of planning information to consult before initiating shoreline development.

Clean Water Act which governs the dredging and filling of wetlands.¹⁵⁵ The Corps administers the section 404 permitting program and is responsible for reviewing permits proposing the filling of protected wetland areas.¹⁵⁶ EPA plays a limited, but potentially powerful, role because of its ability to veto the grant of any Corps permit.¹⁵⁷ The Fish and Wildlife Service is responsible for submitting comments on proposed permits, but has no power to affect the grant or denial of a section 404 permit.¹⁵⁸ Finally, the Soil and Conservation Service derives its wetlands regulatory powers from an entirely different source, the Food Security Act of 1985.¹⁵⁹ The Act provides for the removal of United States Department of Agriculture benefits from farmers who initiate cultivation in wetland areas.¹⁶⁰

The regulation of wetlands revolves around the criteria that the four agencies use to define wetlands. In 1989, the agencies jointly developed *The Federal Manual for Identifying and Delineating Jurisdictional Wetlands* to provide a common scheme for identifying the boundary and extent of wetland areas.¹⁶¹ The Manual relies on three criteria to characterize wetland boundaries: hydrology, vegetation, and soils.¹⁶² Revisions in the Manual proposed last summer could alter the methods used to evaluate each criteria and substantially reduce the number of acres of wetlands protected by federal law.¹⁶³ The revisions would require wetlands to be saturated with water at the surface for a longer period of time and generally require a higher standard of proof of hydrologic characteristics than the prior provisions.¹⁶⁴ Some estimates suggest that the revisions will remove protection from fifty million acres of areas currently defined as wetlands.¹⁶⁵ The comment period for the proposed revisions had just closed as of the writing of this Article, so it is hard to know what standards the final Manual will contain.¹⁶⁶

155. 33 U.S.C. § 1344 (1988).

156. *Id.* § 1344(a).

157. *Id.* § 1344(c).

158. *Id.* § 1344(m).

159. 16 U.S.C. § 3812 (1988).

160. *Id.* § 3811.

161. EPA, ARMY CORPS. OF ENG'S DEP'T OF AGRIC. SOIL CONSERVATION SERV. & DEP'T OF INTERIOR FISH AND WILDLIFE SERV., *THE FEDERAL MANUAL FOR IDENTIFYING & DELINEATING JURISDICTIONAL WETLANDS* (1989).

162. *Id.*

163. 56 Fed. Reg. 40,446 (August 14, 1991).

164. *Id.* at 40,460, 40,463.

165. *See Groups Predict Major Environmental, Economic Harm from 1991 Manual Changes*, Env't Rep. (BNA) at AA-1 (Jan. 17, 1992).

166. The final Manual will be published in Appendix A of 33 C.F.R. § 328 upon promulgation. 56 Fed. Reg. 65,970 (Dec. 19, 1991).

V. SUPERFUND

The nation's Superfund program,¹⁶⁷ pursuant to which EPA has responsibility to clean up the nation's most seriously polluted toxic waste sites, continues to sow environmental litigation. The most interesting development may be EPA's own internal examination of the program to determine whether it is working.

Since the creation of Superfund in 1980, the program has drawn criticism for taking too long and costing too much to identify and clean up targeted sites.¹⁶⁸ In 1991, top level management at EPA announced changes in the program that EPA says will speed up the cleanup process.¹⁶⁹ Specifically, EPA's Office of Solid Waste and Emergency Response has set a goal of tripling the number of completed cleanups by 1993, with a ten-fold increase by the end of the decade.¹⁷⁰ The agency intends to do this by using standardized cleanup technologies for certain sites to eliminate or reduce some of the tasks involved in the evaluation of cleanup alternatives.¹⁷¹ Also, EPA announced that it would more aggressively negotiate with states and other government agencies in disputes that sometimes slow down cleanup work and begin requiring private parties to design remedial work right away instead of waiting until completing protracted negotiations on paying for and carrying out the work.¹⁷²

167. "Superfund" is the short-hand reference to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. §§ 9600-9675 (West Supp. 1991).

