

“TURNING POINT”: THE FOUNDERING OF ENVIRONMENTAL LAW AND POLICY IN INDIANA?

ROBERT F. BLOMQUIST*

INTRODUCTION

I believe the State of Indiana is at a turning point. The Council of State Governments soon will release a survey that ranks Indiana 50th in both per capita and per industry spending on environmental and natural resource issues. We cannot continue to trail the rest of the nation.¹

The above quotation from Kathy Prosser, Commissioner of the Indiana Department of Environmental Management, set the tone for evaluating environmental and natural resource developments in Indiana during 1993. Despite some notable legislative, administrative, and judicial contributions,² 1993 has been a year characterized by a crisis of environmental law and policy in the state.³ The reason for this problem is traceable to a dispute between Governor Evan Bayh and the Indiana General Assembly over the state budget. This dispute led to an unprecedented action by the Governor and the Indiana Department of Environmental Management (IDEM) when the General Assembly passed Indiana's 1993-95 biennial budget over the Governor's veto: commencement of "the process of returning all permitting functions for the NPDES [National Pollutant Discharge Elimination System] and RCRA [Resource Conservation and Recovery Act] programs to [the United States Environmental Protection Agency] EPA," while "cutting back dramatically in [IDEM's] solid

* Professor of Law, Valparaiso University School of Law; B.S., 1973, University of Pennsylvania (Wharton School); J.D., 1977, Cornell Law School. Vice-Chair, Indiana Pollution Prevention Board. The views of this article are my own and should not be ascribed to the Indiana Pollution Prevention Board. I thank Barton R. Peterson, Chief of Staff to Governor Bayh, Kathy Prosser, Commissioner of the Indiana Department of Environmental Management (IDEM), and IDEM attorney Joyce Martin for their generous assistance in providing background information for this article. I am also indebted to my research assistant, Maureen L. McCarthy, for her excellent contributions to this article.

1. Office Memorandum from Kathy Prosser, IDEM Commissioner, to IDEM Staff (July 28, 1993) at 2 [hereinafter Prosser Memorandum].

2. See *infra* notes 38-103 and accompanying text.

3. The climate of environmental progress in Indiana was quite different a few years ago. Cf. 1989-90: "A watershed in the evolution of environmental law in Indiana" brought about by the crafting of several important legal innovations protective of the state's environmental and natural resources. Robert F. Blomquist, *The Evolution of Indiana Environmental Law: A View Toward the Future*, 24 IND. L. REV. 789, 789 (1991) (footnote omitted). See also, John C. Hamilton, *Environmental Law: The Roles of Commerce, Citizens, and the Land in an Era of Intensifying Competition*, 26 IND. L. REV. 921, 921 (1993) ("Indiana in 1992, was unusually active . . . in terms of expanding the body of environmental law. . .").

waste permitting programs.”⁴ As explained in a letter from Governor Bayh to Carole Browner, Administrator of the U.S. EPA:

The Indiana General Assembly recently passed Indiana’s 1993-95 budget, overriding my veto. Because of major funding deficiencies in that budget, the State of Indiana cannot currently fund and implement important components of some federally-delegated programs.

Specifically, the Indiana Department of Environmental Management (IDEM) cannot meet the staffing and administrative demands of permitting functions in both the Resource Conservation and Recovery Act (RCRA) and the National Pollutant Discharge Elimination System (NPDES) because of inadequate funding. Therefore, I have directed Kathy Prosser, the Commissioner of the IDEM, to work closely with EPA Region V to immediately begin the process of voluntarily returning federally-delegated program responsibilities in these programs pursuant to 40 CFR 271.23(a) (RCRA) and 40 CFR 123.64(a) (NPDES). This letter therefore serves as the notice to EPA required by federal law and regulations.⁵

Holding out a faint prospect for a last-ditch reconciliation with the General Assembly, Governor Bayh ended his letter on a note of hope: “If the budget deficiencies are adequately addressed in the 1994 legislative session, the State of Indiana intends to maintain primacy over these programs. In the meantime, IDEM will continue to prepare the required transfer plan for submission to Region V [of the EPA] in cooperation with [EPA] staff.”⁶

4. Prosser Memorandum, *supra* note 1, at 1.

5. Letter from Governor Evan Bayh to Carole Browner, EPA Administrator (Sept. 8, 1993).

6. *Id.* One newspaper editorial characterized the dispute between the Governor and the Indiana General Assembly as a “[g]ame of chicken on enforcement,” while urging that “[t]he Indiana General Assembly must enact better laws for environmental regulation.” Gary Post-Tribune, Sept. 14, 1993, at A11. Yet, the IDEM Commissioner provided detailed factual support for the administrative “realignment” necessitated by a massive state budget shortfall between anticipated revenue and anticipated expenditures:

This realignment is unavoidable because of the \$4.76 million deficit created when the legislature failed to approve fees for our [state run] water and solid and hazardous waste programs. We depended on these fees when we put together our 1993-95 budget, but a [recent] court decision struck the fees down. Because the legislature didn’t act, we cannot collect fees for our NPDES, RCRA or solid waste programs this year.

In addition to that, the State Budget Agency has ordered additional cuts to make up for the \$370 million deficit in the legislature’s budget. IDEM’s share of those cuts will be \$1 million in the first year and \$3 million in the second year of this biennium, making our total deficit \$7.76 million—more than 30 percent of our general fund budget in fiscal year 1995.

We cannot survive the ultimate \$7.76 million loss without eliminating some of our programs or returning them to the federal government. You know IDEM is stretched too thin already, and that we are constantly criticized because we cannot meet the public’s

Although not without doubt, it is reasonable to assume that, in all probability, a budgetary accommodation will be reached in 1994 between the Governor and the Indiana General Assembly that will allow Indiana to “maintain primacy”⁷ over the NPDES and RCRA programs and to halt the state turnback of its federally-delegated environmental powers. Of more lasting importance, however, is how this case study illustrates the increasing complexity in the continuing evolution of the “cooperative” federalism model of American environmental law.⁸ Indeed, Indiana’s environmental regulatory turnback gambit of 1993 might be a portent for a new game strategy by other states to balance their tight budgets by turning certain environmental responsibilities back to the federal government.⁹

expectations. I can no longer ask you to do more with less. It’s not good for Indiana’s environment and it’s not fair to IDEM employees who want to be effective in their jobs. Prosser Memorandum, *supra* note 1, at 1. See also INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, IDEM FACT SHEET (July 1993) which provided further details of IDEM’s funding dilemma:

IDEM is funded by a combination of state, federal and dedicated funds (fees). During the past few years, environmental agencies across the country have seen a dramatic shift in funding. State and federal funds are making up a smaller percentage of their operating budgets, and the use of dedicated funds is growing.

Three related trends are behind this. First, federal funds are decreasing. Five years ago, the federal government supplied 44 percent of IDEM’s operating budget. In 1993-95, federal funds will account for only 19 percent of the agency’s budget.

Second, although state general funds have increased, their proportion of the agency budget has decreased. Third, due to increased environmental awareness, Congress and state lawmakers have given IDEM 57 new programs to implement—programs that often come without adequate funding.

Those realities have caused IDEM and many other state agencies to increase their reliance on fees to fund environmental programs.

Previously, each Indiana facility paid only \$150 per year for a permit. IDEM established fees to cover the actual costs of issuing environmental permits and monitoring for compliance.

However, a lawsuit by 11 companies challenged our water fees, and a judge ruled in January that the fees were invalid. The ruling also placed our solid and hazardous waste fees in question. We asked for a legislative remedy, but a possible compromise was killed in the General Assembly’s final days.

Id. at 2-3.

7. See *supra* notes 5-6 and accompanying text. See also *Bayh Seeks Environmental Funding*, INDPLS. STAR, Oct. 31, 1993, at B5. (Describes how Governor Bayh wants state legislation passed that would restore IDEM’s authority to charge increased water pollution permits while pointing out the possible adverse consequences to businesses in Indiana—through long waiting times to receive environmental permits. Discusses a task force of business, environmental, and government leaders assembled by Governor Bayh to resolve the problem).

8. See generally 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER at v. (1986) (the concept of evolution “tends to surface regularly, probably because the facts, players, policies, rules, and strategies [of environmental regulation] invariably drift and move when plotted over time”).

