

Environmental Law: The Roles of Commerce, Citizens, and the Land in an Era of Intensifying Competition

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Environmental law is, as the developments reported here demonstrate, much more than “environmental regulation.” It is a multifaceted reflection of growing competition among several interests. Although struggles among individuals, interest groups, economic combinations, and political parties have been integral to the American political process from before the Constitution’s creation, in latter days—and in terms of the environment—that process of intermeshing and sometimes clashing interests now includes, in an increasingly intense form, conflicts among private individuals and organizations, their government, both state and federal, and even conflicts between levels of government itself.

Indiana, in 1992, was unusually active both in terms of expanding the body of environmental law and of testing the relationship of national ideals over development as compared with, and sometimes in competition with, individual liberty and responsibility.

Because Indiana produced so much new law affecting environmental matters, this Article will include three main parts. The first part will discuss the Commerce Clause and out-of-state waste (Part I); the second, citizens’ right to sue and the Four County Landfill (Part II); and the third, flood plain regulation and its impact on notions of property (Part III). This Article will also include three shorter “interludes” involving more circumscribed subjects: construction of the solid waste “character” law; 1992 environmental legislation and regulations; and environmental consent decrees and citizen suits under state law.

I. STATE REGULATION OF SOLID WASTE AND THE COMMERCE CLAUSE

The struggle between the states and the national government over commerce has been with us since the Articles of Confederation. One of the essential reasons why the Constitution was created in 1787 was to break down the thirteen protected markets the original states had created during the Revolutionary War. However, it was not until the 1840s, with the rise of the railroads and the movement of immigrants and free blacks, that the Supreme Court approached the Commerce

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Clause in terms familiar to present day debates.¹ Under the aegis of the Commerce Clause of the United States Constitution, as well as decisional law developments,² the national economy was so successfully encouraged and fostered that, by the late twentieth century, this country has reached a level of development that is the envy of much of the world. However, as high levels of economic development have been achieved across the country, counter-pressures oriented toward preservation of local resources have led to a running fight between localities and states, on the one hand, and the national economy, on the other, over the issue of garbage, or as it is antiseptically called in modern parlance, "solid waste."³

Because states on the eastern and western seaboard are running out of room to do away with the waste products of their shares of the national economy, the cost of dumping solid waste within their borders has so increased that it has become "economic" to transport it hundreds of miles to states where, relatively speaking, dumping grounds are cheap.⁴ Because of this differential in cost of dumping, several states in which this excess of waste from other states was dumped attempted by a variety of methods either to ban, or restrict, the flow of such waste. Almost all these efforts were defeated, primarily on the basis of the "dormant" effect of the Commerce Clause.⁵

Nevertheless, as Chief Justice Rehnquist, dissenting in *Chemical Waste Management, Inc. v. Hunt*,⁶ noted, these Commerce Clause solid waste cases seem not to have dissuaded states from trying, as best they can, to avoid unlimited imposition of solid and hazardous waste within

1. *Cooley v. Board of Wardens*, 12 How. 299, 318-21 (1852); *Passenger Cases*, 48 U.S. (7 How. 571) (1849); *Thurlow v. Massachusetts*, 46 U.S. (5 How. 504) (1847); 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 134-35, 138-39, 152-55, 168-82, 236-38 (1937).

2. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1960* 65 passim (1992).

3. Solid waste is the subject of extensive federal statutory and regulatory law, including, most prominently, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901-6987 (1988 & Supp. II 1990) (RCRA) and related regulations, 40 C.F.R. §§ 240-81 (1992). RCRA treats waste differently, depending on whether it is hazardous, see 42 U.S.C. § 6903(5) (1988), or solid waste that does not fit the definition of hazardous waste, see 42 U.S.C. § 6903(27) (1988).

4. The first in a growing series of "garbage as commerce" cases, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), evidences the economic pressures that led to exportation of municipal and hazardous waste.

5. The latest Supreme Court decisions in this area, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), have reaffirmed, in emphatic terms, Commerce Clause protection of the interstate shipment of both municipal and hazardous waste.

6. 112 S. Ct. 2009 (1992).

their borders.⁷ Indiana presents a good example of this effort of some states, by any reasonable means, to stem the flow of out of state waste.⁸

The state's first attempt occurred in 1990. Indiana passed legislation that attempted to slow the receipt of out-of-state hazardous and solid waste by several indirect methods.⁹ Almost immediately a group located in Pennsylvania involved in brokering waste, that is, arranging its consolidation from several public and private generators for shipment elsewhere, filed suit.¹⁰ They obtained injunctive relief against several provisions in the new legislation that imposed differential regulatory effects on out of state waste, on the ground that they conflicted with the Commerce Clause.¹¹ The state did not appeal. Rather, in 1991, the State enacted new legislation that attempted to deal with the problem of uncontrolled dumping of out of state waste by different means.¹²

Although the 1991 legislation, like its predecessor, did not directly restrict the flow of solid waste into the state, it did attempt to regulate both truckers who carried waste to this state and the brokers who arranged its shipment here.¹³ One of the problems the new legislation attempted to deal with was the practice of "back hauling." Trailers that had been used to carry solid waste from Indiana were used on the return trip to ship ordinary goods, including food, back across Indiana's borders. The new legislation attacked the problem both by an outright ban and by a system of informational stickers applied to tractors used to haul solid waste.¹⁴ The legislation also included a differential tipping fee for out-of-state waste, as well as imposition of a system of permits applied to all waste transfer stations, wherever located, and a requirement that out of state brokers of waste post bonds to cover possible liability for violating Indiana's solid waste regulations.¹⁵

7. *Id.* at 2019

8. For examples of other states' recent and unsuccessful efforts, see *In re Southeast Ark. Landfill*, 981 F.2d 372 (8th Cir. 1992); *Chemical Waste Management, Inc. v. Templet*, 967 F.2d 1058 (5th Cir. 1992).

9. 1990 Ind. Acts c. 10, § 15. Those methods included verified statements by truck drivers hauling out of state waste as to where "the largest part of the solid waste was generated." *Id.* As to out of state waste, the driver was required to present a statement from a public official in the state where the waste was generated, that it did not include hazardous or infectious waste.

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

11. *Id.* at 748-49.

12. IND. CODE § 13-7-10.5 (Supp. 1992).

13. See generally Peter M. Racher, *Clean Air Act Amendments Leave Small Business Up In the Air*, 25 IND. L. REV. 1183, 1194-1200 (1992).

14. IND. CODE § 13-7-31 (Supp. 1992).

15. *Id.* §§ 13-7-31-1 to -17 (Supp. 1992).

The same plaintiffs who had defeated the 1990 legislation attacked Indiana's 1991 effort. Although they met with almost complete defeat in district court,¹⁶ they achieved total victory in the United States Court of Appeals for the Seventh Circuit.¹⁷

The state attempted to defend its legislation before the Seventh Circuit on grounds that it promoted health and safety of the citizens of Indiana¹⁸ as well as the reputation of products shipped from this state.¹⁹ The court of appeals found little evidence supporting such a view. The court concluded that health of the citizens of Indiana would not be promoted by the back haul ban because, among other factors, only citizens outside the state would be affected by goods shipped out of state in trailers that had brought solid waste to Indiana, and trailers coming into the state may have carried waste outside the state.²⁰

Although the Seventh Circuit was urged to review the Indiana legislation pursuant to a balancing test,²¹ its analysis of the actual impact of the back haul ban and stickering program persuaded the court that in fact the legislation discriminated directly against such out of state commerce.²² The court therefore scrutinized the legislation, with the burden on the state to justify the discrimination "by a valid factor unrelated to economic protectionism."²³ The court of appeals had little

16. *Government Suppliers Consol. Serv., Inc. v. Bayh*, No. IP 91 899 C (S.D. Ind. Feb. 5, 1992) (Order on Plaintiff's Motion for a Declaratory Judgment).

17. *Government Suppliers Consol. Serv., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993).

18. *Bayh*, 975 F.2d at 1279-80.

19. The state asserted that goods shipped in trailers that had carried waste would be undesirable to the market. *Id.* at 1272-73, 1280.

20. *Id.* at 1279-80.

21. Generally called the "Pike Test," referring to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (citation omitted). If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, (citation omitted), but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

Id. at 142.

22. *Bayh*, 975 F.2d at 1278-79.

23. *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988); *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023-24 (1992).

difficulty concluding that all parts of the Indiana legislation attacked by the brokers on appeal failed the test.²⁴ The court went on to conclude that even under the *Pike*²⁵ test, the legislation must fail.²⁶

The decision in *Government Suppliers Consolidated Services, Inc. v. Bayh*,²⁷ is the latest in what is developing to be quite a long series of decisions that have found improper a variety of attempts by states and local units of government to regulate the flow of garbage and hazardous waste into their jurisdictions. It seems difficult from this vantage point to imagine what form of state regulation of such waste might find acceptance by the United States Supreme Court.²⁸ This does not mean, however, that the pressure to resist the flow of waste from one jurisdiction to another has ceased.

Senator Dan Coats of Indiana has, since early 1991, authored legislation allowing individual states to take control of out of state waste disposal within their borders by various means.²⁹ So far none of those efforts have been successful.³⁰ While it seems clear that in the absence of federal legislation, Indiana's ability to affect seriously the flow of solid waste into this state is quite limited.

Decisions stripping from the states any ability to preserve their lands from what they perceive to be excess burdens of waste generated by other sectors of the country³¹ raise potentially quite large questions for the future. Although the debate over the transfer of solid waste from one part of the country to another has generally been dealt with in terms of commerce and the dormant power of the Commerce Clause of the Constitution, underlying this debate is a question of resources and the control of resources. Although the Supreme Court once recognized a state's ability to protect its resources in the context of Com-

24. *Bayh*, 975 F.2d at 1279-81.

25. *See supra* note 21.

26. 975 F.2d at 1285-86.

27. 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993).

28. On the other hand, at least two elements of Indiana's initiative survived, either because they were not attacked at all (a 14-day delay imposed on trailers used to carry food before they might carry waste, IND. CODE § 16-1-28-13.5 (Supp. 1992)), or because the plaintiffs lost the issue in the district court and did not pursue the matter on appeal (inspection of transfer stations located outside as well as inside the state, *id.* § 13-7-10.5-16 (Supp. 1992)). 975 F.2d at 1272 n.5, 1279. Given the failure of the legislation discussed above, it is unlikely these provisions will achieve much of benefit to Indiana citizens.

29. S. 2877 102d Cong., 2d Sess. (1992); S. 2384, 102d Cong., 2d Sess. (1992); S. 153, 102d Cong., 1st Sess. (1991).

30. Although S. 2877 passed the Senate by a vote of 89-2 on July 23, 1992, it failed to pass the House.

31. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2030-31 (Rehnquist, C.J., dissenting).

merce Clause analysis,³² the latest series of decisions over solid waste arguably have rendered absolute, in terms of national value, the process of commerce itself. Thus, if a thing is defined as an item in commerce, in light of the solid waste cases and other Commerce Clause cases on which they are based, a state's ability to preserve its natural resources may be limited to quite small areas of jurisdiction. In the future, it may well be that states will be able to regulate (and possibly control) exploitation of their resources only if they can present a sufficiently precise and well-defined health interest.

As one of the Great Lake states, Indiana is the beneficiary of Lake Michigan. Will the national economy, in future years, require the transshipment of water from well-watered states to drier areas of the country, especially should endemic drought increase in other areas, such as the southwest and Great Plains states?³³ In *Sporhase v. Nebraska*,³⁴ the Supreme Court held that groundwater is an article of commerce and that a state's claim to it as its natural resource does not exempt state regulation of it from the Commerce Clause.³⁵ The Court held that Nebraska's effort to restrict the transfer of groundwater to a state that did not allow its waters to be transferred to Nebraska constituted an impermissible burden on interstate commerce.³⁶ Although it is true that the Supreme Court commiserated with the state's interest in conserving its own water in times of drought,³⁷ it is quite unclear whether the Court would recognize such an interest if a number of states sustained great drought over long periods. On what constitutional basis might Indiana or other water-rich states preserve the waters they have in the face of private or public efforts to transfer water from their boundaries? Senator Coats' effort to persuade Congress to allow the states to control some aspects of interstate commerce is one approach, though difficult to achieve in terms of legislative politics, that can succeed. For example, the Great Lakes states have banded together successfully to protect their greatest water resource. In 1986 Congress was persuaded to pass legislation that appeared to ban diversion of water from the Great Lakes basin.³⁸ How-

32. *E.g.*, *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356-57 (1908).

33. Concerns over global climate change has led commentators to review water policy in terms of shifting drought patterns and consequent demand for large scale transfers of water. *E.g.*, Ludwik A. Teclaff, *The River Basin Concept and Global Climate Change*, 8 PACE ENVTL. L. REV. 355, 377-78 (1991); A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 LOY. L.A. L. REV. 979, 999-1001 (1991).

34. 458 U.S. 941 (1982).

35. *Id.* at 951-54.

36. *Id.* at 957-58. *See generally* Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 763-74 (1991).