168. It takes more than a year on average for EPA to evaluate a site and determine its eligibility for inclusion on the National Priorities List of Superfund sites. It takes more than three years on average to determine the extent of contamination and the options for cleanup. Negotiations with private parties on carrying out the cleanup take about a year, and another year and a half is required to design the specifications of the remedial work and submit the project to contractors for bidding. Carrying out the actual cleanup work takes years longer. Some 1,300 sites are at various stages of the Superfund process. Only 63 have made it all the way through the "completion" stage. See Memorandum from Don R. Clay, EPA Asst. Adm'r, Recommendations for Accelerating Cleanup and Managing Risks at Superfund Sites (July 19, 1991) (on file with author).

169. *Id.*

170. *Id.*

171. The current investigation/remedy selection process takes over three years to complete because each site is treated as a unique problem, requiring preparation of site-specific risk assessments, cleanup levels, and technical solutions. According to EPA, standardization of the process would reduce the time needed before cleanup can start and would also improve consistency in the way sites are treated across the nation. It will take three to six years, however, to develop the regulations, standards, and guidelines for standardizing the remedies.

172. EPA says disputes between EPA, the Department of Justice, the states, and other parties can be a significant source of delay in finalizing records of decision, settlements, and remedial designs, and in starting and completing remedial actions.

One of the more intriguing ideas is to permit private parties with liability at more than one Superfund site to engage in "liability trading" pursuant to which they would undertake the entire cleanup at one site in exchange for a reduction or complete release of liability at the other sites.¹⁷³ EPA also will create a new National Superfund Director to oversee all Superfund spending to prevent money from being wasted on inflated and unnecessary items like business cards, parking fees, and potted plants for EPA contractors.¹⁷⁴

A. Lender Liability

Perhaps the most controversial Superfund case during the survey period was the decision by the Eleventh Circuit Court of Appeals in *United States v. Fleet Factors Corp.*¹⁷⁵ The court held that a secured creditor may incur liability for its debtor's hazardous substance cleanup costs under the statute without having any actual ownership or operational control over the debtor.¹⁷⁶ All that is required is sufficient participation in the debtor's financial management "to a degree indicating capacity to influence" the debtor's hazardous waste activities.¹⁷⁷ Thus, the standard for liability is not whether the secured creditor actually was involved in the debtor's day-to-day operations. A secured creditor may be liable if it merely participated in the debtor's financial management and had sufficient involvement in the debtor's affairs for a court to infer an ability to affect the debtor's hazardous waste disposal decisions.¹⁷⁸

Fleet Factors was shortly followed by a similar holding by the Ninth Circuit Court of Appeals in *In re Bergsoe Metal Corp.*¹⁷⁹ The Ninth Circuit held, however, that "there must be some actual management of the facility" to hold a lender liable.¹⁸⁰

The two decisions caused an uproar in the nation's lending community. Although "owners" and "operators" are among the broad

173. For example, when a party is responsible for \$18 million worth of costs at Site A where a \$20 million remedy is required, and is also responsible for \$1 million worth of costs each at Sites B and C, the party would be allowed to conduct the entire cleanup at Site A in exchange for protection from contribution actions at the other sites. The proposal could be a real transaction cost savings for large waste generators with Superfund exposure at many sites, but it likely will be opposed by businesses that are small waste generators who have liability at only one or a few sites. The small generators stand to absorb a larger share of total Superfund costs.

174. See ADMINISTRATOR'S TASK FORCE, UNITED STATES ENV'T PROTECTION AGENCY, IMPLEMENTATION OF SUPERFUND ALTERNATIVE REMEDIAL CONTRACTING STRATEGY (1991).

175. 901 F.2d 1550 (11th Cir. 1990).

176. *Id.* at 1554-55.

177. *Id.* at 1557.

178. *Id.*

179. 910 F.2d 668 (9th Cir. 1990).

180. *Id.* at 672.

classes of responsible parties that are liable for the costs of cleaning up hazardous substances, the law exempts from the owners and operators group a person "who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest."¹⁸¹ Lenders complained that the *Fleet Factors* and *Bergsoe* decisions gutted this secured lender exemption.