9. Professor Rodgers has pointed out that, in the realm of environmental law and policy, legal change is likely to produce future legal changes as the current legal regime “produces its own

dissatisfactions, gives rise to new 'gaps' to be filled, and creates its own demands for more regulation." Robert F. Blomquist, *The Beauty of Complexity* (Book Review Essay), 39 HAST. L. J. 555, 568 (1988) (quoting RODGERS, *supra* note 8, § 1.3, at 17).

A turnback strategy by the states, however, would be against the traditional wisdom that return of federally-delegated environmental authority would be detrimental to the long-term interests of the states' environments and business interests. This line of argument was articulated in a recent white paper prepared by the non-profit Indiana Environmental Institute, Inc., which opposed Indiana's turnback strategy. See, INDIANA ENVIRONMENTAL INSTITUTE, INC., WILLIAM BERANEK, JR., KEEP INDIANA ENVIRONMENTAL PROTECTION PROGRAMS IN INDIANA (July 19, 1993). Among the salient points in the Indiana Environmental Institute's analysis were the following:

Such indiscriminate permanent staff reduction of IDEM would be an option with dire consequence for environmental protection and for economic vitality in Indiana. This would be akin to the U.S. Congress giving legislative authority back to the English Parliament. Not only do we lose the invaluable years of understanding of state environmental issues by our Indiana civil servants, we greatly reduce access to the decisionmaking about our environmental concerns.

* * *

What is now done with many state staff would be accomplished by a much smaller number in a distant federal bureaucracy. What is now done with understanding of the local concerns of citizens, the regulated, and environmentalists, will be done by-the-federal-book with no time or inclination for fitting the spirit of the law to the particular Indiana circumstance. Access to government by most Indiana stakeholders would be greatly reduced. For Indiana to request the program back later would be very expensive. The entire program staff would need to be hired, trained and implementing a parallel state program adequately before EPA could redelegate authority.

Traditionally, in environmental programs the federal EPA operates best at overseeing the state program and paying attention to the hotspots, not performing routine compliance. EPA is best when 1) serving as ombudsman to look into the situation when the state agency is not responsive enough, 2) handling the really big cases needing federal clout or expertise or 3) handling the technically complex appeals.

A state government is best at the remaining ninety percent of the regulatory responsibility: talking with citizens; permitting, inspecting and enforcing the regulated; relating to local governments; communicating with the state legislature; monitoring the environment; day-to-day educating of the regulated and the citizens; and setting and tackling state priorities.

Short-term budgetary gain of removing the state from parts of the environmental protection business would be our long-term loss as a state. Lost would be institutional memory of state staff who know our situation. The sum of knowledge of those who know how to make the complex system work under trying conditions in Indiana is invaluable. Lost would be access to decision-makers. The only way for the federal government to recreate part of the access would be to recreate the staff positions (funded by all of us through the federal government). The federal government itself is underfunded and under great pressure to reduce its size. Expecting the EPA to do what IDEM could do is unrealistic.

Id. at 1-2.

Yet, as T.S. Eliot noted, "As we grow older, the world becomes stranger, its patterns more complicated." T.S. ELIOT, EAST COKER, PART V (1940). From the standpoint of game theory, would not a state be pursuing a rational, gain-maximizing strategy by giving back to EPA, in a "tit-for-tat" approach, some of the enforcement headaches dished out by EPA in the first place without adequate federal funding? See generally RICHARD M. AXELROD, THE EVOLUTION OF COOPERATION (1984) (demonstrating, by computer simulation, the validity of a "tit-for-tat" strategy in maximizing long-

This Article is divided into three major parts. In light of the novelty and legal uncertainty of Indiana's turnback approach—the first voluntary state turnback of federally-delegated environmental powers in the nation—and the plausibility that other states may choose to follow Indiana's lead,¹⁰ considerable space in the first section is devoted to an analysis of the mechanics, timing, and criteria in the federally-defined process of a state's voluntary return of federally-delegated water and hazardous waste environmental regulatory powers. The second section discusses the key Indiana environmental and natural resources statutes enacted into law during 1993 by the General Assembly and Governor Bayh. Finally, the Article concludes by analyzing selective state judicial decisions that interpret Indiana environmental and natural resources law and important federal court opinions that address specific Indiana environmental disputes.¹¹

term gain).

10. I use the word "lead" with a certain sense of irony. From one perspective, Indiana *has* demonstrated national leadership. Regarding environmental law and policy, *see, e.g.*, Public Law No. 105-190, IND. CODE § 13-9-1-1 *et. seq.*, which is considered one of the best state pollution prevention statutes in the country. Blomquist, *supra* note 3, at 809-12. Viewed from another perspective, however, Indiana has become one of the nation's laggards in environmental quality and commitment. As demonstrated in two recent national comparison studies of environmental measurements, Indiana is deficient in many measures of environmental quality and commitment.

According to BOB HALL & MARY LEE KERR, 1991-1992 GREEN INDEX: A STATE-BY-STATE GUIDE TO THE NATION'S ENVIRONMENTAL HEALTH (1991), Indiana ranks 50th (or worst) out of the 50 states in "toxics released to land per square mile," 50th in "release of toxins causing birth defects," 49th in "sulfur dioxide emissions" and 47th in "acid rain." *Id.* at 12. Indiana's "Final Green Index" ranking, according to this publication, is 43rd out of 50 states. *Id.* at 3. "The Green Index is a set of 256 indicators that measure and rank each state's environmental health. Taken together, these indicators describe the condition of things as they are, as well as policies and political leadership in place to make things better." *Id.* at 1.

According to WORLD RESOURCES INSTITUTE, THE 1993 INFORMATION PLEASE ENVIRONMENTAL ALMANAC (1993), Indiana ranks as a state with some of the highest "pollutant releases" in the United States. In this regard, Indiana ranks 4th in "toxics released" (84,400 tons); 8th in "per capita toxics released" (30.45 pounds); 9th in "toxics transferred" (21,400 tons); 7th in "greenhouse gas emissions (CO₂ equivalent)" (217.1 million tons); and 5th in "per capita greenhouse gas emissions" (39.07 tons). *Id.* at 245. Moreover, according to this source of information, Indiana ranks 47th in its "budget spent on environmental and natural resources" (0.68% of total state budget); 49th in "per capita budget spent on environmental and natural resources" (\$9.50); 40th in "per capita budget" for solid waste (\$.02); and 47th in "per capita budget" for water quality (\$0.59).

11. Environmental rulemaking, a critical part of the developing environmental law in Indiana and at the federal level, is beyond the scope of this Article. However, because of its importance, the recent EPA Water Quality Guidance for the Great Lakes System ("Guidance") is briefly mentioned herein. See generally 58 Fed. Reg. 20802-01 (1993). According to the summary of the proposed rule, EPA contends that:

This guidance, once finalized, will establish minimum water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System in the states of New York, Pennsylvania, Ohio, Indiana, Illinois, Minnesota, Wisconsin, and Michigan, including the waters within the jurisdiction of Indian tribes. [The Guidance] proposal also is intended to satisfy the requirements of Section 118(c)(7)(C) of the Clean Water Act that EPA publish information concerning the public

I. NPDES AND RCRA STATE PROGRAM
WITHDRAWALS — MECHANICS AND IMPLICATIONS

A. The NPDES Program

In conformance with the model of cooperative federalism, “the NPDES program anticipated initial federal administration and a gradual turnover of authority to states demonstrating a capacity to administer their own programs.”¹² During the 70s and 80s, states, including Indiana, demonstrated eagerness to administer the NPDES program within their borders by obtaining approval from the EPA.¹³ In order to obtain EPA’s approval, Indiana and other applicant states had to submit a proposed state-administered NPDES regulatory program together with a statement from the State Attorney General “that the laws of such state . . . provide adequate authority to carry out the described program.”¹⁴ Federal approval of state NPDES program administration was easy to obtain;

health and environmental consequences of contaminants in Great Lakes sediment and that the information include specific numerical limits to protect health, aquatic life, and wildlife from the bioaccumulation of toxins.

The proposed Guidance specifies numeric criteria for selected pollutants to protect aquatic life, wildlife and human health within the Great Lakes System and methodologies to derive numeric criteria for additional pollutants discharged to these waters. The proposed Guidance also contains specific implementation procedures to translate the proposed ambient water quality criteria into enforceable controls on discharges of pollutants, and a proposed antidegradation policy for the Great Lakes System.