37. *Sporhase*, 458 U.S. at 955-57.

38. 42 U.S.C. § 1962d-20 (1988). *See generally* Stephen Frerichs & K. William

ever, Congress acted before global warming and possible climate change became matters of general notice. Should the climate change and should great droughts extend over time and space, would the current ban on diversion of water from the Great Lakes survive future Congresses?

Given the decline of states' ability to preserve and conserve resources within their borders as commerce is made supreme, Senator Coats' efforts to persuade some of the other states to combine in Congress against imported waste—the Great Lake States' recent and so far successful union to safeguard their greatest water asset—suggest an era of increasingly intense regional politics over dwindling resources and environmental values.

Interlude No. 1: Indiana's Solid Waste "Character" Requirements, Retroactivity, and Legislative History

In 1990 the Indiana legislature enacted a "character law" intended to govern any application to operate a solid waste disposal facility in this state.³⁹ Indiana Code section 13-7-10.2-3⁴⁰ provides that before an application for a new, renewed, or substantially modified permit may be granted, the applicant "and each person who is a responsible party"⁴¹ must submit to the Indiana Department of Environmental Management (IDEM) a statement disclosing much financial, experiential, and personal information, including criminal histories, if any.⁴²

Easter, *Regulation of Interbasin Transfers and Consumptive Uses from the Great Lakes*, 30 NAT. RESOURCES J. 561, 578-79 (1990). 42 U.S.C. § 1962d-20(d) provides:

No water shall be diverted from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes States.

Id.

39. IND. CODE § 13-7-10.2 (Supp. 1992). As set forth at *id.* §§ 13-7-10.2-1 and 13-7-10-1(e), the good character requirements apply to applications for permits to control solid waste, *see id.* § 13-7-1-22 (Supp. 1992); IND. ADMIN. CODE tit. 329, r. 1-1-1 to 2-21-16 (1992), hazardous waste, *see* IND. CODE § 13-7-8.5 to 8.7 (1988 & Supp. 1992); IND. ADMIN. CODE tit. 329, r. 3-1-1 to 3-59-9 (1992) and atomic radiation, *see* IND. CODE § 13-7-9 (1988).

40. IND. CODE § 13-7-10.2-3 (Supp. 1992).

41. *Id.* The Indiana Code defines responsible party as:

- (1) an officer, a corporation director, or a senior management official of a corporation, partnership, or business association that is an applicant; or
- (2) an individual, a corporation, a partnership, or a business association that owns, directly or indirectly, at least a twenty percent (20%) interest in the applicant.

Id. § 13-7-10.2-2 (Supp. 1992).

42. *Id.* § 13-7-10.2-3(a)(1), (b), and (c).

The new legislation was enacted on March 20, 1990; it was given effect upon passage due to a declaration of an emergency.⁴³ In the meantime, Chemical Waste Management of Indiana, Inc. (Chem Waste), operator of the only extant hazardous waste landfill in Indiana, had on file with IDEM since December 1988, an application under the Resource Conservation and Recovery Act (RCRA) for a Part B permit.⁴⁴ IDEM applied it to Chem Waste's pending Part B permit application. By January 1992, no permit having yet been issued, and IDEM still apparently considering Chem Waste's application in terms of the good character statute. Chem Waste sued IDEM for injunctive and declaratory relief. Chem Waste contended that the statute should not be applied retroactively and that it was unconstitutional in several respects.⁴⁵

After issuing a preliminary injunction against application of the statute to Chem Waste, the trial court granted partial summary judgment on the ground that the statute was not retroactive. The trial court did not decide any of the constitutional issues that Chem Waste had raised.⁴⁶ On appeal IDEM presented two arguments. First, it asserted that the trial court had no jurisdiction because Chem Waste had not exhausted its administrative remedies before filing suit. Second, it argued that the statute did have retroactive effect since it had been enacted as an emergency matter and was made effective on the day of enactment.⁴⁷

The court resolved the exhaustion of administrative remedies issue relying primarily on a well-known Indiana Supreme Court case on the availability of declaratory relief in the context of administrative proceedings.⁴⁸ It concluded that Chem Waste could pursue a declaration of its rights in the matter without first having exhausted its administrative remedies because (1) retroactivity involved a question of law rather than fact; (2) a judicial decision on the issue would not disrupt the administrative process; in fact it would likely simplify IDEM's review of pending permit applications; and (3) Chem Waste's declaratory relief action attacked an agency policy, rather than "an agency action subject to judicial review."⁴⁹

43. 1990 Ind. Acts 1863, 1871.

44. *Indiana Dep't of Env'tl. Management v. Chemical Waste Management*, 604 N.E.2d 1199, 1201 (Ind. Ct. App. 1992).

45. *Id.* at 1201-02.

46. *Id.* at 1202, 1203-04 n.2.

47. *Id.* at 1202, 1205. IDEM also argued, as to retroactivity, that the record contained disputed issues of fact. The court quickly disposed of this argument, by referring to the trial court's analysis of retroactivity and questions of fact: "The trial court expressly decided that the sole undisputed, material fact . . . was that Chemical's application was pending prior to the effective date of the Character Law." *Id.* at 1204.

48. *Wilson v. Board of Ind. Employment Sec. Div.*, 385 N.E.2d 438 (Ind. 1979), *cert. denied*, 444 U.S. 874 (1979).

49. *Chem Waste*, 604 N.E.2d at 1202-03.

The court then turned to retroactivity. Its resolution of that issue appears to have established a form of legislative history as all but invincibly conclusive on whether a statute is to be given retroactive effect.

The court noted the general rule that "a law shall be prospective only in the absence of an express statement that it be retroactive."⁵⁰ It reviewed two features of the legislation that supported prospective application. First, the Good Character Law affects an "applicant" "that applies for . . . a permit."⁵¹ This and similar uses of the term "applicant" persuaded the court that the Good Character Law could only affect one who "applies," which event could only occur after the statute came into existence.⁵²

Second, the court confronted and roundly rejected IDEM's argument that the declaration of emergency implied legislative intent that the law be applied retroactively. Its first point appears unremarkable: "applicants have a right to have their applications considered in accordance with the laws in effect when the application is made."⁵³ The court's second point, on the other hand, appears to be new.

The court described its second ground as "more conclusive" than the proposition it had just stated. On the same day that the Good Character Law was passed another provision in the state's environmental legislative scheme which dealt with financial statements preceding construction or operation of solid waste landfills had also been enacted.⁵⁴ Unlike the Good Character Law, the financial statement provision was accompanied by an uncodified, but specific provision calling for retroactive effect in rather clear terms:

This act applies to:

- (1) a permit application that is filed on or after the effective date of this act,
- (2) a permit application that was filed before the effective date of this act but was not granted or denied . . . before the effective date of this act, and
- (3) a permit application that was filed before the effective date of this act and that was granted . . . before the effective date of this act if the . . . action in granting the permit was appealed

50. *Id.* at 1204.

51. IND. CODE § 13-7-10.2-1 (Supp. 1992).

52. *See Chem Waste*, 604 N.E.2d at 1204-05.

53. *Id.* at 1205. In *Board of Dental Examiners v. Judd*, 554 N.E.2d 829 (Ind. Ct. App. 1990), one of the cases the court cited for this proposition, contained the following: "[W]hile no one has an absolute right to practice dentistry, . . . dentists, like members of other professions and trades, have a cognizable property interest in their ability to practice, and the practice may not be regulated arbitrarily." *Id.* at 832.

54. IND. CODE § 13-7-22-2 (Supp. 1992).

. . . and that appeal is pending on the effective date of this act.⁵⁵

The court said of this rather clear expression of legislative intent, "[T]his uncodified application clause is precisely the type of expression required to put a statute in reverse."⁵⁶ The Legislature's silence as to retroactivity of the Good Character Law left the court "with no doubt that the General Assembly did not intend for the Character Law to be applied to permit applications pending on the effective date of the act."⁵⁷

Although *Indiana Department of Environmental Management v. Chemical Waste Management of Indiana, Inc.*⁵⁸ certainly is an important clarification of environmental regulatory law, as is true of other "environmental" cases, its holding on legislative history extends to all legislation enmeshed in questions of retroactivity. The very ease in establishing conclusively that the financial statement law would be given retroactive effect will likely simplify future disputes. Ambiguity that had attended statements of emergency, in light of Indiana's relative paucity of formal legislative history,⁵⁹ should no longer exist. If a statute is not attended by a statement of intended application as the financial statement legislation was, it will likely, and automatically, be given prospective effect only. *Chemical Waste Management* has thus given legislators a sure way of establishing retroactivity when they do intend it.

Interlude No. 2: New Legislation

Indiana's output of legislation affecting environmental issues was not as extensive as in 1990 and 1991.⁶⁰ Nevertheless, at least three pieces of legislation are worthy of note.

a. Indiana Heritage Trust Program.—In 1992 the Indiana General Assembly added chapter 14-3-20, known as the "Indiana Heritage Trust Program."⁶¹

55. 1990 Ind. Acts ch. 107, § 3.

56. *Chem Waste*, 604 N.E.2d at 1205.

57. *Id.*

58. 604 N.E.2d 1199 (Ind. Ct. App. 1992).

59. *See, e.g., O'Laughlin v. Barton*, 582 N.E.2d 817, 821 (Ind. 1991) (Trial court erred when it considered affidavits of four legislators offered to establish legislative intent).

60. *See Racher, supra* note 13.

61. Indiana Code § 14-3-20-1 (Supp. 1992), subsection (1)(b) provides that the trust program: "[w]ill acquire real property for new and existing state parks, state forests, nature preserves, fish and wildlife areas, wetlands, trails, and river corridors. The program will insure that Indiana's rich natural heritage is preserved or enhanced for succeeding generations."

The trust fund will receive regular appropriations by the General Assembly, donations, and fees from "environmental license plates."⁶² The fund itself will be allocated to purchase and maintain property for state park purposes, state forests, nature preserves, fish or wildlife management, and outdoor recreation, historical, or archeological sites. Of note is the fact that the funds cannot be used to pay for costs of removal and remedial action relating to hazardous substances or the cost of waste water treatment.

If properly funded, this legislation could go far to enable Indiana to benefit from the work of private organizations such as the Nature Conservancy, in acquiring and preserving acreage having environmental or recreational values. The legislation could well be successful in terms of its purpose since it establishes a private partnership. The partnership will succeed, however, only to the extent that private individuals provide both small and large donations. Given the apparent public concern over environmental issues in recent years, and provided the trust fund is publicized sufficiently, it may well prove a success. A good sign of the possibility of that success will be the number of "vanity" environmental license plates purchased by the public.

b. Composting.—Another relatively positive legislative development in 1992 was the enactment of a ban on depositing "vegetative matter resulting from landscaping, maintenance, and land clearing projects"⁶³ in a solid waste landfill after September 30, 1994. The new legislation includes provisions governing "composting facilities,"⁶⁴ no doubt on the theory that with the ban against depositing compostable materials in landfills, a private market for composting operations should follow.

One may operate a composting facility "only if the person registers the composting facility with the Department."⁶⁵ The legislation prescribes information to be submitted to the department including, the area it is to serve, an estimate of the volume of materials it will process annually as well as any other information IDEM might require by rule.⁶⁶ A composting facility is prohibited from being located within 200 feet of a drinking water well or a residence in existence when the facility is first registered with IDEM. Furthermore, a privately operated composting facility must be located outside the ten-year flood plain and must be

62. IND. CODE §§ 9-18-29-1 to -5 (Supp. 1992). Each environmental license plate purchased under that legislation will produce an additional fee of \$25.00. *Id.*

63. *Id.* § 13-7-29-3 (Supp. 1992). The legislation also provides that "[a]fter June 30, 1994, a person may not knowingly combine" compostable materials subject to the statute with other types of solid waste. *Id.* § 13-7-35-9 (Supp. 1992).

64. *Id.* §§ 13-7-35-1 to -10 (Supp. 1992).

65. *Id.* § 13-7-35-4.

66. *Id.* § 13-7-35-5.

designed to prevent compost from being placed within five feet of the water table. It must control run-off, manage leachate and maintain controls for dust, odor and noise. The operator of the composting facility must report annually the volume of material it processed during the preceding year.⁶⁷

The Legislature's anticipation that by banning the dumping of compostable materials in a landfill will create a market for composting, reflects what may be the most interesting future thrust of environmental regulation. By excluding certain materials from traditionally easy and cheap disposal, the Legislature has raised the cost of such disposal and may have, thereby, encouraged a new industry servicing a new market. On the other hand, provisions requiring annual reports and potentially close administrative oversight of a business that should not have much adverse environmental impact is a questionable extension of governmental responsibility with two possible adverse results. First, IDEM itself has more than enough work to do in terms of air pollution, hazardous waste, and other major regulatory agendas. Adding oversight of what may turn out to be a number of small composting businesses may interfere with the agency's primary functions. Second, imposing close administrative oversight on what theoretically could be small businesses may add a level of cost that will, at least to some extent, inhibit easy entry into a market place the Legislature has otherwise likely created.