The tempest has since cooled in light of EPA's clarification that it will not enforce the Superfund law against lenders who act to protect their interest in property by undertaking a financial workout with a borrower by periodically monitoring the borrower's business; conducting on-site inspections and audits; requiring certification of financial information or compliance with applicable duties, laws, or regulations; or by taking other steps to protect their interest in property serving as collateral for a loan.¹⁸² Such actions, including foreclosing and liquidating the secured property, generally will not be considered to be participation in the management of a facility provided that the actions taken are necessary to protect the security interest and provided that the lender within twelve months following a foreclosure sells or advertises the sale of the subject property and does not, following six months of foreclosure, reject any written bona fide offers of fair consideration for the property.¹⁸³

Indiana has a "mini-Superfund" statute¹⁸⁴ that partially tracks the federal law, but until the *Fleet Factors* decision, the law did not contain any express secured lender exemption.¹⁸⁵ It does now.¹⁸⁶ The Indiana General Assembly has made clear during the survey period that persons who have an interest in a facility to secure an extension of credit or who hold title to property due to a borrower's default, will not have liability under the mini-Superfund law unless the creditor exercised actual and direct managerial control over the use, generation, treatment, storage, or disposal of the hazardous substances in question.¹⁸⁷

B. Bankruptcy and Superfund

Environmental cleanup costs often are so oppressive that parties held liable for such costs seek refuge in the Bankruptcy Code. In such cases,

181. 42 U.S.C. § 9601(20)(A) (West Supp. 1991).

182. See National Oil & Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. § 300).

183. *Id.* at 28,809 (to be codified at 40 C.F.R. § 300.1100(b)(7)(ii)(B)).

184. IND. CODE §§ 13-7-8.7-1 to -13 (1988 & Supp. 1991).

185. Instead, the Indiana statute provides simply that persons liable under CERCLA shall be equally liable under the state law in the same manner and to the same extent. *Id.* § 13-7-8.7-8.

186. *Id.*

187. *Id.* § 13-7-8.7-8(e).

the bankruptcy objective of creating a "fresh start" for the debtor collides head-on with the environmental goal of cleaning up contaminated sites quickly and at private expense. By definition, the bankruptcy estate does not have enough money to pay everyone's legitimate claims, so the issue becomes who gets stuck with the loss. Some courts have held that environmental claims must be satisfied in full, even if that means harming innocent creditors, even secured ones.¹⁸⁸

In *In re Chateaugay Corp.*,¹⁸⁹ the Second Circuit Court of Appeals took a different approach and ruled that environmental interests do not inevitably preempt the nonenvironmental objectives of bankruptcy law.¹⁹⁰ The court held, among other things, that Superfund response costs for environmental contamination arising from pre-petition releases or threatened releases of hazardous substances were "claims" under the Bankruptcy Code that could be discharged like any other claim.¹⁹¹ The case concerned EPA's efforts to recover cleanup costs at fourteen sites where the debtor had been identified as a potentially responsible party. Only one of the fourteen sites had been remediated to the point where EPA could estimate its claim, which was around thirty-two million dollars. Cleanup costs at the other sites, which did not necessarily represent all the sites where the debtor had been involved, simply were unknown.

EPA argued that its right to collect response costs in future cleanups could not be discharged by the debtor's bankruptcy reorganization. Otherwise, EPA argued, it would be forced prematurely to liquidate all its claims for unincurred Superfund response costs, which would require litigation over EPA's choice of remedies and would inevitably require the bankruptcy court to pass on EPA's cleanup decisions. This would constitute impermissible judicial review of EPA's pre-enforcement activity, which is precluded under the Superfund law.¹⁹² The Second Circuit disagreed, however, and held that nothing in the Superfund statute prevented EPA from making "a speedy and rough estimation" of its claims that could be adjusted after the outcome of normal Superfund enforcement proceedings.¹⁹³ At that point, EPA could share pro rata in the debtor's assets.

188. See, e.g., *In re Environmental Waste Control, Inc.*, 125 B.R. 546 (N.D. Ind. 1991) (holding that the debtor was required to expend its full resources on corrective action at a hazardous waste landfill, notwithstanding that: (1) the debtor did not have nearly enough funds to complete the work and (2) expenditure of the funds on a futile corrective action program would leave creditors, including secured creditors, with nothing). Cf. *In re Helder*, 131 B.R. 578 (D.N.J. 1991) (holding that state law environmental claims do not take priority over payment of nonenvironmental secured claims).