The Great Lakes States and Tribes must adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with the final Guidance. If a Great Lakes State or Tribe fails to adopt consistent provisions within two years of EPA’s publication of the final Guidance, EPA will promulgate such provisions within the same two-year period.

Id. at 20802.

Legal developments regarding environmental implications of property transfers is beyond the scope of this Article. *See generally* THE LAW AND STRATEGY OF ENVIRONMENTAL TRANSACTIONS AND COMPLIANCE IN THE GREAT LAKES STATES (Robert F. Blomquist, General Ed. 1995) (forthcoming) (Lawyers Cooperative Publishing Co.).

12. RODGERS (Vol. 2), *supra* note 8, at 373. *See generally* 33 U.S.C. § 1342(c) (1993).

13. RODGERS (Vol. 2), *supra* note 8, at 373.

14. 33 U.S.C. § 1342(b) (1993).

The “adequate authority” covers the spectrum of pollution regulatory powers, including permit issuance, enforcement, public participation, discharge of pollutants into treatment works, and the like. The regulations add a good deal of gloss, including particulars on the memorandum of agreement between the State and the Regional administrator. This document is expected to contain provisions on “classes and categories” of permit applications and proposed permits submitted for EPA review, compliance monitoring, and [other] specifications. . . .

RODGERS (Vol. 2), *supra* note 8, at 377-78 (footnote omitted). *See generally* 40 C.F.R. § 123.24 (1985).

some critics “would say that federal power was handed off with nobody there to receive it.”¹⁵

“Many of the same forces that [led] to eventual state program approvals create formidable obstacles to [involuntary] takebacks of authority”¹⁶ by EPA. Indeed, an involuntary “takeback” of federally-delegated NPDES regulatory power from a state by EPA, as opposed to a voluntary “turnback” by a state to EPA, is the predominant paradigm under federal law. However, according to an authority on the subject, an involuntary EPA “takeback” was contemplated to be a rare event:

The procedures for withdrawal of state programs would be suitable for the Nuremberg trials, and will be invoked only upon epochal occasions. A withdrawal of authority, or even the suggestion of it, is so demeaning and disruptive as to be eagerly avoided by both governments that are attuned to the necessities of coexistence. If a withdrawal of authority ever happens, it is likely to be a “media” event chastising the named offender in the interests of a broader program of reform. It is true also that there are lesser alternatives to withdrawal that may accommodate the full range of federal concerns about poor state performance—individual permit reviews. It is in this context that the “adequacy” of state performance will be continuously and concretely judged.¹⁷

For similar reasons—including programmatic disruption, institutional embarrassment, and availability of less radical alternatives—it would seem that a state’s voluntary turnback and EPA withdrawal of previously delegated NPDES regulatory powers also would be unlikely. Yet, the governor of Indiana, faced with industry hostility toward higher permit fees, a fiscal shortfall in the state budget, an unreceptive state legislature, and burgeoning underfunded federal mandates in numerous policy areas, undertook to start what may grow into a contrarian national trend by similarly-situated state governors trying to reconcile the regulatory dilemma of the nineties: voter opposition to higher taxes juxtaposed with exploding and oppressive federal regulatory mandates.¹⁸

15. RODGERS (Vol. 2), *supra* note 8, at 379.

16. *Id.*

17. *Id.* (footnotes omitted). *Cf.*, *Citizens for a Better Environment v. E.P.A.*, 596 F.2d 720 (7th Cir. 1979) (judicial invalidation of EPA approval of the Illinois NPDES program without prior promulgation of citizen participation procedures); *Central Hudson Gas & Elec. Corp. v. United States EPA*, 587 F.2d 549 (2d Cir. 1978) (within the context of a jurisdictional question, held that federal approval of a state’s NPDES authority does not deprive EPA of the power to adjudicate NPDES proceedings pending before it).

18. *Cf.* Thomas P. Wyman, *Bayh: Clinton Interested in Indiana “Streamlining” Effort*, GARY POST-TRIBUNE, Nov. 12, 1993, at B9 (Indiana asking federal government for permission to experiment with a plan to cut back the levels of bureaucracy and red tape people face in the state, involving 199 federal programs from school milk programs to grants for disabled toddlers).

The three-part procedure for Indiana's voluntary turnback of NPDES regulatory powers is delineated, in elaborate detail, in the *Code of Federal Regulations*.¹⁹ First, "[t]he State shall give the Administrator [of the EPA] 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA (such as permits, permit files, compliance files, reports, permit applications) which are necessary for EPA to administer the program."²⁰ While this provision would allow the electronic transfer of computer databases between state and federal offices via an "information highway," the current reality of NPDES recordkeeping in the states would probably necessitate shipment of cartons of paper reports, and mailing of taped parcel packages of state records, creating a troublesome storage problem for federal officials.

The second federal procedure governing Indiana's voluntary transfer of NPDES regulatory power to the EPA requires that "[w]ithin 60 days of receiving the notice and transfer plan, the Administrator shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal government for program administration and/or identify any other deficiencies in the plan."²¹ Third, according to the EPA regulation, "[a]t least 30 days before the transfer is to occur the Administrator shall publish notice of the transfer in the *Federal Register* and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA and state mailing lists."²² One can almost picture an earnest federal official, under these provisions, trying to figure out the newspaper circulation for various newspapers in Indiana and determining "appropriate" versus "inappropriate" mailing lists.

Given the ultimate compliance by Indiana, or another state choosing to turn back NPDES regulatory power to EPA sometime in the future, with the notice and information transfer procedures, and the EPA's fulfillment of the publication of transfer standard, the relevant *Code of Federal Regulations* language implies state *entitlement* to effectuate the transfer. This conclusion, however, is uncertain in light of an analogous EPA regulation addressing "criteria for withdrawal of State Programs on an involuntary basis."²³ This regulation is phrased in discretionary, as opposed to mandatory, language in the following fashion:

(a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the

19. 40 C.F.R. § 123.64 (1992). It should be noted, however, that the regulations provide for a "fudge factor" by allowing the transferring State to take action "in such other manner as may be agreed upon with the Administrator." *Id.* at 123.64(a).

20. *Id.* at § 123.64(a)(1).

21. *Id.* at § 123.64(a)(2).

22. *Id.* at § 123.64(a)(3).

23. 40 C.F.R. § 123.63.

State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.24.

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.²⁴

24. *Id.*

However, according to the Supreme Court of the United States in *New York v. United States*,²⁵ the Tenth Amendment of the Federal Constitution prohibits federal use of the States “as implements of regulation.” Thus, it is unlikely that the EPA would pass constitutional muster if it were to interpret the Code of Federal Regulations’ criteria for withdrawal of state programs as allowing the Administrator to decide not to allow Indiana to voluntarily turn back its federally delegated NPDES regulatory responsibilities.

25. 112 S. Ct. 2408 (1992). *New York v. United States* involved three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The statute was designed to create sanctions against states that refused to deal with low-level radioactive wastes that they produced. The statute provided the states various incentives to tackle this issue. First, states with low-level radioactive sites were authorized to charge gradually increasing fees for waste from states that had not authorized low-level radioactive sites within their borders. Second, states that missed certain deadlines were authorized by Congress to charge higher surcharges and, eventually, denied access in other states’ disposal facilities altogether. Third, the so-called “take title” provision essentially directed states that eventually they would literally own the low-level radioactive wastes produced within their borders if they didn’t cooperate and provide for some type of storage within their territory.

The State of New York did not join a regional compact. It complied with the initial requirements of the statute by enacting legislation providing for the siting of a facility within its borders. But, residents of two counties containing potential sites in New York opposed the state’s choice of location—a classic NIMBY (“Not in My Back Yard”) response. Fearing that it could not comply with the statutory deadlines, New York and these two counties brought suit, contending that the statute was inconsistent with the Tenth Amendment and with the Guarantee Clause of Article IV of the United States Constitution. Justice O’Connor, writing for a majority of the Court, found that “take title” provisions violative of the Tenth Amendment as “infringing upon the core of state sovereignty reserved” by the amendment. *Id.* at 2429. In the alternative, the Court indicated that congressional power to direct the states to regulate in this fashion probably was “outside Congress’ enumerated powers.” *Id.* As noted by Justice O’Connor, “[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the State to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” *Id.*

See also *Board of Natural Resources of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993). In that case, the State of Washington challenged portions of the 1990 Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. §§ 620-620(j), which restricts the export of unprocessed timber from federal and state public lands in western states. The purpose of the restrictions, passed by Congress, was to preserve jobs at domestic sawmills in the face of reduced cutting an old-growth forest, due in part to efforts to protect the habitat of the Western Spotted Owl. The statute provides that “[e]ach state shall determine the species, grade, and geographic origin of unprocessed timber to be prohibited from export *** and shall administer such prohibitions consistent with the intent of Sections 620 to 620(j),” and that “the Governor *** shall *** issue regulations to carry out the purposes” of the Act. The Ninth Circuit held that these provisions violate the Tenth Amendment as interpreted in *New York v. United States*, 992 F.2d at 947.