The vegetative material ban should go far to ease volume pressures on Indiana's limited reserves of solid waste landfills. Finally, it may demonstrate how environmental regulation by market preclusion can achieve success in creating new arenas for the free market system to operate.

c. Voluntary Remediation.—A third environmental initiative that may have a positive impact on the state is the Legislature's provision for voluntary remediation of sites contaminated by hazardous substances and some forms of petroleum, subject to IDEM's oversight and approval.⁶⁸ In general terms the legislation is intended to allow a site burdened with hazardous substances as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁶⁹ as well as "petroleum" defined as "petroleum asphalt or crude oil"⁷⁰

67. *Id.* § 13-7-35-6.

68. *Id.* §§ 13-7-8.9-1 to -23 (Supp. 1992).

69. 42 U.S.C. § 9601(14) (1988).

70. IND. CODE § 13-7-8.9-3 (Supp. 1992). The addition of some portion of petroleum, not including refined gasoline or other petroleum derived products, responds to the petroleum exclusion in 42 U.S.C. § 9601(14). *See* *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801, 804-10 (9th Cir. 1989); *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973, 981-82 (E.D. Mich. 1991). *Compare* *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 489-90 (S.D. N.Y. 1990).

of certain characteristics, to be remediated by private parties with some protection against future liability.

In terms of effectiveness, the voluntary remediation law has two problems. First, it is true that an applicant who obtains the department's approval is saved from state litigation during the course of the remediation⁷¹ and is issued a certificate of completion from IDEM. It is also true that IDEM can grant the applicant a covenant not to sue which is good against any claimant under state law.⁷² However, the statute specifically provides that the voluntary program of remediation will not save persons affected thereby from liability under federal legislation such as CERCLA or the Resource Conservation and Recovery Act (RCRA).⁷³

The second problem with the program of voluntary remediation is that it involves a rigorous regime of oversight by IDEM that appears little different from what would result from an enforcement action initiated by the agency in the first instance. However, a voluntary remediation might be advisable where the contaminated site is likely not to rise to the level of the national priority list established pursuant to CERCLA and therefore, become the object of an action for response costs or contribution under CERCLA. On the other hand, the sheer cost of complying with the various administrative processes established within the statute may deter smaller businesses from attempting to undertake the effort of voluntarily remediating contaminated property. It remains to be seen to what extent this version of volunteerism will actually be used.

II. CITIZENS AND THE FRAGILE "RIGHT" TO SUE

Beginning with the Clean Air Amendments in 1970,⁷⁴ Congress has inserted a series of "citizen suit" provisions in no fewer than seventeen pieces of environmental legislation. All of them run to a pattern reflective of the notion that federal and state agencies should take the lead when it comes to protecting the environment by way of civil litigation.⁷⁵ First, before a citizen can bring suit, he or she must give written notice to the Environmental Protection Agency Administrator, the state in which the proposed suit is to be brought, and the actual defendant in the

71. IND. CODE § 13-7-8.9-18(e) (Supp. 1992).

72. *Id.* § 13-7-8.9-18 (Supp. 1992).

73. *Id.* § 13-7-8.9-18(d) (Supp. 1992).

74. 42 U.S.C. § 7604 (1983 & Supp. 1992). See *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 n.1 (1989) (collecting statutes).

75. *E.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987); *United States v. City of Green Forest*, 921 F.2d 1394, 1403 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 914 (1991).

case.⁷⁶ Second, a citizen may not file an action if the federal or state government has taken appropriate steps to remedy the situation giving rise to the claim.⁷⁷

The Clean Water Act and, specifically, its National Pollutant Discharge Elimination System (NPDES) program, has produced most of the reported cases involving citizen suit litigation.⁷⁸ The plaintiff's burden

76. 42 U.S.C. § 6972(b)(1) (Supp. 1992). This section is similar to, but more complicated than other environmental notice provisions. Section 6972(a)(1)(A) authorizes citizens to file suits in federal court against "any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter" *Id.* Section 6972(b)(1)(A) requires that such a suit be preceded by 60 days notice given to the Administrator of the EPA, the "State in which the alleged violation occurs" and "the alleged violator of such permit, standard." *Id.*

The complications start at this point. First, the 60-day notice applies to enforce those of RCRA's requirements that apply to the solid waste (not hazardous waste) disposal business. If the alleged violation is of subchapter III of the Act (42 U.S.C. §§ 6921-34 (1983)), which deals with hazardous waste, then, under 42 U.S.C. § 6972(b)(1), a citizen suit "may be brought immediately after such notification." § 6972(b)(1). *See, e.g., Dague v. City of Burlington*, 935 F.2d 1343, 1349-52 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992). *Compare* 33 U.S.C. § 1365(a) (allowing immediate notice in Clean Water Act cases where toxics are involved).

Second, RCRA allows citizens to sue for injunctive relief against any person: [I]ncluding any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. 6972(a)(1)(B) (Supp. 1992). 42 U.S.C. § 6972(b)(2)(A) mandates that one who would bring an imminent endangerment claim under § 6972(a)(1)(B) must give ninety days notice before filing suit.

77. Again, the RCRA citizen suit provision is similar to, but more complicated than, other "due diligence" defenses. 42 U.S.C. § 6972(b)(1)(B) governs § 6972(a)(1)(A) claims alleging violations of permits, standards, and regulations issued under the act. It precludes a citizen suit "if the Administrator [of the EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court . . . to require compliance with such permit, standard, regulation" 42 U.S.C. § 6972(b)(1)(B).

The due diligence bar to an imminent endangerment claim under 42 U.S.C. § 6972(a)(1)(B) added quite a bit more complexity, affected as it obviously was by CERCLA. 42 U.S.C. § 6972(b)(2)(B) bars a citizen's suit for imminent endangerment if the EPA has, among other things, brought and is diligently pursuing the government's suit for imminent endangerment provided in 42 U.S.C. § 6973 or a suit to recover response costs under 42 U.S.C. § 9606, or is actually engaging in a removal action under 42 U.S.C. § 9604. 42 U.S.C. § 6972(b)(2)(C) makes similar actions by the state bars to suit. *See Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 182 (M.D. Pa. 1988); H.R. CONF. REP. No. 1133, 98th Cong., 2nd Sess., *reprinted in* 1984 U.S.C.C.A.N. 5649, 5688-89.

78. *See, e.g., National Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974 (4th Cir. 1992); *National Resources Defense Council, Inc. v. Lowengart & Co.*, 776 F. Supp. 996 (M.D. Pa. 1991).

of proof in a NPDES case, relatively speaking, is quite easy since the NPDES permit holder is required by law to make admissions of violations.⁷⁹ In comparison, RCRA's citizen suit provision has, over the years, generated relatively few reported cases.⁸⁰

Indiana has produced more than its fair share of citizen suit litigation over hazardous waste. One hazardous waste landfill, the Four County Landfill in northern Fulton County, has produced no fewer than fifteen published decisions and orders from 1987 through 1992.⁸¹

All, to one degree or another, involve aspects of RCRA's citizen suit statute. The cases reflect a good deal of initial success for the citizens group, Supporters to Oppose Pollution, Inc. (STOP). However, STOP ultimately failed in its efforts to remedy the Four County Landfill. The story of that failure reflects problems with citizen suit legislation

79. See *United States v. Dexter Corp.*, 132 F.R.D. 8 (D. Conn. 1990); Lauren Mileo O'Sullivan, *Citizen Suits Under the Clean Water Act*, 38 RUTGERS L. REV. 813, 820-21 (1986).

80. *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983) is an early example of a decision favorable to citizen suits under RCRA. Most of the other reported cases involve the procedural defenses in RCRA already discussed. *E.g.*, *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Garcia v. Cecos Int'l., Inc.*, 761 F.2d 76, 79 (1st Cir. 1985); *McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401, 1406-08 (N.D. Ohio 1987), *aff'd*, 856 F.2d 39 (6th Cir. 1988). In a few cases, citizens did obtain some relief under the statute. *E.g.*, *Dague v. City of Burlington*, 733 F. Supp. 23 (D. Vt. 1990), *aff'd*, 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992).

81. *Environmental Waste Control, Inc. v. Agency for Toxic Substances & Disease Registry*, 763 F. Supp. 1576 (N.D. Ga. 1991); *United States v. Environmental Waste Control, Inc.*, 131 B.R. 410 (N.D. Ind. 1991), *aff'd*, 973 F.2d 1320 (7th Cir. 1992); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 760 F. Supp. 1338 (N.D. Ind. 1991), *aff'd*, 973 F.2d 1320 (7th Cir. 1992); *In re Environmental Waste Control, Inc.*, 125 B.R. 546 (N.D. Ind. 1991); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 33 E.R.C. 1052 (N.D. Ind. 1991), *aff'd*, 973 F.2d 1320 (7th Cir. 1992); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 32 E.R.C. 1154 (N.D. Ind. 1990); *United States v. Environmental Waste Control, Inc.*, 737 F. Supp. 1485 (N.D. Ind. 1990); *In re Environmental Waste Control, Inc.*, 31 E.R.C. 1462 (N.D. Ind. 1990); *United States v. Environmental Waste Control, Inc.*, 31 E.R.C. 1458 (N.D. Ind. 1990); *United States (EPA) v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989); *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1621 (1991); *United States (EPA) v. Environmental Waste Control, Inc.*, 698 F. Supp. 1422 (N.D. Ind. 1988); *United States (EPA) v. Environmental Waste Control, Inc.*, 26 E.R.C. 2075 (N.D. Ind. 1987); *In re Environmental Waste Control*, 122 B.R. 341 (Bankr. N.D. Ind. 1990).

For a description of the Four County Litigation through the original judgment (March, 1989), see Robert M. Blomquist, *The Evolution of Indiana Environmental Law: A View Toward the Future*, 24 IND. L. REV. 789, 818-29 (1991). Because of the large number and intertwined nature of the Four County Landfill reported decisions, the names of the cases will be abbreviated hereinafter as follows: *Supporters to Oppose Pollution, Inc. v. Heritage (STOP)*; *United States v. Environmental Waste Control, Inc.* and *In re Environmental Waste Control, Inc. (EWC)*.

in its present state, and it reflects practical difficulties and traps that may befall counsel not wary enough to cope with the kind of litigation RCRA can generate.⁸² What follows is a cautionary tale anyone who considers bringing an environmental citizens suit should review quite closely.

A. *The Four County Landfill*

The Four County Landfill was operated from 1973 until 1978 by the owners of the land, James Wilkins and his father. In 1978, Environmental Waste Control, Inc. (EWC) was formed, and ultimately became solely owned by Stephen Shambaugh. EWC entered into a ten year lease with Wilkins that allowed EWC to operate a landfill on Wilkins' land.⁸³ Beginning in 1980 the landfill began to dispose of only hazardous waste.⁸⁴

By the mid-1980s, groundwater underlying the landfill was observed to be contaminated with relatively low levels of various hazardous substances including benzene, carbon tetrachloride, 1,2 dichloroethane, chloroform, tetrachloroethylene, and trichloroethylene.⁸⁵

B. *A Four County Chronology*

As was true of many hazardous waste landfills in operation at the time, the 1980 amendments to RCRA came into effect, the Four County Landfill automatically received "interim status" when EWC submitted its "Part A" permit application in November 1980.⁸⁶ In the meantime, STOP, an organization made up of residents in the vicinity of the landfill, actively and vocally opposed the Landfill's receipt of waste. In February 1987 the Environmental Protection Agency (EPA), by the Justice Department, filed suit against Shambaugh, Wilkins, and EWC seeking civil penalties and closure of the landfill.⁸⁷ By the time of trial, the government asserted that the landfill lost its interim status because, as of a date in November 1985, it did not have an adequate ground water monitoring system in place and because it did not then have sufficient insurance; it disposed waste in unlined cells; its groundwater

82. The author was lead counsel for STOP from December 1987, forward. *EWC*, 737 F. Supp. 1485, 1489 (N.D. Ind. 1990).

83. *EWC*, 710 F. Supp. 1172, 1181-82 (N.D. Ind. 1989).

84. *Id.* at 1181.

85. *Id.* at 1226-27.

86. *Id.* at 1183. The district court described the Part A permit process in some detail. *Id.* at 1182. See also *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 373 (7th Cir. 1986); *United States v. Conservation Chem. Co.*, 660 F. Supp. 1236, 1237 (N.D. Ind. 1987).

87. *EWC*, 710 F. Supp. at 1182.

monitoring system did not comply with regulations issued under RCRA; and, finally, a "release" of hazardous waste or constituents had occurred in groundwater beneath the landfill.