189. 944 F.2d 997 (2d Cir. 1991).

190. *Id.* at 1005.

191. *Id.*

192. See 42 U.S.C.A. § 9613(h) (West Supp. 1991).

193. *In re Chateaugay Corp.*, 944 F.2d at 1006.

The case is significant because of its holding that EPA is like any other creditor in bankruptcy and must accept its pro rata share of whatever portion of the debtor's assets are made available for the satisfaction of creditor claims.¹⁹⁴ Consequently, EPA might never be made whole for its Superfund response costs. The court relied in part on a bankruptcy appellate panel's decision in *Jensen v. California Department of Health Services*,¹⁹⁵ which rejected the argument that environmental claims should be treated differently from other claims or should be accorded higher priority.¹⁹⁶

C. *Underground Storage Tanks*

A new Indiana statute clarifies that any person who has undertaken "corrective action" resulting from the release of petroleum from an underground storage tank, regardless of whether the corrective action is taken voluntarily or pursuant to an IDEM cleanup order, is entitled to contribution from the person who owned or operated the tank at the time the release occurred.¹⁹⁷ The person bringing a successful action is also entitled to reasonable attorney's fees and court costs from the owner or operator.¹⁹⁸ One court already has held that the right to contribution applies even to petroleum releases that occurred before the new law took effect, although only costs and attorney's fees incurred after the effective date are recoverable.¹⁹⁹ Also, the new statute provides that the owner of a petroleum facility (such as an above-ground tank) is entitled to all rights of the state to recover reasonable response or remedial action costs from another responsible person.²⁰⁰

The release of gasoline or other petroleum products from underground storage tanks is a serious environmental problem. Characterizing the scope of contamination and determining the best way to remediate the site can require knowledge of geology, hydrogeology, chemistry, and other technical disciplines. In the past, excavation contractors without any environmental expertise have been engaged to remove leaking tanks

194. The Second Circuit's decision appears to apply only to environmental claims for contamination occurring before the bankruptcy petition was filed. Post-petition releases of hazardous substances presumably could not be discharged by the bankruptcy reorganization.

195. 127 B.R. 27 (E.D. Cal. 1990).

196. *Id.* at 31.

197. IND. CODE § 13-7-20-21 (Supp. 1991).

198. The prior version of the law arguably provided this relief, but the law was confusing and could have been read to permit contribution actions only when corrective action costs were paid over to the state.

199. *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713 (S.D. Ind. 1991).

200. IND. CODE § 13-7-20.1-9(b) (Supp. 1991).

and have actually made the problems worse by misdiagnosing the extent of the contaminant plume, by disrupting confining clay layers in the soil, or by exposing groundwater to surface contaminants. To make sure that only qualified persons perform tank removals, Indiana law now requires persons who supervise, manage, or direct underground tank installations or removals to first apply for a certificate.²⁰¹ Before getting the certificate, an applicant must pay a fee and get a passing score on an examination testing the individual's knowledge of tank installation, testing, retrofitting, removal, and closure.²⁰² Also, applicants must be insured for liability in the amount of one million dollars.²⁰³

D. Administrative Law

Much environmental enforcement activity in Indiana takes place at the administrative agency level, either before IDEM or the Indiana Department of Natural Resources (DNR). Two recent coal cases, one decided by the Indiana Court of Appeals and the other by an Indiana trial court, raise important questions about administrative enforcement procedures. These decisions may have a broad impact on Indiana environmental law.

In the first case, the court of appeals held that an administrative agency enforcing an alleged rule violation bears the burden of proving the violation.²⁰⁴ The burden of proof is never on the person charged with the violation. The concept seems plain. Until the *Peabody Coal* case, no Indiana appellate court had passed on the allocation of the burden of proof in administrative agency enforcement proceedings under the Indiana Administrative Orders and Procedures Act.²⁰⁵ The case sends a warning to all administrative agencies that a mere prima facie showing of a permit violation or some other infraction will not suffice. The agency must prove the violation by the requisite evidentiary standard to justify the imposition of fines or other punitive sanctions.