B. *The RCRA Program*

Professor William H. Rodgers, Jr. provides an interesting backdrop to federal-state interaction in administering the RCRA hazardous waste program by observing:

RCRA is stuck firmly on the “partnership” mode—some would say the statute is committed to a “partnership” that can’t possibly work. Indeed, only one of five basic EPA roles under RCRA could be said to be fully compatible with the “cooperative spirit” of a partnership. This role consists of a variety of support and advice-giving activities that include “the provision of grants, technical assistance and counsel to aid [the States] in solving both generic and specific hazardous waste problems.” Four other statutory roles place EPA prominently in the position of a federal father—as the rulemaker that lays down the minimum standards and the program regulations; as the regulator responsible for acting in states choosing not to develop their own programs; as the overseer with powers to say “yes,” “no,” and “maybe” to state requests for program authorization; and as the enforcer with the authority to initiate enforcement actions even in states with authorized programs. One must remember, of course, that efficiency and consistency are not legislative requirements.²⁶

The dynamics of federal authorization of state RCRA programs and withdrawal of authorization of these programs is analogous to the applicable standards regarding state NPDES programs under the Clean Water Act.²⁷ As explained by Professor Rodgers:

[A]uthorization is very much a one-way street that is granted but almost never withdrawn. [RCRA] gives the Administrator power to withdraw authorization after a “public hearing” and a finding that a State “is not administering and enforcing a program authorized under this section in accordance with requirements of this section.” This takeaway provision closely parallels those found in other environmental statutes. EPA is strongly constrained from invoking blunderbuss sanctions of this sort

26. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES (Vol. 4) (1992) 253 (footnotes omitted). The RCRA authorization process is properly characterized as involving a “crazy-quilt pattern of authorization” by virtue of the “‘non-HSWA’, ‘pre-HSWA’, or ‘base’ RCRA programs where new rules took effect only in non-authorized States and in authorized States only through State adoption of equivalent requirements and the ‘HSWA’ RCRA Programs where the new federal rules are effective immediately in all States.” *Id.* at 260. “HSWA” stands for the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 601(a), 98 Stat. 3221, 3277 (Nov. 8, 1984), enacting Sections 9001-9010 of the Solid Waste Disposal Act, 42 U.S.C. §§ 6991-6991i.

27. See *supra* notes 12-25 and accompanying text.

out of a reluctance to provoke political retaliation or to burn bridges if there is any hope of salvaging the relationship.²⁸

Only one instance of an attempt by EPA to involuntarily withdraw a previously-delegated state RCRA authorization—involving the State of North Carolina—exists to date. That single instance, which ultimately resulted in a determination by EPA not to withdraw North Carolina's RCRA authorization, has been characterized as "an unusual and solemn event in the history of modern pollution law."²⁹ Section 3006(e) of RCRA³⁰ gives the EPA Administrator the power to withdraw authorization of a state program for a state's failure to meet the congressionally-mandated requirements of RCRA. Yet, in the past, "[e]xercise of this blunderbuss declaration of incapacity [has been] hedged by a number of procedural restrictions (public hearing, a ninety-day grace period for correcting identified deficiencies, written findings), and all but obliterated by the political realities and institutional disincentives that dissuade EPA from announcing to the world that a particular state program is an irretrievable failure."³¹

The three-part *Code of Federal Regulations* procedure for Indiana's voluntary turnback of RCRA regulatory powers to EPA which involves notice, information transfer, and publication,³² is identical to the previously discussed NPDES program voluntary turnback provisions under the Clean Water Act.³³ Moreover, with one minor exception, the analogous criteria for involuntarily withdrawing approval of a state's RCRA program by EPA³⁴ is also identical to the NPDES involuntary withdrawal criteria.³⁵

The same constitutional issues implicated in a potential EPA decision refusing to withdraw Indiana's voluntary attempt to turn back its NPDES regulatory authorization under the Clean Water Act³⁶ would also be involved with regard to Indiana's voluntary attempt to turn back its RCRA regulatory

28. RODGERS (Vol. 4), *supra* note 26, at 261-62 (footnote omitted).

29. *Id.* See *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991) (holding that EPA properly decided not to withdraw authorization of North Carolina's program because the state law did not effect a statewide ban on hazardous waste facility siting and treatment options within the State). See also Comment, *The EPA-North Carolina Dispute: The Right of States to Pass Stricter Laws Under the Resource Conservation and Recovery Act*, 8 VA. J. NAT. RES. L. 171 (1988).

30. 42 U.S.C. § 6926(e) (1993).

31. RODGERS (Vol. 4), *supra* note 26, at 278 (footnote omitted).

32. 40 C.F.R. § 271.23 (1992).

33. See *supra* notes 12-25 and accompanying text.

34. 40 C.F.R. § 271.22 (1992).

35. See *supra* notes 12-25 and accompanying text. The one exception is that the RCRA withdrawal criteria omit, for obvious reasons, the NPDES withdrawal criterion involving a state's failure to develop "an adequate regulatory program for developing water quality-based effluent limits in NPDES permits." See 40 C.F.R. § 123.63(a)(5).

36. See *supra* note 25 and accompanying text.

authorization. In short, the courts would probably interpret a negative decision by EPA, refusing to withdraw RCRA authority notwithstanding the Governor's voluntary request, to be violative of Indiana's "core of state sovereignty" protected by the Tenth Amendment.³⁷

II. KEY INDIANA ENVIRONMENTAL AND NATURAL RESOURCES LEGISLATION, 1993

Indiana's 1993 First Regular Session of the 108th General Assembly enacted a few significant bills pertaining to the environment. These bills addressed the following four issues: (a) general regulatory oversight; (b) environmental rulemaking reform; (c) pollution prevention policy; and (d) state implementation of the federal Clean Air Act Amendments.³⁸ The General Assembly also passed a variety of less important environmental and natural resource bills during 1993.³⁹

37. *Id.*

38. *See infra* notes 40-75 and accompanying text.

39. Less important environmental and natural resources legislation passed during 1993 includes the following items. Indiana House Enrolled Act No. 1427, Pub. L. No. 32-1993 (codified at IND. CODE §§ 4-13.4-4-8, 13-7-23-6, 13-7-23-10.3, 13-7-23-11, 13-7-23-12, 13-7-23-13, 13-7-23-17, 13-7-23-18, 13-7-23-19, 13-7-23.2-9.3, & 36-1-9-15 (Supp. 1993)) expands the authority of IDEM in dealing with waste tires. The legislation also requires that before purchasing or procuring waste tires, a purchasing agent must include retread tires in the specifications. Moreover, the disposal of whole waste tires at a solid waste landfill is banned, under this law, after July 1, 1995.

Indiana Senate Enrolled Act No. 295, Pub. L. No. 99-1993 (amending IND. CODE § 8-2.1-18-36) (addresses motor carrier safety, particularly dealing with cargo tanks used to transport hazardous materials. It also sets out requirements for the maintenance, recondition, repair, inspection and testing of cargo tanks).

Indiana Senate Enrolled Act No. 632, Pub. L. No. 165-1993 (amending IND. CODE § 13-7-35 (Supp. 1993)) provides further details of regulation of composting activities resulting from landscaping maintenance and land-clearing projects. However, two exceptions from these regulations are provided by the legislation: (1) those operations that process less than 2,000 pounds of vegetative matter a year, and (2) the temporary storage of vegetative matter where composting is merely incidental to temporary storage.

Indiana House Enrolled Act No. 1078, Pub. L. No. 149-1993 (codified at IND. CODE § 13-1-1.2 (Supp. 1993)) permits an individual to openly burn certain vegetation under prescribed conditions.