The court granted STOP's motion for leave to intervene in November 1987 on the basis of the recently enacted 42 U.S.C. § 9613(i),⁸⁸ and in view of the fact that, in § 9613(i)'s terms, the government did not make any showing that the intervenor's "interest is adequately represented by existing parties."⁸⁹ STOP sought "nothing short of permanent closure."⁹⁰

1. *The EWC Trial*—The trial consumed thirty court days from December 1988 through February 1989. In the middle of the trial, the government's lawyers disclosed to STOP a July 1986 loan agreement among Shambaugh, Wilkins, and an entity known as Resources Unlimited, Inc. (RUI), by which, among other things, RUI agreed to loan EWC money and to serve as its broker of waste shipped to the landfill. RUI was a subsidiary of Heritage Environmental Services, Inc. Both companies were part of an organization called the Heritage Group.⁹¹

The court issued its decision March 1989. In addition to imposing a fine on the defendants of \$2.78 million, for the first, and apparently still the only time in the history of litigation under RCRA, the court closed the Four County Landfill permanently in specific response to STOP's request for that relief.⁹² In addition to the permanent closure order, the court ordered Shambaugh and EWC to take corrective action at the landfill, "forthwith."⁹³

2. *The EWC Bankruptcies and Heritage*—Within ten business days of the trial court's decision, each of the defendants in *EWC* filed for protection under Chapter 11 of the Bankruptcy Code. Following the bankruptcy filing, in addition to reporting approximately \$2 million in cash on hand,⁹⁴ EWC disclosed contract documents by which, from December 1986, RUI controlled a bank account into which all of EWC's receipts were deposited.⁹⁵ The documents also reflected the fact that in August 1988, RUI had agreed to pay Shambaugh and Wilkins \$250,000 each for an option to purchase the landfill within the next three years for a prize between \$5 million and \$10 million.⁹⁵ RUI eventually

88. *EWC*, 698 F. Supp. 1422, 1425 (N.D. Ind. 1988).

89. *Id.* at 1440-41.

90. *EWC*, 710 F. Supp. at 1181.

91. *Id.* at 1203-04 & n.28.

92. *EWC*, 917 F.2d at 331-32 & n.2; *EWC*, 710 F. Supp. at 1245-47.

93. *EWC*, 710 F. Supp. at 1249-55.

94. *EWC*, 125 B.R. 546, 547 (Bankr. N.D. Ind. 1991).

95. Appendix for Appellants at 35, 65-66, Supporters to Oppose Pollution, Inc. v. Heritage, No. 91-1247 (7th Cir. 1991) (hereinafter STOP Appendix).

96. *Id.* at 37-38, 72-87.

filed a secured claim against EWC's estate in the amount of \$430,000.⁹⁷

3. *STOP's First Complaint Against Heritage.*—In July 1989 STOP gave "immediate" notice of its intent to sue as provided by 42 U.S.C. §§ 6972(b)(1) and 2(A), and filed the first of what would become three separate actions against the Heritage Group and others, including RUI and Heritage Environmental Services, Inc.

In October 1989 the Heritage Group moved to dismiss STOP's complaint on several grounds. One ground asserted that STOP had not given ninety days notice of its claim of imminent endangerment, contrary to 42 U.S.C. § 6972(b)(2)(A). Another, based on *res judicata*, contended that STOP's failure to name the Heritage Group as an additional party defendant in *EWC* barred it from doing so in a second action. A third contended that STOP's claim based on the hazardous waste provisions in RCRA was barred in terms of 42 U.S.C. § 6972(b)(1)(B) because the government was diligently pursuing *EWC*, then on appeal.

4. *Hallstrom and STOP's Second Complaint.*—In the meantime, on November 7, 1989, the Supreme Court issued its decision in *Hallstrom v. Tillamook County*⁹⁸ that the sixty-day notice requirement in 42 U.S.C. § 6972(b)(1) was a mandatory condition precedent to suit and that failure to give the notice before suit was filed required dismissal of the action, no matter how far along it may have proceeded.⁹⁹

Later, in November 1989, in an effort to comply with the Supreme Court's holding in *Hallstrom*, STOP dismissed its first complaint against Heritage and immediately filed a new suit by way of a slightly revised complaint.

STOP's second complaint against Heritage was, like the first, in two counts. Count I sought relief for the Landfill's imminent endangerment.¹⁰⁰ Count I was new in terms of the claims asserted in *EWC*. Neither the government nor STOP had asserted a claim for imminent endangerment

97. *In re EWC*, No. 89-30581 (Bankr. N.D. Ind. 1989).

98. 493 U.S. 20 (1989).

99. The Supreme Court left open the option of plaintiffs giving notice and filing suit in compliance with the statute. *Id.* at 32.

The Supreme Court was not presented with the immediate notice required in suits involving hazardous waste. The district court in *EWC* did face that issue; it concluded that the immediate notice should not be treated as jurisdictional. 710 F. Supp. 1172, 1190. The Seventh Circuit affirmed this and several other procedural rulings in a footnote. *EWC*, 917 F.2d 327, 331 & n.1; *see also* Dague v. City of Burlington, 935 F.2d 1343, 1349-52 (2d Cir. 1991). (Court would not dismiss untimely RCRA notice as to some claims where others were subject of immediate notice pursuant to 42 U.S.C. § 6972(b)(1)&(2)).

100. STOP Appendix at 24, 27-125. STOP incorrectly cited 42 U.S.C. § 6973(a) as the basis for its suit. Section 6973(a) authorizes the government to bring imminent endangerment cases in terms essentially identical to 42 U.S.C. § 6972(a)(1)(B)'s authorization of citizens to do so.

in *EWC*. Count II, on the other hand, was presented as derivative of the claims both the government and STOP had raised in *EWC*. It sought to hold Heritage liable for the remedies awarded in *EWC* and for current and future violations of RCRA's hazardous waste provisions at the landfill.¹⁰¹

5. *Second Complaint Against Heritage Dismissed.*—The district court dismissed STOP's complaint against Heritage in July 1990.¹⁰² The court addressed only two of the group's positions, which it held were conclusive. The court treated Count II, the claim based on alleged violations of RCRA's hazardous waste provisions, first. While the court discussed Heritage's contention that the government's involvement in the appeal in *EWC* and the pending *EWC* bankruptcies constituted "diligent prosecution of an action in court" for purposes of 42 U.S.C. § 6972(b)(1)(A), its actual holding sounded as though it was based on principles of res judicata.¹⁰³

Having dismissed count II, the court then dismissed count I, imminent endangerment, because STOP had not complied with the ninety-day notice requirement in 42 U.S.C. § 6972(b)(2)(A).¹⁰⁴ The court acknowledged that STOP had given presuit notices in July of the previous year, just before it filed its first suit against Heritage. However, relying on dictum in *Hallstrom v. Tillamook County*,¹⁰⁵ the court concluded that notice may be given only when no litigation exists among the affected parties.¹⁰⁶ In August 1990, STOP gave a new round of RCRA presuit notices¹⁰⁷ as a prelude to a third suit against Heritage.¹⁰⁸

101. STOP Appendix for Appellant at 47-48. Unlike the claim of imminent endangerment, which specifically covers past actions, 42 U.S.C. §§ 6972(a)(1)(B), 6973(a), Count II's claims, based as they were on 42 U.S.C. § 6972(a)(1)(A), could lie only if it included current or future violations of the hazardous waste provisions. See *Gawaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 58-59 (1987); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1187 (E.D. Cal. 1989).

102. *STOP*, 32 E.R.C. 1154 (N.D. Ind. 1990).

103. Given the breadth of the order in the original EPA action, STOP's allegations that the Heritage Group committed substantially the same violations as those of the original defendants bars STOP from commencing a new action for the same violations as in the EPA action. The EPA (and STOP) continue to pursue the EPA action. Therefore, this citizen suit is barred by 42 U.S.C. § 6972(b)(1)(B). *Id.* at 1156.

104. *Id.*; see *infra* note 181 and related text for the operative language of RCRA § 6972(b)(2)(A).

105. 493 U.S. 20 (1989) ("Retroactive operation of our decision will further the congressional purpose of giving agencies and alleged violators a 60-day nonadversarial period to achieve compliance with RCRA regulations."). *Id.* at 32.

106. *STOP*, 32 E.R.C. at 1156. In *Coalition Against Columbus Center v. New York City*, 750 F. Supp. 93, 95 (S.D.N.Y. 1990), the court noted that a Clean Air Act claim had not been preceded by timely notice. However, since the proper period had run since a post-complaint notice had been given, the court stated it would dismiss the claim

6. *1989 Judgment in EWC Affirmed.*—In October 1990, the Seventh Circuit affirmed all aspects of the district court's judgment in *EWC*, including a number of jurisdictional and procedural rulings important to environmental citizens suits, not the least of which was the court's order permanently closing the landfill.¹⁰⁹ At the end of its opinion, the Seventh Circuit approved, in passing, several other rulings. In one of them, the district court concluded that a winning citizen who had intervened pursuant to 42 U.S.C. § 9613(i) could obtain attorneys fees and expenses, even though § 9613(i) did not so provide.¹¹⁰

7. *Third Complaint Against Heritage.*—By November, 1990, more than ninety days had passed since STOP had given its new round of presuit notices to Heritage. That month, STOP filed its third complaint against Heritage.¹¹¹ Unlike the earlier complaints, it was limited to a claim of imminent endangerment.

8. *STOP's Third Complaint Dismissed.*—The district court dismissed STOP's third complaint in March 1991.¹¹² The district court presented two grounds for dismissing the last of STOP's complaints against Heritage. The first, once again, involved the notice provision in

without prejudice and allow plaintiffs to refile immediately, presumably on the basis of the original notice.

This result probably violates the decision in *Hallstrom v. Tillamook County*: "Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. at 32 (emphasis added). It appears that, where a claim is dismissed because of a bad pre-suit notice, the Supreme Court would require a new and timely notice be given before the new action may be filed. That, at least, is what the district court held as to STOP's second complaint against Heritage. *STOP*, 32 E.R.C. at 1156.

107. *STOP* Appendix at 244-53.

108. *STOP*, 760 F. Supp. 1338, 1339 (N.D. Ind. 1991).

109. In addition to holding that RCRA authorized permanent closure of an interim status facility by judicial decree, the Seventh Circuit held that the court properly balanced the equities, "notwithstanding that it may not have even been required to undertake such a balance. It is an accepted equitable principle that a court does not have to balance the equities in a case where the defendant's conduct has been willful." *EWC*, 917 F.2d at 332. Compare, *N.R.D.C. v. Texaco Refining*, 906 F.2d.934, 939-41 (3d Cir. 1990) (Court balances equities in environmental case.).

The court made clear that a citizen group had the same power as the government to obtain permanent judicial closure of a RCRA facility: "Our conclusion is in no way changed by the fact that it was STOP, and not the EPA, that asked for permanent closure of the Landfill." *EWC*, 917 F.2d at 332 & n.2.

110. *Id.* at 335. The district court had concluded that, "for attorney fee purposes, an intervention under 42 U.S.C. § 9613(i) may be deemed a suit brought pursuant to the citizens suit section." [42 U.S.C. § 6972] *EWC*, 710 F. Supp. 1172, 1248 (N.D. Ind. 1989).

111. *STOP* Appendix at 202-54.

112. *STOP*, 760 F. Supp. 1338 (N.D. Ind. 1991).

42 U.S.C. § 6972(b)(1)(B). While STOP had given more than ninety days notice before filing its complaint, once again, STOP had not done so during a “nonadversarial” period. Whereas the earlier dismissal was based upon the pendency of the original complaint against Heritage, it was the pendency of the court’s nonfinal dismissal of the second complaint against Heritage that destroyed the possibility of a “nonadversarial” period following the August 1991 notice.¹¹³

Unlike the July 1990 dismissal of STOP’s second complaint—when the court refused to consider Heritage’s reliance on *res judicata* as a defense—this time the court held that, because STOP had failed to name Heritage as defendants in the original EPA suit, it was barred from suing them thereafter on the basis of *res judicata*. Relying on a long line of Seventh Circuit authority, the court concluded that STOP’s claim of imminent endangerment, although different in some respects from the claims STOP and the government asserted in *EWC*, was not such as to avoid the Seventh Circuit’s cases defining “the same cause of action”¹¹⁴ and, in fact, constituted nothing more than a change in legal theory.¹¹⁵

C. *The Seventh Circuit’s Decision*

1. *The Seventh Circuit’s Rulings on Res Judicata.*—The Seventh Circuit affirmed the district court’s dismissal of STOP’s third complaint grounded on *res judicata*.¹¹⁶ First, it held that *Federated Department Stores, Inc. v. Moitie*¹¹⁷ “scotches equitable arguments” for exceptions to merger and bar.¹¹⁸ The court then rejected STOP’s arguments that its claim of imminent endangerment was different in kind—was a different cause of action—from claims of hazardous waste violations that both STOP and the government had alleged in *EWC*. In so doing, the court

113. *Id.* at 1342. The dismissal was “nonfinal” because STOP had filed a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, which was not ruled on until January 1991.

114. *See, e.g., Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986).

115. *STOP*, 760 F. Supp. at 1345. Since *res judicata* was available to Heritage, in part due to its “privity” with the *EWC* defendants, in a last ditch effort to impose liability on Heritage, STOP attempted to enforce the March 1989 judgment in *EWC* directly against Heritage. STOP hoped to persuade a court, whether district or appellate, that the very privity that triggered *res judicata* should allow STOP to execute the source of that *res judicata* effect, the judgment in *EWC*, directly against Heritage. The district court rejected the position, *EWC*, 131 B.R. 410, 422-23, and the Seventh Circuit affirmed in emphatic terms. *STOP*, 973 F.2d 1320, 1327-28.