The *Peabody Coal* case applies to all administrative agency proceedings. It is particularly relevant in environmental cases because the rules of the Indiana Department of Natural Resources expressly provide that in permit revocation proceedings, the permittee, not the agency, bears the burden of persuasion.²⁰⁶ Those rules may now have to be rewritten.

201. *Id.* §§ 13-7-20-13 to -13.4.

202. *Id.* §§ 13-7-20-13.1, -13.2.

203. *Id.* §§ 13-7-20-13 to -13.4.

204. *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991).

205. IND. CODE §§ 4-21.5-3-14, -5-14 (1988) (allocating burdens of persuasion and proof between agency and other party).

206. *Id.* § 4-21.5-5-14.

In another interesting coal mine case, an Indiana trial court held that the entry of summary judgment by an administrative law judge in a DNR enforcement proceeding is not reviewable by the Natural Resources Commission, DNR's "ultimate authority" responsible for entering final DNR orders.²⁰⁷ This is because the Administrative Orders and Procedures Act (AOPA)²⁰⁸ only provides for review by the ultimate authority of orders entered pursuant to Indiana Code section 4-21.5-3-27.²⁰⁹ The AOPA section providing for summary judgments in administrative adjudicative proceedings is a different section.²¹⁰ The court ruled that when an administrative law judge grants a summary judgment, the judge is the ultimate authority and there is no statutory basis for the Natural Resources Commission (or ultimate authorities of other agencies to affirm, modify, or dissolve the order, pursuant to Indiana Code section 4-21.5-3-29).²¹¹

The implications of this are significant. Administrative law judges in Indiana, with exceptions, are not final decisionmakers. The judges make recommendations to the agencies they serve. Those agencies in turn have deliberative policymaking bodies who review the administrative law judge's recommendations and the rest of the agency record and make the "final" decisions, which are then reviewable in court. If summary judgments are final orders after all, then power to determine the outcome of adjudicative proceedings will shift to the administrative law judges and away from the politically appointed bodies that otherwise would constitute the ultimate agency authority.

Also, if summary judgments are final orders and ripe for judicial review, then litigants must prepare to take their appeals to court sooner than might otherwise be expected. Indiana Code section 4-21.5-5-5 provides that petitions for judicial review must be filed within thirty days after service of notice of the final agency action in the controversy.²¹² In Indiana, meeting the filing deadline is a jurisdictional requirement. Most litigants assume that the thirty day time period starts running after the ultimate authority passes on the administrative law judge's recommended order. If it turns out the administrative law judge is the ultimate authority when summary judgment is entered, then the thirty day time period starts running much sooner in the process. If a litigant seeks

207. *United Minerals, Inc. v. Natural Resources Comm'n*, No. 63C01-9009-CP-189 (Pike Cir. Ct. Jan. 1992) (decided by Judge Marvin D. Stratton).

208. IND. CODE §§ 4-21.5-1-1 to -6-6 (1988 & Supp. 1991).

209. That section sets forth the requirements (such as separately stated findings of fact) for all orders, final and nonfinal.

210. IND. CODE § 4-21.5-3-23 (1988).

211. *United Minerals, Inc.*, No. 63C01-9009-CP-189 (Pike Cir. Ct. Jan. 1992).

212. IND. CODE § 4-21.5-5-5 (1988).

further agency review of a summary judgment and waits until after the "ultimate authority" passes on the summary judgment pursuant to Indiana Code section 4-21.5-3-29, then it will be too late to seek judicial review. Any court considering a petition for judicial review in which the administrative law judge granted a summary judgment would have to dismiss the case on the ground that the appeal was not timely perfected.

VI. CONCLUSION

A major focus of environmental law for years to come will be air pollution control. Big businesses have largely implemented emission controls. It is now time for small business to clean up. Many small businesses lack the technical expertise and perhaps financial resources to comply with the new rules. They may depend increasingly on government ombudsmen²¹³ to explain the new requirements, but it will take competent legal counsel to explain *all* the compliance options and help clients navigate the environmental twists and turns.

213. Such as Indiana's Office of Regulatory Ombudsman within the Department of Commerce. For more information, write:

Indiana Department of Commerce
Office of Regulatory Ombudsman
Permit Assistance Center
One North Capitol, Suite 700
Indianapolis, Indiana 46204-2288

or phone:

317-232-7304 or 1-800-824-2476.