Indiana Senate Enrolled Act No. 349, Pub. L. No. 150-1993 (codified at IND. CODE § 13-1-12-8, 13-1-12-9 & 13-7-10-6 (Supp. 1993)) prohibits the Solid Waste Management Board from adopting rules to prohibit, encumber, or arbitrarily restrict vertical expansions of existing permitted landfills. The legislation also requires the Board to adopt rules requiring the applicant for a vertical expansion to submit environmental assessments as part of the vertical expansion application.

Indiana Senate Enrolled Act No. 394, Pub. L. No. 160-1993 (codified at IND. CODE §§ 13-7-8.5-7, 13-7-8.9-24 & 13-7-10-1.5) requires the Solid Waste Management Board to adopt rules allowing a treatment, storage, or disposal facility to reject partial shipments of solid wastes under certain circumstances, while also specifying that new voluntary cleanup provision is intended to provide an alternative procedure to ensure compliance.

Indiana Senate Enrolled Act No. 368, Pub. L. No. 152-1993 (amending IND. CODE § 13-2-6.1 (Supp. 1993)) modifies water resource management standards to mandate the development of a water

A. General Regulatory Oversight

HEA 1646⁴⁰ establishes an Administrative Rules Oversight Committee,

shortage plan by IDNR. The legislation also establishes a water resources study committee to make policy recommendations concerning surface and groundwater in the state.

Indiana Senate Enrolled Act No. 367, Pub. L. No. 153-1993 (codified at IND. CODE § 13-2-11.1-3 and 13-2-15-1 (Supp. 1993)) mandates that a permit—required for activities which lower the water level of any fresh water lake—be posted at the activity site until the pertinent activity is completed.

Indiana Senate Enrolled Act No. 249, Pub. L. No. 154-1993 (codified at IND. CODE § 13-2-22-13, 36-2-16-5, 36-7-4-222.5, 36-7-4-223, 36-9-27-26.5, 36-9-27-45.5, 36-9-27-71, *et al.* (Supp. 1993)) amends the general permit requirements under the Flood Control Act.

Indiana Senate Enrolled Act No. 649, Pub. L. No. 161-1993 (codified at IND. CODE §§ 13-7-8.5-11.3 & 13-7-16.5-9) adds more requirements for a permit for the construction or operation of a hazardous waste facility used to destroy or treat PCBs. A permit may not be issued for the construction or operation of a hazardous waste facility or an ancillary facility unless (1) an applicant has demonstrated that the destruction or treatment technology to be used at the proposed facility has been in operation at an equivalent facility for a time sufficient to demonstrate that 99.9999% of the PCBs processed are destroyed and (2) that a hazardous substance has not been released into another solid, liquid, or gaseous substance by the destruction or treatment.

Indiana Senate Enrolled Act No. 180, Pub. L. No. 155-1993 (codified at IND. CODE § 13-2-22-13, 13-2-22-13.2, 13-2-22-13.3 & 13-2-22-13.4 (Supp. 1993)) provides certain exceptions and modifications to the general requirement in existing legislation that an applicant must obtain a permit from the IDNR before constructing or reconstructing a residence that is located in a floodway.

Indiana House Enrolled Act No. 1503, Pub. L. No. 158-1993 (codified at IND. CODE § 13-7-2-15 *et al.* (Supp. 1993)) addresses various aspects of real property transactions that impact environmental concerns. For example, it requires that IDEM give thirty days' notice regarding its intent to file a lien to recover costs involved in an IDEM response action.

Indiana Senate Enrolled Act No. 195, Pub. L. No. 159-1993 (codified at IND. CODE § 13-7-5-3.3 (Supp. 1993)) requires IDEM property inspectors to give property owners an oral report about any inspection undertaken by IDEM, including any potential violations of a law or a permit issued by IDEM.

Indiana Senate Enrolled Act No. 609, Pub. L. No. 169-1993 (codified at IND. CODE § 13-7-13-3 (Supp. 1993)) eliminates criminal provisions for negligent violation of an environmental statute, rule, permit or order.

Indiana Senate Enrolled Act No. 360, Pub. L. No. 162-1993 (codified at IND. CODE § 13-7-10-2 (Supp. 1993)) requires that IDEM inform National Pollutant Discharge Elimination System (NPDES) applicants, seeking permits to discharge into a stream, that the county drainage board must also approve the application when the stream is a "regulated drain."

Indiana House Enrolled Act No. 1433, Pub. L. No. 163-1993 (amending IND. CODE § 13-7-10.2-1 (Supp. 1993)) amends the "good character" requirements for obtaining a solid or hazardous waste permit from IDEM. Prior law required that a permit applicant must submit a disclosure statement describing civil, administrative, and criminal complaints for environmental violations for the five years preceding the date of application. Pub. L. No. 163 limits the definition of "applicant" to the following: "an individual or a business that receives, for commercial purposes, solid or hazardous waste generated off-site for storage, treatment, processing, or disposal, but does not include an individual or a business that generates solid or hazardous waste, and stores, treats, processes, or disposes of the solid or hazardous waste at a site that is limited to its storage, treatment, processing, or disposal." The legislation makes the revised definition of "applicant" apply retroactively to all permit applications filed after March 19, 1990.

40. Indiana House Enrolled Act No. 1646, Pub. L. No. 12-1993 (portions codified at IND. CODE §§ 2-5-18 & 4-22-2-29 (amending current law), 4-22-2-32 (amending current law) (Supp.

consisting of eight members of the Indiana General Assembly, to receive and review complaints filed by interested persons regarding a rule or practice of a state agency. The legislation authorizes the Committee to review an agency rule, agency practice, or failure by an agency to adopt a rule. Moreover, the Committee is authorized to recommend that a rule be modified, repealed, or adapted.⁴¹

An interesting provision in the legislation contemplates that the Committee will function like an administrative ombudsman between the numerous Indiana state agencies and the General Assembly. The following language is pertinent: "[w]hen appropriate, the committee shall prepare and arrange for the introduction of a bill to clarify the intent of the General Assembly when the General Assembly enacts a law or to correct the misapplication of a law by an agency."⁴² Moreover, sensitive to recent conservative trends in Takings jurisprudence,⁴³ the legislature establishes a non-adjudicative review process by the state Attorney General to consider whether rules adopted by state agencies "may constitute the taking of property without just compensation to an owner."⁴⁴

HEA 1646 represents an intriguing attempt by the General Assembly to exert more control over the diffuse administrative rulemaking apparatus that has become the heart of state government in Indiana.⁴⁵ However, despite its ostensibly noble intentions, the apparent defect with this legislation is the improbability that a small group of part-time state legislators will be able to keep abreast and stay conversant with the flood of regulations promulgated by various state agencies in multiple policy areas. One wonders, moreover, why the existing standing committees in the House and the Senate are incapable of keeping track of administrative developments under their respective jurisdictions through traditional oversight and review activities.

1993)).

41. *Id.* § 1(8)(A)-(C).

42. *Id.* § 1(8)(D).

43. *See generally*, ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 637-58 (1991) (collecting cases).

44. HEA No. 1646, *supra* note 40, § 3(b)(3).

45. *See generally* INDIANA CHAMBER OF COMMERCE, HERE IS YOUR INDIANA GOVERNMENT (29th ed. 1991) (describing the multiplicity of state agencies and boards embedded in Indiana state government).

B. *Environmental Rulemaking Reform*

SEA 302,⁴⁶ which focuses on environmental rulemaking, is interrelated to the general regulatory oversight provisions of HEA 1646.⁴⁷ The apparent motivation by the legislature in passing SEA 302 is its overarching concern for agency accountability regarding environmental policymaking. In this regard, SEA 302 requires greater public notice and involvement in shaping substantive rules passed by boards associated with IDEM (i.e., the Air Pollution Control Board, the Solid Waste Management Board, the Water Pollution Control Board, and the Financial Assurance Board).