116. *STOP*, 973 F.2d 1320, 1325 (7th Cir. 1992).

117. 452 U.S. 394 (1981).

118. *STOP*, 973 F.2d at 1325.

relied essentially on the definition of "cause of action" in *Car Carriers, Inc. v. Ford Motor Co.*¹¹⁹

Having rejected all of STOP's opening arguments, the court turned to STOP's effort to make use, in its reply brief, of the rule of non-preclusion as to a successful plaintiff who later sues parties in privity with the judgment debtor in Restatement (Second) of Judgments, Section 49. The Court apparently misunderstood STOP's argument: "In its reply brief [STOP] tries to retract the concession in its opening brief that Heritage is the privy of EWC. This comes too late and is more than a little odd, for the assertion that Heritage controlled EWC's actions is the foundation of [STOP's] substantive contentions."¹²⁰ The court then completed the *res judicata* portion of its opinion by referring to an important Supreme Court decision on collateral estoppel: "[T]he sequence here tracks *Montana v. United States*¹²¹ (citation omitted): suit No. 1 by or against the cat's paw, followed by suit No. 2 by or against the cat. Under *Montana*, cat and cat's paw are the same, and the second suit must be dismissed."¹²²

2. *Implications.*—On its face, the opinion holds that any plaintiff must name all defendants in privity with each other, before judgment, or face an insuperable defense of preclusion based on that judgment. Whether the plaintiff won a judgment or lost the suit does not matter. The holding that a plaintiff who won an unsatisfied judgment against parties in privity with nonparties is precluded from suing the nonparties in a second suit is new law in this circuit and everywhere else.

Montana v. United States,¹²³ first, did not involve claim preclusion at all. Second, its facts, and its holding, were limited to a plaintiff—and the party who controlled the plaintiff—who *lost* the first action. *Montana*, therefore, serves as no authority for the result the Seventh Circuit reached in *STOP v. Heritage*.¹²⁴

STOP v. Heritage's holding that a winning plaintiff is precluded by merger from suing another obligor in a later suit thus appears unique—but for the result in *Lowell Staats Mining Co. v. Philadelphia Electric Co.*¹²⁵ *Staats Mining* did involve preclusion of a plaintiff who had won a judgment in the first action from suing, in a second action, a partner of a defendant in the first. However, the Tenth Circuit was careful to note that the first judgment merged the later claim because controlling

119. 789 F.2d 589 (7th Cir. 1986).

120. *Id.* at 1327.

121. 440 U.S. 147 (1979).

122. *STOP*, 973 F.2d at 1327.

123. 440 U.S. 147 (1979).

124. 973 F.2d 1320 (7th Cir. 1992).

125. 878 F.2d 1271 (10th Cir. 1989).

state substantive law rendered partners jointly and severally liable for partnership obligations. The Tenth Circuit did not reject the general rule of nonpreclusion as to successful plaintiffs bringing second actions.¹²⁶

The Seventh Circuit's holding is, in fact, unique. The holding could have a profound effect on all litigation involving multiple defendants. Plaintiffs must invest inordinate resources into finding all possible defendants before filing suit (or at least before judgment). For impecunious plaintiffs, such as citizen groups like STOP, the extra burden may be unbearable. Thus, in addition to the several statutory barriers citizen environmental litigants must face, they now face an all but insuperable practical one. For, under *STOP v. Heritage*, "silent partners" actually responsible for environmental damage will benefit from creating fronts and shadow corporations.

The government played no role in STOP's efforts to impose liability beyond the original *EWC* defendants. Nevertheless, the government should be concerned about the Seventh Circuit's holding on preclusion. The government was the other winning plaintiff in *EWC*. There is nothing about the holding that would not apply in equal measure to a suit the government might bring against defendants such as *Heritage* after a successful, but unsatisfied, first action.¹²⁷

*Interlude No. 3: State ex rel Prosser v. Indiana Waste Systems*¹²⁸—
Indiana Consent Decrees and Indiana Citizen Suits

For years the Gary city dump had been a thorn in the side of Indiana's environmental agency. As early as 1977 the state had sought an injunction against the dump due to various violations of environmental requirements.¹²⁹ Over the next eleven years, the case encompassed another appeal, a permanent injunction (almost immediately vacated), lengthy periods of inactivity, a contempt citation which also was stayed, and, finally, an "Agreed Judgment" between the Indiana Department of Environmental Management (IDEM) and the city in December 1988.¹³⁰

126. *Lowell Staats Min. Co., Inc. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1279 (10th Cir. 1989).

127. The Seventh Circuit described the district court's decision in terms that put the government in the same shoes as STOP: "[B]ecause by [STOP's] own argument *Heritage* is at least a privy of *EWC* (if it is not *EWC*'s alter ego), the final judgment concerning *EWC* in the case the EPA and [STOP] jointly prosecuted forecloses any later litigation against *Heritage* under RCRA." 973 F.2d at 1325.

128. 603 N.E.2d 181 (Ind. Ct. App. 1992).

129. The early history of the Gary dump litigation is described in *City of Gary v. Stream Pollution Control Bd.*, 422 N.E.2d 312, 313-15 (Ind. Ct. App. 1981).

130. *State ex rel. Prosser v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 183 (Ind. Ct. App. 1992); see also *State ex rel. Prosser v. Lake Circuit Court*, 565 N.E.2d 751, 752-53 (Ind. 1991).

Under the agreed judgment, the dump could operate until January 1, 1990 with closure to be completed by June 30, 1991. On January 2, 1990, the city requested the court to stay the Agreed Judgment. By May 30, 1990, the city (under pressure of yet another order compelling compliance with the December 1988 agreement) and Indiana Waste Systems, Inc. (IWS), an operator of solid waste landfills, were negotiating a basis for IWS to manage the dump, subject to state approval.¹³¹ That deal fell through and, on May 31, the city told the court it did not have an agreement with IWS. The City again requested an extension to seek another third-party operator. The court continued the case until June 4, 1990.¹³²

On June 4, the city stated that it had reached an agreement with a competitor of IWS.¹³³ The next day, both the city and the State submitted to the court an agreed judgment, to which was attached an agreement between Mid-American and the city.¹³⁴ The court stayed earlier enforcement orders and set a hearing for July 2. On June 29, IWS filed a motion to intervene together with a complaint.¹³⁵ The court reset the July 2 hearing on the agreed judgment to July 27. On that date, however, the court granted IWS' motion for leave to intervene and delayed the hearing on the agreed judgment. On December 21, 1990, the court rejected the agreed judgment and replaced it with a set of alternative proposed "resolutions of the case."¹³⁶ After the state and city rejected the court's alternatives,¹³⁷ the court entered a judgment that rejected the agreed judgment of June 1990, and reaffirmed a series of earlier orders.¹³⁸ All parties appealed.

131. IWS owned land adjacent to the city's dump which it intended to operate as a landfill once it received a permit to do so. It was also suing the city over pollution of its property allegedly emanating from the city's dump. 603 N.E.2d at 183 n.3; 565 N.E.2d at 752-53.

132. *Prosser*, 603 N.E.2d at 183-84.

133. The agreement was allegedly made with Mid-American Waste Systems of Indiana (Mid-American). *Id.* at 184.

134. *Id.* According to the agreement, "Mid-American was to operate the Dump, and perform remedial activities, and to be responsible for closure and post-closure activities at the Dump." *Id.*

135. IWS' complaint was based on Indiana Code § 13-6-1-1(a). This section provides in relevant part: "a corporation . . . maintaining an office in Indiana may bring an action for declaratory and equitable relief in the name of the state against . . . a state agency, or . . . a city, . . . or an official, . . . for the protection of the environment of Indiana from significant pollution, impairment, or destruction." IND. CODE. § 13-6-1-1(a) (Supp. 1992).

136. *Prosser*, 603 N.E.2d at 184-85 n.4.

137. IWS accepted both.

138. *Prosser*, 603 N.E.2d at 184.

Although several issues were presented on the appeal, only two merit attention here. They involve the status of Indiana environmental consent decrees and how one portion of Indiana's citizen suit statute operates.

1. *Environmental Consent Decrees in Indiana*.—Indiana has long had a clear rule on the extent to which a court may reject an agreed judgment proposed by the parties. In *State v. Huebner*¹³⁹ the Indiana Supreme Court held that, when presented with an agreed resolution of the case, the court does not perform a judicial act. The duty of the court is ministerial—to have the writing entered as agreed upon.¹⁴⁰ Given this established rule, the appellate court had little difficulty rejecting IWS' argument that the court had "discretion to evaluate the substance of the agreement, and, when the trial court finds the agreement unreasonable . . . the court may refuse to approve"¹⁴¹ it.

Although adherence to the rule of nondiscretion was no doubt correct for an intermediate court of appeal, the supreme court might revisit this area of the law when confronted with a proposed agreed equitable decree that would operate over some substantial period of time and require ongoing judicial oversight.¹⁴² As IWS argued, federal cases grant trial courts some discretion to reject proposed consent decrees.¹⁴³ On the other hand, where a specialized agency presents a comprehensive agreement reflective of the agency's expertise, it can be argued that the need for judicial oversight is negligible.¹⁴⁴

2. *Indiana Citizen Suits and Diligent Prosecution*.—Although the court considered IWS' arguments against the June 5 agreed judgment, it also concluded that the trial court had no basis for granting it leave to intervene. Noting that it was presented with a case of first impression, the court concluded that the diligent prosecution bar in Indiana Code section 13-6-1-1(b)(2)¹⁴⁵ left IWS with no interest on which to intervene,

139. 104 N.E.2d 385 (Ind. 1952).

140. *Id.* at 388. See *Ingoglia v. Fogelson Cos.*, 530 N.E.2d 1190, 1199 (Ind. Ct. App. 1988); *Ash v. Chandler*, 530 N.E.2d 303, 306 (Ind. Ct. App. 1988); compare *Hanover Logansport, Inc. v. Robert C. Anderson, Inc.*, 512 N.E.2d 465, 470-71 (Ind. Ct. App. 1987).

141. *Prosser*, 603 N.E.2d at 185-86.

142. *Ingoglia*, 530 N.E.2d at 1199-1200.

143. *E.g.*, *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1984). The court's extent of discretion is circumscribed. See *Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 603 (1st Cir. 1990), *United States v. City of Alexandria*, 614 F.2d 1358, 1360-62 (5th Cir. 1980); *United States v. City of Miami*, 614 F.2d 1322, 1332-33 (5th Cir. 1980).

144. *Alexandria*, 614 F.2d at 1333.

145. This section provides that a citizen or corporation that brings suit under this section "may not maintain the action" unless "the agency that commences an administrative proceeding or a civil action on the alleged pollution, impairment, or destruction does not diligently pursue the administrative proceeding or civil action." IND. CODE § 13-6-1-1(b)(2) (Supp. 1992).

since it failed to show that the state had not diligently prosecuted its case against Gary through the June 5 agreed judgment.¹⁴⁶ Because no Indiana authority was available, the court construed Indiana Code section 13-6-1-1(b)(2)'s diligent prosecution clause in terms of RCRA's diligent prosecution defense¹⁴⁷ and two federal cases.¹⁴⁸ The court refused IWS's invitation to define diligence in a way that "would require courts" to consider the nature and substance of the agency's actions," and to "second guess the agency's motives in determining whether the agency was diligent in its pursuit of the case."¹⁴⁹ Instead, after discussing the federal cases the court synopsized their approaches to "diligence:"

[T]he courts did not consider the substance of the government action, nor did the court in either case speculate or attempt to evaluate possible motives. Rather, the issue of whether the government was diligently prosecuting its case focused on the degree to which the government remained involved in the case after commencing the action.¹⁵⁰

The court concluded that IWS had no standing because the State had maintained an active involvement in the case against the city, including its effort to resolve it by way of the agreed judgment.¹⁵¹ The court's distillation of federal authority appears to be a workable standard.

The decision does not resolve problems with Indiana Code section 13-6-1-1 itself. Several inherent problems with this legislation raise doubts about how many claims will be pursued under it. First, it is somewhat unclear what sort of claims the statute actually covers. A federal court concluded a few years ago that the statute did not control "environmental" claims that fell within the framework of traditional causes of action.¹⁵² The statute will likely be applied to claims which the Attorney General might bring, presumably including attempts to enforce state environmental statutes or regulations or in some other way to defend the interests of the State or substantial segments of its population.

The very size and complexity of such "AG-like" cases is likely to limit the scope of section 13-6-1-1, at least from the point of view of

146. *State ex rel. Prosser v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 187-89 (Ind. Ct. App. 1991).

147. 42 U.S.C. § 6972(b)(1)(B) (1988).

148. *Prosser*, 603 N.E.2d at 187-89. *See Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) and *McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401 (N.D. Ohio 1987), *aff'd*, 856 F.2d 39 (6th Cir. 1988).

149. *Prosser*, 603 N.E.2d at 188.

150. *Id.* at 189.

151. *Id.*

152. *Massa v. Peabody Coal Co.*, 698 F. Supp. 1446, 1452 (S.D. Ind. 1988).

ordinary citizens. Unlike federal citizen suit statutes, section 13-6-1-1 has no provision for an award of attorneys fees or expenses to successful claimants.¹⁵³ It is far more likely, therefore, that Indiana Code section 13-6-1-1, with its pre-conditions to suit, will be chosen as a shield rather than as a sword, as it was in *State ex rel. Prosser v. Indiana Waste Systems, Inc.*

D. *The Seventh Circuit's Decision in STOP v. Heritage Group*

1. *The Seventh Circuit's Ruling on Diligent Prosecution.*—As we return to the Seventh Circuit's decision in *STOP v. Heritage Group*, and specifically its holding on diligent prosecution, it may be well to review what has and has not occurred at the Four County Landfill. First, despite the fact that the district court in *EWS* ordered corrective action "forthwith" in March 1989, in fact no remediation at the landfill has occurred. By March 1991, the district court noted that data disclosed after the trial in *EWC* showed contamination in the groundwater at the landfill to have reached "spectacularly high levels."¹⁵⁴ Second, the district court's corrective action order by which the landfill was to be cleaned up on a rush basis was issued under RCRA, not CERCLA.¹⁵⁵ The CERCLA remedy remains unused—more than four years after the order was issued.

Nevertheless, because the government won *a* judgment, according to the Seventh Circuit, it has diligently prosecuted "an action" that bars any citizen from attempting to achieve what that original action was intended to achieve. This despite the fact that, once the government obtained its unenforceable judgment against the bankrupt *EWC* defendants, it took no action against third parties the citizens attempted to sue. The court's view of diligent prosecution bars *STOP* (and possibly others) from even attempting to achieve remediation.

The court's construction of 42 U.S.C. § 6972(b)(1)(B) is not compelled by its language. The relevant language is: "If the Administrator . . . is

153. Compare 42 U.S.C. § 6972(e) (1988) and 33 U.S.C. § 1365(d) (1988).

154. *EWC*, 125 B.R. 546, 548, 551 (Bankr. N.D. Ind. 1991).

155. *EWC*, 710 F. Supp. 1172, 1241-42; 1248-55 (N.D. Ind. 1989). On March 29, 1989, the district court ordered corrective action on the basis of these findings, The EPA has demonstrated its entitlement to an order that *EWC* implement a corrective action plan in light of the release of hazardous waste constituents into the groundwater beneath the Landfill. . . . Time is of the essence in remedying such contamination; to await the passage of the contamination from the facility's boundaries simply compounds the difficulties. As the EPA noted during final argument, one need not await a catastrophe before ordering corrective action.

Id. at 1241.

diligently prosecuting a civil or criminal action . . . to require compliance."¹⁵⁶ This does not support an interpretation that, in effect, has amended § 6972(b)(1)(B) to provide a citizen suit is barred, if the Administrator is diligently prosecuting a civil or criminal action *or as a result of an action has obtained a judgment against any party*. The plain wording of § 6972(b)(1)(B) seems to mean precisely the contrary. Even though the government *had* obtained a judgment in *EWC* against some parties responsible for violations of RCRA and its regulations, when STOP brought its suits against Heritage, the government was not diligently prosecuting an action that had any bearing on the problem that gave rise to the *EWC* case.

Several Clean Water Act cases¹⁵⁷ have made it clear that earlier litigation by the government does not preclude later citizen recourse to the courts, where the government's action has ceased,¹⁵⁸ or is irrelevant to the problems the citizens wish to address.¹⁵⁹ These cases are consistent with available legislative history. The Clean Water Act's diligent prosecution clause first appeared as section 505 of the Federal Water Pollution Control Act Amendments of 1972.¹⁶⁰ In a senate report,¹⁶¹ the Public Works Committee said of the notice/diligent prosecution language in section 505:

The Committee has provided a period of time after notice before a citizen may file an action against an alleged violator. The time between this and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation.

It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be *inadequate*, the citizen might

156. 42 U.S.C. § 6972(b)(1)(B).

157. 33 U.S.C. § 1365(b)(1)(B) provides that no citizen suit "may be commenced if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance." *Id.*

158. *New York Coastal Fishermen's Ass'n. v. Department of Sanitation*, 772 F. Supp. 162, 165-69 (S.D.N.Y. 1991); *Connecticut Fund for Env't v. L & W Indus.*, 631 F. Supp. 1289, 1291 (D. Conn. 1986); *S.P.I.R.G. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427-28 (D. N.J. 1985). See *United States v. City of Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990).

159. *Hudson River Fishermen's Ass'n. v. Westchester County*, 686 F. Supp. 1044, 1052-53 (S.D.N.Y. 1988) (Citizen's suits are not barred "when it appears that the Government's effort does not address the factual grievances asserted by private attorneys general."). *Id.*

160. *Codified* at 33 U.S.C.A. § 1365 (West 1986 & Supp. 1993).

161. S. REP. No. 414, 92nd Cong., 1st Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745-46.

choose to file the action. In such case, the court would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency's action as *inadequate*, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.¹⁶²

In *Dague v. City of Burlington*,¹⁶³ a case brought under RCRA over a leaking landfill, the State of Vermont had earlier entered into an "Assurance of Discontinuance" in the form of a state court order "requiring compliance with the standards alleged to have been violated."¹⁶⁴ On this basis the defendant argued that the citizen plaintiffs were barred from suit due to the state's diligent prosecution. The Second Circuit held that a citizen could sue the defendant free of the bar in § 6972(b)(1)(B) because, first, the consent decree was not the product of a suit, and therefore was not "an action." Second, the court then assumed the consent decree was "an action" and still upheld the citizens' right to sue. Although the state did some things to enforce the Assurance, its "conduct does not meet the level of diligence that would trigger the prohibition of a citizen suit."¹⁶⁵ The state's later act of filing suit did not constitute diligent prosecution¹⁶⁶ in light of the actual effect of the state's actions and inaction.

2. *Implications.*—If followed by other courts, the Seventh Circuit's clear preference for SuperFund legislation, the "heavy artillery"¹⁶⁷ of cleanup laws, will go far to prevent those without wealth from enforcing any part of RCRA and to moot § 6972. First, while CERCLA does contain a citizen suit provision,¹⁶⁸ its scope is distinctly limited.¹⁶⁹ In

162. Cf., S. CONF. REP. NO. 92-1236, 92nd Cong., 2d Sess. (1972), *reprinted in*, 1972 U.S.C.C.A.N. 3776, 3822-23 (emphasis added).

163. 935 F.2d 1343 (2d Cir. 1991).

164. The State brought suit against the city to enforce the consent decree, after citizens filed the suit at issue on appeal.

165. 935 F.2d at 1353.

166. *Id.* "Beyond this one action, the state made no attempt to ensure compliance with the rest of the Assurance; instead it allowed the City numerous extensions." See *State Ex Rel. Prosser v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 188-89 (Ind. Ct. App. 1992).

167. *STOP*, 973 F.2d 1320, 1324 (7th Cir. 1992).

168. 42 U.S.C.A. § 9659 (West Supp. 1993).

169. Section 9659(a)(1) and (2) allows citizens to bring civil actions "against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter," or "against

Regan v. Cherry Corp.,¹⁷⁰ the court reviewed CERCLA's legislative history bearing on citizen suits, and concluded that CERCLA did not authorize citizen suits to force potentially responsible parties to clean up waste sites:

[R]ather than create a duplicative private action for response costs, Congress intended to establish a citizens suit provision through which the public could prod the executive branch into zealously enforcing hazardous waste laws. In addition, Congress intended that [Section 9659] establish private attorneys general to supplement administrative action and aid in attacking CERCLA violators.¹⁷¹

In *Cadillac Fairview/California v. Dow Chemical Co.*,¹⁷² the Ninth Circuit held that 42 U.S.C. § 9606(a) did not provide a private cause of action for injunctive relief.

Thus, the citizens' role in enforcing CERCLA appears limited. According to the language of § 9659, citizens may only enforce settlements or cleanups *after* they have been agreed to or ordered, or force federal agencies to perform non-discretionary duties. Private parties may not initiate cleanups. CERCLA allows suit by a private party under § 9607(a) if that party has incurred actual response costs.¹⁷³ For a private party who does not (or cannot) actually incur response costs due to a hazardous waste site, prosecution under RCRA is the only federal means to achieve cleanup.

The Seventh Circuit's decision on diligent prosecution reflects a clear preference for large entities and interests, including the government. For example, the court's solicitude for the EPA's ability to make concessions¹⁷⁴ reflects a fear that if a citizen suitor like STOP can assert a claim against a silent partner of a penniless judgment debtor, "fear of this liability will lead" the silent partner "to fight to the death in the initial suit."¹⁷⁵ Why is this a bad result? If a complicated set of interrelated

the President or any other officer of the United States . . . where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter . . . which is not discretionary." *Id.*

170. 706 F. Supp. 145 (D.R.I. 1989).

171. *Id.* at 149. See also H.R. REP. No. 253 (Pt. 3), 99th Cong., 2d Sess. 37 (1985), reprinted in 1986 U.S.C.C.A.N., 3038, 3060.

172. 840 F.2d 691 (9th Cir. 1988).

173. *E.g.*, *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 43-44 (6th Cir. 1988); see also *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1154 (9th Cir. 1989).

174. *STOP*, 973 F.2d 1320, 1324 (7th Cir. 1992) ("An administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation.").

175. *Id.*

business organizations understands that a RCRA citizen plaintiff can prosecute an action even though the federal government has given up enforcing a judgment against one part of the set, perhaps the entire group would come forward and "fight to the death the first action." If the goal of RCRA litigation is to reduce or avoid environmental degradation, why should one be concerned with the fact that parties responsible appreciate the full scope of their exposure?

Finally, as the Four County Landfill litigation demonstrates, the court's solicitude for the government's position of primacy in environmental litigation rests on uncertain foundations. The Four County Landfill demonstrates, as well as any other failed federal enforcement action, how limited the government's resources actually are. It is this disjunction between the reality of the contaminated groundwater flowing from the Four County Landfill in the face of the government's actual enforcement abilities, on the one hand, and the Seventh Circuit's construction of "diligent prosecution," on the other, that calls for, as the court itself implicitly suggested, comprehensive revision of RCRA's citizen suit statute and all statutes like it.

Perhaps the court's decision is a reflection of distaste for environmental citizen suits. Even if one were to accept the argument that citizen suit statutes provide indirect subsidies to established environmental advocates or organizations,¹⁷⁶ STOP's efforts demonstrate that RCRA, at least, because of its essentially localized focus, should remain the tool of local communities to achieve some level of security in the face of environmental assaults on neighborhoods.

3. "*Nonadversarial*" *Presuit Notice*.—In the course of affirming the judgment, the Seventh Circuit described, but did not decide the appropriateness of, the district court's acceptance of a "nonadversarial" presuit notice.¹⁷⁷ No doubt it did not do so because its decision on res judicata permanently barred STOP from claiming imminent endangerment. On the other hand, the appellate court's description of the trial court's decision based on "nonadversariness" was sufficiently benign¹⁷⁸ to signal approval to anyone reading the district court's decision.¹⁷⁹

This notion of "nonadversariness" will not be found anywhere in RCRA's presuit notice provision:

176. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 *TUL. L. REV.* 339, 386-91 (1990).

177. *STOP*, 973 F.2d at 1322-23.

178. *Id.* at 1322. "The district judge dismissed [STOP] II because Heritage still had not received the 90 days of *nonadversarial* time that the statute contemplates." *Id.* (Court's emphasis).

179. *STOP*, 760 F. Supp. 1338, 1340-42 (N.D. Ind. 1991).

No action [for imminent endangerment] may be commenced . . . prior to ninety days after plaintiff has given notice of the endangerment to —

- (i) the Administrator;
- (ii) the State in which the alleged endangerment may occur;
- (iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste.¹⁸⁰

Insertion of a requirement of “nonadversariness” into this otherwise clear statutory language depends, as noted earlier, upon dictum in the Supreme Court’s opinion in *Hallstrom v. Tillamook County*.¹⁸¹ Almost at the end of its opinion the Supreme Court described Congress’ purpose in enacting RCRA’s notice provisions as to give “agencies and alleged violators a 60-day nonadversarial period to achieve compliance with RCRA regulations.”¹⁸² This was an interpretation of what Congress may have intended when it enacted § 6972. Given *Hallstrom’s* rather simple set of facts, the case did not anticipate the sort of long-running and complicated litigation that had engulfed the Four County Landfill for some five years. The issue in *Hallstrom* centered on the fact that neither EPA nor the State of Oregon had been given presuit notice of any kind.¹⁸³ From the point of view of Oregon and the EPA, suit had begun before either could involve itself in “compliance with RCRA regulations.” There was no “adversarial” period during which any form of notice had been given. In *STOP v. Heritage*, all parties were given statutorily sufficient notice “to achieve compliance with RCRA regulations” long before the imminent endangerment claim in STOP’s third complaint was commenced.¹⁸⁴

Hallstrom stands clearly for literal interpretation of § 6972.¹⁸⁵ But does it also stand for the proposition that its *own* language (“nonadversarial period”) — dictum on the facts of *Hallstrom* itself — must also be followed literally? Nothing in *Hallstrom* compels a conclusion of “nonadversariness” as an additional condition precedent to suit. To the contrary, almost immediately after its use of the words, “nonadversarial period,” the Supreme Court said: “Nor will the dismissal of this action have the inequitable result of depriving the petitioners of

180. 42 U.S.C. § 6972(b)(2)(A).