Two important components of environmental rulemaking by Indiana's environmental boards have been changed by the new law. First, although "the law previously did not require public involvement before new rules were brought to a board for preliminary adoption," SEA 302 provides "new opportunities for the public to comment on the general subject matter of a proposed rule, and to offer amendments to draft rules prior to any action by a board."⁴⁸ Second, although prior law had "discouraged boards from making major amendments to a rule between its preliminary and final adoption" because of a legal standard that disallowed a final rule from substantially differing from the preliminary rule without being "reprocessed," the new legislation creates an ostensibly more flexible standard: "an amendment is acceptable," under SEA 302, "if it is a 'logical outgrowth'" of the proposed rule and any comments provided to the board at the board meeting/hearing at which the rule is finally adopted.⁴⁹

The "logical outgrowth" test may prove too indeterminate in its application to provide certainty and predictability to Indiana's state environmental boards. To paraphrase Justice Holmes on this point, the development of environmental

46. Indiana Senate Enrolled Act No. 302, Pub. L. No. 34-1993 (portions codified at IND. CODE §§ 4-22-2-13 (amending current law), 4-22-2-21 (amending current law), 4-22-2-31 (amending current law), 4-22-2-32 (amending current law), 4-22-2-37.1 (amending current law), 4-22-2-45, 13-7-7-1 (amending current law), 13-7-7-4 (amending current law), 13-7-7-5 (amending current law), 13-7-7.1, 13-7-20-35 (amending current law) (Supp. 1993)).

47. See *supra* notes 40-45 and accompanying text.

48. Joyce M. Martin, *Environmental Rulemaking in Indiana: It's a Whole New Ball Game!*, 3 INDIANA ENVIRONMENTAL COMPLIANCE UPDATE No. 8 at 1 (Aug. 1993).

49. *Id.* (quoting SEA 302, *supra* note 46, §§ 4 & 10). The specific language of the "logical outgrowth" test in the legislation is as follows:

For Rules adopted under IC 13-7-7.1, the Attorney General . . . shall determine whether the rule adopted by the Agency . . . is a logical outgrowth of the proposed rule as published . . . and of testimony presented at the Board Meeting. . . .

SEA 302, *supra* note 406, § 4.

In determining . . . whether an amendment is a logical outgrowth of the proposed rule and any comments, the Board shall consider whether the language of the proposed rule as published . . . and of any comments provided to the Board . . . fairly apprised interested persons of the specific subjects and issues contained in the amendment, and whether the interested parties were allowed an adequate opportunity to be heard by the Board.

Id. § 10.

policy through rulemaking is often not logic, but experience.⁵⁰ Moreover, in the complex world of environmental policymaking, where each rulemaking “produces its own dissatisfactions, gives rise to new ‘gaps’ to be filled, and creates its own demands for more regulation,”⁵¹ one observer’s respectable “outgrowth,” of regulatory developments flowing from prior hearings, documentary submissions, and staff analyses, may be another observer’s illegitimate “undergrowth” of regulatory actions said to take place from off-the-record discussions, non-disclosed documents, and confidential information sources. A better legislative means for achieving the goal of greater rulemaking flexibility for state environmental boards in making changes of preliminary rules at the final rulemaking stage, while providing maximum opportunity for public input, would have been to create a rebuttable presumption of validity subject only to a clear and convincing showing by an aggrieved party that no reasonable public notice of the likely contents of the final rule was made by the board at a stage of the rulemaking proceeding when the aggrieved party could have presented substantial information that may have modified the final outcome of the rule. This proposal, by clearly focusing on the decisionmaking and notice process, rather than a vague comparison test between the preliminary rule and the final rule,⁵² would be more likely to enhance agency flexibility, while protecting the public’s right to reasonable advance notice of proposed rulemaking than the standard posited by SEA 302.

C. Pollution Prevention Policy

Following what may be termed the “cloning model” of legislative creation of statutorily defined “committees” consisting exclusively of members of the General Assembly,⁵³ the General Assembly constituted a new Environmental Study Committee in HEA 1412.⁵⁴ Presumably, the General Assembly believed that a

50. See generally Oliver Wendell Holmes, Jr., *The Common Law and Other Writings* (Legal Classics: 1982) 1 (“The life of the law has not been logic: it has been experience”).

51. Blomquist, *supra* note 9, at 568.

52. SEA 302, *supra* note 46, § 10 attempts to link the “logical outgrowth” comparison test with a “due process” litmus test: whether the interested party was “fairly apprised” of the substance of the amendment and whether they were afforded an “adequate opportunity to be heard.” This linkage provides little help to the fundamental indeterminacy of the “logical outgrowth” comparison test.

53. See *supra* notes 40-46 and accompanying text (criticizing the need and desirability of a legislative Administrative Rules Oversight Committee consisting exclusively of members of the General Assembly).

54. Indiana House Enrolled Act No. 1412, Pub. L. No. 13-1993 (portions codified at IND. CODE §§ 2-5-22, 4-4-3-8 (amending current law), 4-4-10.9-11 (amending current law), 4-13.4-10, 5-17-6-20.1, 13-1-10.1, 13-7-8.7-13 (amending current law), 13-7-10-1.5 (amending current law), 13-7-13-2 (amending current law), 13-7-20-35 (amending current law), 13-9-1.1, 13-9-4-4 (amending current law), 13-9-4-12, 13-9-4-15, 13-9-5-3 (amending current law), 13-9-7-2, 13-9-7-3 (amending current law), 13-9.5-2-9.3 (amending current law), 13-9.5-2-11 (amending current law), 13-9.5-2-14, 13-9.5-3-1 (amending current law), 13-9.5-3.5-2 (amending current law), 13-9.5-7-1 (amending

committee of its own membership would be more desirable than the preexisting Environmental Policy Commission—consisting of a polyglot of representatives from government, environmentalists, and the general public—which was phased out of existence under the new legislation.⁵⁵ In addition to creating its new Environmental Study Committee, the legislature employed HEA 1412 to address an assortment of miscellaneous environmental concerns including development of recycled materials markets, mandatory government purchase requirements of recycled products,⁵⁶ preferences for recycled goods,⁵⁷ and modifications of the powers of solid waste districts.⁵⁸ From the standpoint of the “big picture,” however, the most important provisions of the new legislation amplified and expanded pollution prevention policy in Indiana.⁵⁹

Adding a new section to the Indiana Code, the General Assembly articulated a number of legislative facts on the need for pollution prevention that are worthy of complete reference:

(1) There are opportunities for industry to reduce:

(A) The use of harmful materials, including toxic industrial materials;

(B) The generation of environmental wastes and pollutants

through beneficial changes in production technologies, materials, operations, and products. These changes offer industry savings in reduced production, regulatory compliance, liability, and insurance costs and contribute to technology innovations and industrial competitiveness. Preventative practices applied at the point of production provide the most reliable and effective form of environmental, public health, and occupational health protection.

current law), 13-9.5-9-2 (amending current law), and 2-5-4 (repealed) (Supp. 1993)).

55. HEA 1412, *supra* note 54, §§ 34-35. The Environmental Policy Commission used to be responsible for the following:

This Commission was created in 1987 to consider long-term policy, making ongoing evaluation of the state's environmental program and [to] present its findings and recommendations in annual reports. Its staff is provided by the Legislative Services Agency. Membership consists of four legislators appointed by the President Pro Tempore of the Senate, four legislators appointed by the Speaker of the House and four lay persons appointed by the Governor (not more than two from the same political party in each case). Two of the Governor's appointments are to represent environmental interests and two are to represent economic interests.

INDIANA GOVERNMENT, *supra* note 45, at 8.

56. HEA 1412, *supra* note 54, § 4.

57. *Id.* § 5.

58. *Id.* § 26. See generally Blomquist, *supra* note 3, at 791-809.

59. HEA 1412, *supra* note 54, §§ 7, 15-23.

(2) The many opportunities for industrial pollution prevention are often not realized because existing rules and the industrial resources these rules require for compliance focus on the handling, storage, transportation, and management of waste and pollutants rather than pollution prevention. Rules existing before January 1, 1993 do not emphasize multimedia reduction in or elimination of:

- (A) The generation of environmental wastes and pollutants; and
- (B) The use of toxic or harmful industrial materials.

As a result, businesses need information, technical assistance, guidance and direction to overcome institutional and behavioral barriers that inhibit the adoption of pollution prevention practices.