181. 493 U.S. 20 (1989).

182. *Id.* at 32.

183. *Id.* at 23-24.

184. Aug. 10, 1990, when notice of STOP’s third complaint was given, preceded November 20, 1990, the date when the complaint was filed, by 102 days. STOP Appendix at 203-04, 244-53.

185. *Hallstrom*, 493 U.S. at 25-26.

their 'right to a day in court.' (Citation omitted). Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards."¹⁸⁶

In the bulk of cases, § 6972(b)(2)(A) should have the effect of giving those receiving notice an opportunity to render litigation unnecessary. On the other hand, Section 6972(b)(2)(A) does not appear to require an *absence* of litigation before a notice period may begin to operate. That, however, was the effect of the district court's decision on STOP's third complaint.¹⁸⁷ In the Four County Landfill litigation, factually related issues were litigated, nonstop, from 1987 through 1991. Should the existence of "factually related issues" in other cases preclude the possibility of giving citizen suit notice to anyone as to one or more of those related issues? Even if one were to assume that the "factually related issues" must at least involve the same parties, must the citizen suitor dismiss the earlier action before sending the notice? What if the earlier action involved different factual issues or claims under different environmental statutes? Will the Seventh Circuit's broad reading of "cause of action" be applied in this context?

What of the "immediate notice" for violation of hazardous¹⁸⁸ waste provisions allowed by §§ 6972(b)(1)(A) and (2)(A)? In *Dague v. City of Burlington*,¹⁸⁹ the Second Circuit had little difficulty holding that where a case involved claims subject both to the sixty-day notice and the immediate notice called for in § 6972(b)(1)(A) (as well as the ninety-day notice requirement in § 6972(b)(2)(A)),¹⁹⁰ failure to comply with the sixty/ninety day notice requirements was excused by the fact that immediate notice had been given.¹⁹¹

The court set the issue in these terms:

186. *Id.* at 32.

187. *STOP*, 760 F. Supp. 1338, 1342 (N.D. Ind. 1991).

188. *E.g.*, 42 U.S.C. § 6972(b)(2)(A):

(2)(A) No action [for imminent endangerment] may be commenced . . . prior to ninety days after the plaintiff has given notice of the endangerment. . . . [E]xcept that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of [the hazardous waste provisions of RCRA].

189. 935 F.2d 1343, 1349-52 (2d Cir. 1992), *rev'd on other grounds*, 112 S. Ct. 2638 (1992).

190. *Id.* at 1349-50. The case actually involved a fourth notice requirement: the 60-day notice in 33 U.S.C. § 1365(a).

191. *Dague*, 935 F.2d at 1352. The court said, in this context, "Although the Supreme Court's language in *Hallstrom* leans toward a strict application of the notice and delay requirement, rigid adherence in this case, which involves hazardous wastes, would lean too far, for it would circumvent congress's intent in enacting these statutes." *Id.*

[P]laintiffs' hazardous waste claims in Count I (subchapter III violations) could be brought immediately after giving notice to the administrator of the EPA, the state and the alleged violator. The remaining question, therefore, is whether the notice and delay requirements apply when allegations of subchapter III violations are combined with non-subchapter III claims in a single "hybrid" complaint. Neither Congress nor the Supreme Court in *Hallstrom* addressed the problems associated with this type of "hybrid" situation.¹⁹²

The Second Circuit approved the lower court's analysis that, where a hazardous waste claim had been properly filed immediately after notice pursuant to § 6972(b)(1)(A), the plaintiff need neither to defer commencement of the whole action until the longer notice periods had been fulfilled, nor seek leave to amend the complaint to include claims requiring greater notice after their notice periods had run.¹⁹³ It is readily apparent from the Second Circuit's approach to the problem of "hybrid" RCRA claims that, when a claim properly follows an immediate presuit notice, no "nonadversarial" period for the other related claims would be required by either the statute or the holding in *Hallstrom*. At least one district court has followed this aspect of *Dague* as it concluded that a RCRA notice of a claim later added to a then pending action would not be rejected because it had been given during an "adversarial" period.¹⁹⁴

Because the Seventh Circuit did not actually hold STOP must give "nonadversarial" notices under RCRA, this issue, at least, may be open in this circuit for further argument. Given the court's attitude in *STOP v. Heritage*, however, it is likely, in the absence of legislative clarification, that the court will require "nonadversarial" notice in future cases.

E. Epilogue

As can readily be seen, STOP's part in the Four County Landfill ended not with a bang, but with a whimper. But while STOP failed, its travails as it attempted to make use of an environmental citizens' suit statute may help others to avoid the pitfalls that led to its ultimate loss of victory. At the very least, what the courts have done to RCRA's citizen suit statute by interpretation may help Congress to review the

192. *Id.* at 1351.

193. *Id.* at 1351-52.

194. *Zands v. Nelson*, 779 F. Supp. 1254, 1258-61 (S.D. Cal. 1991). The court specifically rejected the district court's decision in *STOP*, 760 F. Supp. 1338, 1340-42 (N.D. Ind.), on this point.

environmental citizen suit so that ordinary people may do what, as in this case, the federal government will not, or cannot, do.

As of February 19, 1993, no remediation of the Four County Landfill has occurred. The State of Indiana is spending, on average, \$90,000 per month to remove leachate from, and repair the eroding surface of, the Four County Landfill. Negotiations among generators of waste deposited at the landfill to achieve some form of cleanup are still ongoing.¹⁹⁵ EWC's bankruptcy appears close to liquidation as it approaches the end of its fourth year, the \$2 million in cash having been consumed in various carrying costs.¹⁹⁶ RUI's motion to collect \$430,000 from EWC's estate based on its secured claim has not been decided yet.¹⁹⁷

III. FLOOD PLAINS REGULATION AND THE TAKINGS CLAUSE

Indiana's current Flood Control Act was enacted in 1987.¹⁹⁸ Pursuant to Indiana Code section 13-2-22-13(a) one may not maintain "in or on any floodway a permanent structure for use as an abode or place of residence."¹⁹⁹ Floodway is defined as, "the channel of river or stream and those portions of the flood plains adjoining the channel, which are reasonably required to efficiently carry and discharge the flood water or flood flow of any river or stream."²⁰⁰ Indiana Code section 13-2-22-13(b) excludes far more than just residences from floodways. It makes unlawful the presence of:

[A]ny structure, obstruction, deposit, or excavation in or on any floodway . . . which will adversely affect the efficiency of, or unduly restrict capacity of, the floodway, or, . . . will constitute an unreasonable hazard to the safety of life or property, or result in unreasonably detrimental effects upon the fish, wildlife, or botanical resources²⁰¹

All such structures, obstructions, etc., are declared by subsection (b) to be public nuisances.²⁰²

195. Telephone Interview with Patricia Carrasquero, Section Chief, SuperFund, Indiana Department of Environmental Management (February 19, 1993).

196. *EWC*, 131 B.R. 410, 416 (N.D. Ind. 1991).

197. *In re Environmental Waste Control, Inc.*, No. S92-00478M (N.D. Ind. 1992).

198. 1987 Ind. Acts ch. 34, § 73 amended by 1990 Ind. Acts ch. 102, § 1; 1990 Ind. Acts ch. 28, § 6; 1991 Ind. Acts ch. 124, § 1. The predecessor to this legislation was enacted in 1945. 1945 Ind. Acts ch. 318, § 15.

199. IND. CODE § 13-2-22-13(a) (Supp. 1992). The prohibition of residences in floodways is subject to a number of exceptions set forth in subsections (a)(2) and (3).

200. *Id.* § 13-2-22-3(12) (1988).

201. *Id.* § 13-2-22-13(b) (Supp. 1992).

202. *Id.*

The Director of the Department of Natural Resources (DNR),²⁰³ is authorized to execute the Act by various means including investigations²⁰⁴ and eminent domain.²⁰⁵ Finally, subparagraph (d) of Indiana Code section 13-2-22-13 provides that the Director of the Department of Natural Resources may issue permits to construct a structure, obstruction, deposit or excavation in a floodway or improve an existing residence (within established limits), if the Director is of the opinion that the,

[A]pplicant has clearly proven that the structure, obstruction, deposit, or excavation will not adversely affect the efficiency of, or unduly restrict the capacity of, the floodway, will not constitute an unreasonable hazard to the safety of life or property, and will not result in unreasonably detrimental effects upon fish, wildlife, or botanical resources.²⁰⁶

In *Indiana Department of Natural Resources v. United Refuse Co., Inc.*,²⁰⁷ the Department refused to grant a permit to the operator of a solid waste landfill to expand its operations adjacent to a stream called "Junk Ditch" in Allen County. After denial of the permit, the landfill operator sought administrative review, which culminated in a final order that confirmed the permit denial. The landfill operator sought judicial review. The trial court reversed the order and the Department appealed. While several issues were presented on appeal, one bears directly on the environmental aspects of the case, although it comes in the form of an administrative procedural issue.

The appellate court concluded that the trial court improperly imposed upon the Department in the administrative hearing the burden of proving that the permit should not be granted. The issue was a matter of first impression.²⁰⁸ The court held that Indiana Code section 13-2-22-13(d)(2) intended that the permit applicant "is to bear the burden of showing that all requirements for a permit's issuance are met."²⁰⁹ The court held that the administrative law judge properly found that the landfill operator had failed to prove "that no harm would come to fish, wildlife or botanical resources"²¹⁰ as a result of its project.

203. The Director of the Department of Natural Resources fulfills these and other licensing functions formerly carried out by the Commission. *Id.* § 14-3-3-24(b) (Supp. 1992).

204. *Id.* § 13-2-22-7 (1988).

205. *Id.* § 13-2-22-10 (1988). See generally IND. CODE §§ 13-2-22-11 and 13-2-22-13(c) (1988 & Supp. 1992).

206. *Id.* § 13-2-22-13(d) (Supp. 1992).

207. 598 N.E.2d 603 (Ind. Ct. App. 1992).

208. *Id.* at 605.

209. *Id.*

210. *Id.* at 606.

The court's decision is consistent with the clear letter of the statute. What is remarkable about the statute itself is the strictness of the burden of proof it establishes when combined with the discretion that the Department has in issuing any permit.

On the other hand, another 1992 case demonstrates that this legislation is not as draconian in effect as some of its provisions may appear on their face. In *State v. Adams*,²¹¹ the defendant owned land that included a stream. Large amounts of rock, gravel, and other debris collected in the stream, especially after heavy rains and consequent floods. Adams excavated this creek rock and gravel but did not excavate the natural creek bed. The State informed Adams that he was required to obtain a permit to continue the excavation and prosecuted him for an infraction under Indiana Code section 13-2-22-13(h)²¹² after Adams refused to do so. The trial court found the defendant guilty but then granted his motion to correct errors. The State appealed. The court of appeals affirmed. It held that since Indiana Code section 13-2-22-13(b) makes unlawful an "excavation" which will "adversely affect the efficiency of, or unduly restrict capacity of the floodway."²¹³ the trial court's conclusion that Adams' conduct "was consistent with the purposes of the statute" was correct:

Adams removed accumulated rocks and debris and did not excavate the natural stream bed. He did not alter the present water course of the stream. Granted, the rocks and debris were placed in the stream by acts of nature and, when he removed them, Adams thereby arguably altered the "natural" course of the stream. However . . . Adams removed obstructions which would likely have increased the likelihood of and damage from a flood. This is the very event the statute seeks to prevent.²¹⁴

Implicit in the court's conclusion is a recognition of priorities among the interests the Legislature intended to promote by way of Indiana Code section 13-2-22-13(b). A floodway has, as its obviously primary function, channeling flood waters so that they do not expand beyond the floodway itself. In order to avoid "unreasonable hazards to the safety of life or property"²¹⁵ most structures or obstructions are either

211. 583 N.E.2d 799 (Ind. Ct. App. 1992)

212. Section 13-2-22-13(h) provides in relevant part:

[A] person who fails to:

(2) obtain a permit under subsection (d); commits a Class C infraction. Each day a person violates subsection . . . (d) constitutes a separate infraction.

IND. CODE § 13-2-22-13(h) (Supp. 1992).

213. *Adams*, 583 N.E.2d at 800.

214. *Id.* at 801.