Due to the substantial public benefit of pollution prevention policies and programs, the purpose of this [article] is to reduce as expeditiously as possible the use of toxic or harmful industrial materials and the generation of industrial wastes and pollutants at the point of production by means of pollution prevention.⁶⁰

The reference to “article” in the new legislative policy statement is to the Pollution Prevention & Industrial Safe Materials Act of 1990, which was codified at article 9 of Title 13 of the Indiana Code.⁶¹ While legislative attempts to employ precatory “policy findings” have often failed to impress judges,⁶² in light of the active interest of the Governor and the General Assembly in advancing pollution prevention—as discerned by creation of unique institutions like the Indiana Pollution Prevention and Safe Materials Institute and the Indiana Pollution Prevention Board⁶³—these legislative policy pronouncements seem destined to impact future judicial decisions and legal interpretations. This conclusion is buttressed by the new substantive “state environmental hierarchy” established in HEA 1412 as follows:

Sec. 1. The General Assembly recognizes that there are two (2) approaches to environmental protection:

- (1) pollution prevention; or

60. *Id.* § 15 (codified at IND. CODE § 13-9-1.1).

61. IND. CODE § 13-9-1-1 *et. seq.* See generally Blomquist, *supra* note 3, at 809-12.

62. “Precatory” language is language that is “beseeching” or “entreating.” BALLENTINE’S LAW DICTIONARY 975 (1948).

63. See generally Blomquist, *supra* note 3, at 809-12.

(2) waste management, which is also known as pollution control.

Sec. 2. Pollution Prevention consists of economically feasible practices that reduce, avoid, or eliminate the unnecessary use of harmful industrial materials and the generation of industrial wastes, pollutants, emissions, and discharges at the point of production. Pollution prevention practices are limited to the following:

- (1) Product reformulation.
- (2) Input substitution.
- (3) Equipment redesign.
- (4) Improved operations and procedures.
- (5) Closed loop, inprocess recycling.

Sec. 3. Waste management or pollution control consists of environmental protection practices employed after industrial wastes, pollutants, discharges, and emissions have been generated. Waste management or pollution control practices include the following:

- (1) Waste storage and waste transportation.
- (2) Waste treatment, including the following:
 - (A) Detoxification.
 - (B) Incineration.
 - (C) Biological treatment.
 - (D) Land disposal of waste.
 - (E) Conventional waste recycling.
 - (F) Burning waste as fuels.
 - (G) Dispersal of waste to air or water.
 - (H) Dewatering of waste.

Sec. 4. The General Assembly recognizes the following:

(1) Pollution prevention is:

(A) The most reliable and effective form of environmental protection; and

(B) The preferred approach to environmental protection.

(2) Wastes, pollutants, emissions, or discharges that have not been avoided or eliminated by means of pollution prevention at the point of production should be managed or controlled in a manner that has the least adverse impact on human health and the environment.⁶⁴

These new pollution prevention statutory provisions reflect a clear, concise, focused, and well-crafted articulation of the most efficient and effective means for achieving the challenge of “sustainable development” in Indiana. Indeed, “[t]he challenge for companies, governments and the public at large is, how can industry both produce products to meet needs and generate wealth in ways that do not degrade the environment” or exacerbate economic dislocation for some people.⁶⁵ The new overarching pollution prevention policy, now embedded in Title 13 of the Indiana Code, makes Indiana one of the most progressive state governments in the nation in terms of environmental protection theory. This new legislation provides Indiana with the potential to exercise a national leadership role as a catalyst “for the development of shared principles and for long-term industrial [pollution prevention] targets.”⁶⁶ Moreover, a miscellany of other enhancements to Indiana’s pollution prevention infrastructure and institutional framework, passed into law in 1993, reinforced this positive trend.⁶⁷

64. HEA 1412, *supra* note 54, § 7 (codified at IND. CODE § 13-1-10.1-1 to -4 (Supp. 1993)).

65. Nick Robins and Alex Trisoglio, *Restructuring Industry for Sustainable Development* in MAKING DEVELOPMENT SUSTAINABLE: REFINING INSTITUTIONS, POLICY, AND ECONOMICS (Johan Holmberg ed. 1992) 157.

66. *Id.* at 180.

67. See, e.g., HEA 1412, *supra* note 54, § 16 (codified at IND. CODE § 13-9-4-4 (refining the powers and responsibilities of the Indiana Pollution Prevention and Safe Materials Institute); § 17 (codified at IND. CODE § 13-9-4-12) (authorizing the Institute to “conduct and publish studies” regarding a wide assortment of national, state, and local pollution prevention policy issues), § 18 (codified at IND. CODE § 13-9-4-13) (directing the Institute to “identify problems encountered by businesses and governments attempting to implement multimedia pollution prevention programs”); §§ 20-21 (codified at IND. CODE §§ 13-9-4-15, 13-9-5-3) (providing guidelines for Institute publications and public dissemination of information and studies and contents of a pollution prevention manual to be published by the Institute); § 22 (codified at IND. CODE § 13-9-7-2) (stipulating that guidance documents and pollution prevention policies are “not binding on participating businesses”), and § 23 (codified at IND. CODE § 13-9-7-3) (IDEM Division of Pollution Prevention directed to “encourage pollution prevention and not discourage the use of recycling or treatment techniques”).

As the legislatively-crafted, trilateral partnership involving the Indiana Pollution Prevention Board, the Indiana Pollution Prevention and Safe Materials Institute, and IDEM is consummated, and the Institute's first director assumes responsibilities in early 1994, pollution prevention potential in Indiana should start to convert to action.⁶⁸

*D. State Implementation of the Federal Clean
Air Act Amendments*

HEA 1839⁶⁹ implements the federal 1990 Title V requirements of the Clean Air Act Amendments of 1990⁷⁰ regarding state and federally enforceable operating permits for air pollutant sources. The new state legislation authorizes the Indiana Air Pollution Control Board to adopt rules to implement both mandatory and discretionary portions of the Clean Air Act. Significantly, the new state legislation authorizes the Indiana Air Pollution Control Board to adopt rules for the air permit program and establish a fee schedule that will recover the direct and indirect costs of running the program.⁷¹

With the passage of this new legislation, Indiana will soon be issuing and administering air permits to a much larger number of emitters in an even more complex regulatory milieu. Among the changes imposed by the federal government on the states, which led to the passage of Indiana HEA 1839, were that each state administering the federal air program must develop a new operating permit system that can implement the ozone, hazardous air pollutant, acid rain, and other provisions required by the new federal legislation. Congress further mandated that each state program must be fully funded through fees paid by the permittees.

An interesting development in the coming years will be IDEM's response to the additional requirements that become applicable to permitted sources and

68. On January 24, 1994, an Agreement on the Indiana Pollution Prevention and Safe Materials Institute was entered into between Purdue University (the situs for the Indiana Pollution Prevention & Safe Materials Institute, chosen by the Indiana Pollution Prevention Board), the Indiana Department of Environmental Management, and the Indiana Pollution Prevention Board. This Agreement formalizes the legislatively-mandated trilateral partnership between these three parties in implementing pollution prevention policy in Indiana. The Agreement provides, *inter alia*, for the following: coordination of activities and policies; administrative and financial coordination; grants and contracts coordination; policy/legislation/education coordination; cooperation regarding the State Information Clearinghouse and Computer Database; and, confidentiality of data, property rights and products, and copyright prohibition.

At its January 24, 1994 meeting, the Indiana Pollution Prevention Board chose Lynn A. Corson, Ph.D., as the first director of the Indiana Pollution Prevention and Safe Materials Institute. Minutes of Indiana Pollution Prevention Board, January 24, 1994.

69. Indiana House Enrolled Act No. 1839, Pub. L. No. 148-1993 (codified at IND. CODE §§ 13-7-11, 13-7-5-7, 13-1-1-25, 13-1-1-26, 13-7-2-15, 13-7-8.5-4, 13-7-10-2, 13-7-10-2.5, 13-7-10-5).

70. Pub. L. 101-549, Title V, Nov. 15, 1990, 104 Stat. 2690 (codified as amended at 42 U.S.C. § 7661a-f).

71. HEA 1839, *supra* note 69, § 1.

air quality regions under the federal acid rain program,⁷² and the federal ozone non-attainment program.⁷³ On a surface level of analysis, it seems likely that IDEM's federally-mandated strategy for raising sufficient revenue through permit fees on major sources of air pollution will provide the state agency with ample fiscal resources to handle the increased regulatory burdens required by federal legislation. In this respect, IDEM has crafted two preliminary alternative fee schedules for major sources, one of which will provide the basis for rulemaking by the Indiana Air Pollution Control Board. "The first bases a source's annual fee on the estimated cost to IDEM of providing to that source the range of services required by Title V [of the federal Clean Air Act Amendments of 1990]. The second schedule bases fees on [a] pre-established cost per ton of pollution as suggested in the approach described in the federal Clean Air Act."⁷⁴ Upon deeper analysis, however, the attempt to internalize the regulatory costs of administering the expensive new air program by radically shifting the burden to Indiana industrial firms is likely to lead to a variety of defensive reactions. These conceivable reactions could include industrial-led litigation challenging: (a) the reasonableness of IDEM's costs for providing air pollution regulatory services, (b) the accuracy of IDEM's case-by-case assessment of pre-established cost per ton of various air pollutants, and (c) the constitutionality (on takings, due process, and equal protection grounds) of the entire federally-inspired approach.