215. IND. CODE § 13-2-22-13(b).

to be removed or not constructed at all.²¹⁶ As a result of Indiana Code chapter 13-2-22, generally speaking, floodways governed by the Act will tend to be vacant and therefore will be available as a site of fish, wildlife, or botanical resources. However, as the court's decision in *Adams* seems to reflect, natural accretion of flood debris, which may enhance fish, wildlife or botanical resources, will not be given priority over the floodway's ability to receive and enable flood waters to pass through with efficiency and safety. Human needs come first.

However, *McIntyre v. Guthrie*²¹⁷ sheds a good deal of doubt on the trial court's conclusion in *Adams* that the defendant's excavations fulfilled the intent of the Flood Control Act. The first *McIntyre* case involved a DNR permit that authorized upstream landowners' clearing and changing a stream bed. The court held that downstream riparian landowners who claimed the authorized work had injured their property were not required to exhaust administrative remedies triggered by Indiana Code section 13-2-22-22 before suing upstream permit holders because the statute did not provide them with an administrative remedy.²¹⁸ As a result, in the second *McIntyre* case, the downstream owners sued the permit holder for injunction and damages. The court of appeals affirmed an award of damages against the permit holder due to changes that caused an increase in the flow of water resulting in additional property erosion.²¹⁹ The court specifically held that the fact that the upper owners had been granted a permit to clear the banks of the creek relieved them of no liability under the circumstances:

The [upper owners] do not point to, nor does our research reveal, any authority granting the DNR the authority to limit or preclude civil liability simply by approving action under the Flood Control Act. Because this case concerns the [lower owners'] private property rights, as opposed to Flood Control Act violations, the DNR permit provides no grounds for reversal.²²⁰

Possibly had the defendant's excavations in *Adams* caused injury to downstream riparian owners, the trial court's ruling might have been different. *Adams* and *McIntyre* together provide a small example of how environmental cases tend to present greater problems of unintended

216. See also *id.* § 13-2-22-13(a) and (f). (The latter subsection authorizes the director to remove or eliminate any structure, obstruction, deposit or excavation in any flood way meeting certain conditions).

217. 596 N.E.2d 979 (Ind. Ct. App. 1992); *Guthrie v. McIntyre*, 563 N.E.2d 651 (Ind. Ct. App. 1990).

218. 563 N.E.2d at 652.

219. 596 N.E.2d at 981-82.

220. *Id.* at 983.

consequences than other areas of litigation. The answer to this tendency toward diffuse consequences is not necessarily more administrative decision-making; rather, part of the answer might be found in expanding litigant and judicial consciousness to include greater awareness of how environmental issues impinge on, and interact with, the law.

Returning to the *McIntyre* cases, could the downstream owners assert a private claim against the upstream defendants (assuming they had no DNR permit) for having violated Indiana Code section 13-2-22-13(b)? The answer appears to be "no." Although it has no bearing on floodway regulation, but rather involves the extension of riparian rights into the waters of Indiana fresh water lakes, the court in *Zapffe v. Srbeny*,²²¹ was presented with the question of whether Indiana Code section 13-2-11.1-2²²² implied a private cause of action against one who violated it. The court held, both forthrightly and quite broadly, that none of Title 13 provides a private right of action.²²³ On the other hand, a private litigant might make use of the citizen suit provision²²⁴ to prod the State into enforcing the Flood Control Act (or other provision in Title 13) in a particular case.

While the *Town of Beverly Shores v. Bagnall*,²²⁵ does not involve the Flood Control Act, it presents a factual situation that provides an appropriate setting for a discussion of the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.²²⁶ As will be seen, *Lucas* is likely to inspire a good deal of litigation over regulatory takings, including, but by no means limited to Indiana's regulation of floodways.

In *Town of Beverly Shores v. Bagnalls*, the Bagnalls owned a fifty foot-wide, 275-foot-deep lot located on a sand dune which they intended to level in order to build a house. Other houses had been built on fifty-foot-wide lots in the past, but apparently before a 1982 ordinance forbade constructing houses on undersized lots and lots less than 100 feet in width. After the building commissioner denied the Bagnall's application for a building permit, because the lot was undersized and too narrow, they sought a variance from the Board of Zoning Appeals (BZA). The BZA also denied the application. The Bagnalls filed suit and won a judgment in the trial court. Among a number of conclusions adverse to the BZA's refusal to grant a variance, the trial court held that it constituted a taking of the Bagnall's property.²²⁷ The court's conclusion

221. 587 N.E.2d 177 (Ind. Ct. App. 1992).

222. IND. CODE § 13-2-11.1-2 (1988).

223. *Zapffe*, 587 N.E.2d at 181.

224. IND. CODE § 13-6-1-1 (Supp. 1992).

225. 590 N.E.2d 1059 (Ind. 1992).

226. 112 S. Ct. 2886 (1992).

227. 570 N.E.2d 1363, 1368 (Ind. Ct. App. 1991).

was apparently based on the fact that the plaintiff's property was zoned residential and could be used for no other purpose.²²⁸

On the town's appeal the judgment was affirmed, but remanded to allow the board either to "compensate the property owner for the taking or grant the petitioner's requested relief."²²⁹ The dissent argued that the trial court substituted its discretion for the board's decision to preserve the Indiana Dunes.²³⁰ The supreme court granted transfer and reversed.²³¹ The court stated it would avoid the takings issues because the BZA's decision could be supported by another local ordinance dealing specifically with protection of dune property.²³² In that context the court said:

We agree with the trial court that peveling a sand dune cannot be said to be injurious to the public health. Nor can we imagine even the most enthusiastic environmentalist arguing with a straight face that leveling the dune would leave the populace imperiled or undermine public morality. On the other hand, we find nothing "vague" about the BZA's finding that damage to existing topography is contrary to the "general welfare."²³³

In effect, the landowner's permit application did not respond to remediation requirements in an ordinance the BZA did not cite in its own findings.

Having shored up the legislative basis for the BZA's permit denial, the court provided two reasons for not confronting the constitutional issue: first the Bagnalls' failure to provide plans in compliance with the Dune topography ordinance and, second, the principle that courts will not decide cases on constitutional issues when they can be resolved on other grounds.²³⁴ The court explained its ruling:

We do not wish to imply, however, that *any* denial of a building permit for the Bagnalls would pass constitutional muster. We simply cannot tell from the record whether the board, if presented

228. *Id.*

229. *Id.* at 1369.

230. *Id.* at 1370. "The town of Beverly Shores is part of the Indiana Dunes National Lakeshore, a national park extending along the shoreline of southern Lake Michigan. Authorization of the park in the 1960s culminated a 50-year fight to save the dunes from the encroachment of industrialization. The area is a highly unique and richly diverse ecosystem which prompted the poet Carl Sandburg to write, 'The dunes are to the Midwest what the Grand Canyon is to Arizona and the Yosemite is to California. They constitute a signature of time and eternity.'" *Id.*

231. *Town of Beverly Shores v. Bagnall*, 590 N.E.2d 1059 (Ind. 1992).

232. *Id.* at 1062-63.

233. *Id.* at 1063.

234. *Id.*

with a petition to construct a home under plans which would protect the dune, would deny the petition solely on grounds that the lot does not conform to the width and square footage requirements of the 1982 ordinance. . . .

[W]e . . . do not know whether the Bagnalls will be denied *any* use of their property, since they have not sought approval for plans which might mitigate damage to the dune. There is thus no basis upon which to resolve a takings claim.²³⁵

The court's resolution of the issue the Bagnalls presented leaves the takings question quite unclear. If the Bagnalls present the town with plans designed to mitigate adverse impact on a dune within a fifty foot wide lot, will the Town be required to issue the permit or pay the Bagnalls the value of their property?

In *Lucas v. South Carolina Coastal Council*, a case involving development of a barrier island, the Supreme Court held that if a state regulation causes private property to be without economic value, the state will be required to make just compensation under the takings clause, no matter what the State's basis for the regulation is.²³⁶ The Court's decision is not quite so rigorous as first appears, since it took pains to make clear how seldom a regulation should remove all economic value. Quoting Justice Holmes' opinion that began the Supreme Court's jurisprudence on takings by regulation (rather than physical invasion), *Pennsylvania Coal Co. v. Mahon*,²³⁷ Justice Scalia wrote,

And the *functional* basis for permitting the government, by regulation, to affect property values without compensation — that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.²³⁸

How Indiana courts will address regulatory takings claims in view of *Lucas*, of course remains to be seen. A few courts have dealt with regulatory takings claims in terms of *Lucas*.²³⁹ Returning specifically to

235. *Id.* at 1063-64.

236. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-95 (1992). The court does recognize an exception where "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 2899.

237. 260 U.S. 393, 413 (1922).

238. *Lucas*, 112 S. Ct. at 2894.

239. *Rehard v. Lee County*, 968 F.2d 1131, 1134-36 (11th Cir. 1992) (40-acre undeveloped parcel of waterfront land); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1383-90 (N.J. 1992) (quarry); *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. Ct. App. 1992) (lots on "dry sand area" of beach front).

floodway regulation, the Supreme Court in *First Luthern Church v. Los Angeles County*²⁴⁰ dealt with flood plain regulation in the context of a claim of a temporary taking.²⁴¹ The court held that a temporary taking was compensable.²⁴² However, because the case had come up to the Supreme Court on the pleadings, the matter was remanded for a determination whether, in fact, the landowner had been "denied all use of its property for a considerable period of years."²⁴³ On remand the California Court of Appeals concluded that the flood control ordinance was a valid exercise of police power²⁴⁴ and it did not take away all the use of the owner's property.²⁴⁵ It is unclear whether the California court's approach to the property owner's alleged loss of all utility would pass muster under the rule announced in *Lucas*. The court seemed to argue that appropriateness of the flood control measure was so clear that the property owner's interests, whatever they might be²⁴⁶ must take second place. Given the Supreme Court's emphasis on economic values, future plaintiffs may well have greater success against flood plain regulations, no matter how clear the danger or how appropriate the legislation may be.²⁴⁷

IV. CONCLUSION

As Indiana and the rest of the country come to grips with the implications of full economic development, and possibly over-develop-

240. 482 U.S. 304 (1987).

241. The regulation provided that "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon." *Id.* at 307.

242. *Id.* at 317-20.

243. *Id.* at 321-22.

244. *First English Evangelical Luthern Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 898-901 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

245. 258 Cal. Rptr. at 901-06.

246. The court decided the matter, again, on the pleadings. The court described the plaintiff's allegation of loss of use:

True, the complaint *alleges* [the ordinance] denies First English "all use" of Lutherglen. But as will be seen shortly, the ordinance *does not* deny First English "all use" of this property. It does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished or damaged by the raging waters and the construction of new structures. In no sense does it prohibit uses of this campground property which can be carried out without the reconstruction of demolished buildings or the erection of new ones.

Id. at 902.

247. See *Powers v. Skagit County*, 835 P.2d 230, 236 (Wash. Ct. App. 1992) (Dismissal reversed in order to allow property owner to show flood plain regulation rendered his land capable of no economically viable use).

ment in terms of its impact on our physical environment, some basic questions have arisen or at least approach national consciousness. If the fundamental purpose of the Commerce Clause was to achieve a fully developed national economy, and if that full development has been achieved, have we reached the point where we should consider re-defining what commerce is? Has the time come to balance the policy of supporting economic exploitation of natural resources by placing an independent value in natural resources themselves? Is it possible to re-define notions of commerce so that local protection of natural conditions, including natural resources, can be preserved from economic exploitation generated from outside a locality's boundaries? If our system is incapable of flexibility when it comes to a 200 year gloss on the Commerce Clause, then, is it likely that the country will witness increased multi-state regional politics akin to the regional politics that marked the era that preceded the Civil War? Is the Great Lakes organization of states and Canadian provinces a foretaste of things to come?

Moving on to individual citizens' relationship to their environment, whether natural or man-made, have they, with the rise of larger and larger governmental and corporate structures, lost the ability to control any part of that environment? Has the command and control form of regulation the Environmental Protection Agency administered over the last twenty years or so promoted a national sense that the federal government will effectively protect and promote environmental goals and values? If one doubts whether the command and control approach to environmental regulation can ever be "successful" (given the government's past record of incapacity to deal with the multitude of environmental problems its jurisdiction encompasses), why should citizens not have substantially freer access to the courts than the multitude of discordant citizen suit provisions now allow? Is it time for a comprehensively revised uniform environmental citizen suit statute to be enacted?

Finally, turning to the regulation of land, in order to preserve "environmental" values, is the notion of what "property" is at risk? Before this question may be answered, are property interests to be defined in terms of the lifetime of the current owner or can they (or should they) be defined in terms of the property's value over the total time of its potential utility? As this country reaches a point of full economic development and possibly over-development, is it time for the definition of property rights to be reconsidered in terms of an "economic" analysis that is not limited to the current market but, rather, includes, as it did in earlier times, future generations as a present interest group? If it is attempted, can such reconsideration be achieved without harm to the letter and spirit of the takings clause?

1992 was a dynamic year for "environmental" law in Indiana. Indiana, however, merely reflects what is happening across the country.

As traditional notions of “environmental regulation” are shown in the cases to be, in various ways, insufficient to the task, much deeper themes involving cultural and attitudinal changes about established constitutional premises may be approaching the stage of discourse