Unless Congress is willing to complement its rigorous regulatory requirements concerning air pollution with generous revenue sharing payments or grants-in-aid programs, Indiana and other states will likely experience the fiscal cost of more demanding regulation in a manner analogous to its recent difficulties with water and hazardous waste regulation. Ultimately, this scenario could lead to efforts to return additional onerous state regulatory responsibilities to the federal government.⁷⁵

III. CASE LAW DEVELOPMENTS

During the 1993 survey period, Indiana state courts and federal courts, addressing problems that arose within Indiana, issued a number of opinions on a variety of interesting environmental and natural resources issues. Five significant published opinions—two state and three federal—are worthy of further comment.

72. *Id.* § 8.

73. *Id.* § 10.

74. *Title V Air Operating Permit Program*, 6 INDIANA WASTE EXCHANGE No. 5 (Oct./Nov. 1993) at 3.

75. *See supra* notes 1-37 and accompanying text.

A. *State Opinions*

In *Indiana Department of Environmental Management v. Conrad*,⁷⁶ the Supreme Court of Indiana issued an important state administrative law decision which limited the ability of a citizen to challenge the terms of a federal consent order. After the federal consent order, Westinghouse had submitted to IDEM a NPDES water permit application for a landfill water treatment facility. IDEM issued the NPDES permit to Westinghouse, which included the one part per billion (ppb) PCB limit contained in the consent decree. The Conrads unsuccessfully sought to have the administrative law judge set aside the one ppb PCB limitation established in the consent decree. However, after a hearing, the Indiana Water Pollution Control Board adopted the administrative law judge's recommended findings and order to the effect that the IDEM permitting process "was bound by the 1 ppb limitation established in the Consent Decree."⁷⁷

The Conrads, however, were temporarily successful when they filed in the Monroe Circuit Court for judicial review of the board's decision. The trial court held that IDEM was estopped from claiming that the consent decree's one ppb PCB limit was binding, while also holding that the permitting process was not bound by the terms and limits of the consent decree. The trial court "ordered IDEM to reopen the NPDES permitting process and reconvene a hearing . . . to explain to the public that the permit is not bound by the Consent Decree, and to solicit additional public comment about the permit."⁷⁸ The court of appeals affirmed the trial court's decision.⁷⁹

The Supreme Court of Indiana reversed the Court of Appeals and trial court, focusing in large measure on the proper scope of review of an administrative decision. The Supreme Court observed that "[t]he trial court in this case did not accord the decision of the Water Pollution Control Board the deference required" under legislation and case law.⁸⁰ Turning to the substantive grounds, the court noted that "[a]s consent judgments are contractual in nature and [are] to be construed as written contracts . . . we look only to the terms of the decree, which unambiguously establish Westinghouse's duties concerning its treatment facility. Because Westinghouse waived its right to litigate the issues implicated in the [federal court action], the conditions upon which it gave that waiver must be respected."⁸¹ Reinforcing its decision by reference to the inability of parties to "collaterally attack" a valid consent order, the Supreme Court noted as follows: "The Conrads' challenge to the binding effect of the PCB limitations set by the Consent Decree is a collateral attack on the decree because its substance inescapably implicates the decree and because validation of their claim would

76. 614 N.E.2d 916 (Ind. 1993).

77. *Id.* at 918.

78. *Id.* at 919.

79. *Id.*

80. *Id.*

81. *Id.* at 920 (citations omitted).

adversely affect implementation of the decree.”⁸² Moreover, the court reasoned that “[t]o allow a collateral attack contesting the terms of the consent decree in this case ‘would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement of actions alleging violations of federal law.’”⁸³

While the ultimate effect of the decision was to foreclose the Conrad’s ability to challenge the PCB requirement for Westinghouse⁸⁴—arguably unjust since they were unable to intervene in the earlier federal case leading to the consent decree⁸⁵—*Conrad* establishes principles of certainty and predictability important in hazardous waste enforcement law. In concluding that a collateral attack by the Conrads was impermissible, the Indiana Supreme Court expressed a major public policy concern regarding negotiated settlements in environmental litigation with the government. Allowing collateral attacks would only defeat the purpose behind settlements, which is to instigate the cleanup of hazardous contamination. Without a predictable and certain settlement, there would be no incentive for defendants, like Westinghouse, to settle. The *Conrad* decision, therefore, will encourage defendants to negotiate settlements with the government and advance large-scale public interests in predictable settlements to clean up hazardous waste sites.

In *Indiana Department of Natural Resources v. United Refuse Company Inc.*,⁸⁶ the Supreme Court of Indiana issued another important administrative law decision in the area of environmental and natural resources law. The case involved a landfill operator who filed an application to construct an earthen dike on floodway property in order to expand its landfill operations. The Natural Resources Commission (NRC) denied the permit because it found the area to be a storage floodway. United Refuse then requested an administrative review of the denial. An administrative law judge conducted a hearing and issued a report, including proposed findings of fact and a recommended order. The ALJ found that there was a “rational basis” for the Natural Resources Commission’s denial.⁸⁷

United Refuse sought judicial review, arguing that the administrative law judge had not fulfilled his duties by deferring to the Natural Resources Commission’s determination that the area in question was a storage floodway. The trial court vacated the administrative order. Upon appeal by the Commis-

82. *Id.* at 922.

83. *Id.* (citations omitted).

84. *Id.* at 923.

85. *Id.*

86. 615 N.E.2d 100 (Ind. 1993).

87. *Id.* at 100-02.

sion, the Court of Appeals, in turn, reversed the trial court and reaffirmed the Natural Resources Commission's order in its entirety.⁸⁸

In granting transfer of the case, the Supreme Court held that: (1) the property at issue was a floodway within the Natural Resources Commission's jurisdiction, but that (2) the administrative law judge did use an erroneous standard of appellate review at the administrative hearing.⁸⁹ Reasoning that an administrative law judge "performs a duty similar to that of a trial judge sitting without a jury,"⁹⁰ the Supreme Court criticized the administrative law judge in the case at bar for "deferr[ing] to the agency's initial determination by applying a reasonableness standard instead of hearing the evidence as if for the first time."⁹¹

United Refuse is an important case because it pertains to state administrative law and procedure regarding the role of an administrative law judge under Indiana's Administrative Orders and Procedures Act.⁹² The Supreme Court makes it clear in this decision that a state administrative law judge should rule strictly on the evidence presented in the hearing record. In other words, an administrative law judge is not supposed to defer to the agency by giving it the benefit of the doubt. This approach is evenhanded and properly balances the interests of state agencies with aggrieved parties who seek to challenge permit decisions by state agencies. A possible limitation of this approach, however, is that traditional notions of deference to agency expertise may have been given insufficient attention by the court.

B. Federal Opinions

The United States Court of Appeals for the Seventh Circuit, in *Amcast Industrial Corp. v. Detrex Corp.*⁹³ explored the "outer limits" of CERCLA, to resolve the important question of whether CERCLA extends to "any chemical spill that creates an environmental hazard."⁹⁴ As noted in the Court's opinion, written by Judge Posner, "[t]his is an important question that has not until now been the subject of an appellate case. Our conclusion is that the spiller, but not the shipper of the chemical that spilled, is within the Act's long reach."⁹⁵ Specifically, the Seventh Circuit held that: (1) the chemical manufacturer in the case at bar was a "responsible person" under CERCLA for chemicals spilled from its trucks, but that (2) the chemical manufacturer was not a "responsible

88. *Id.* at 102.

89. *Id.* at 102-03.

90. *Id.* at 104.

91. *Id.*

92. IND. CODE § 4-21.5-3-1 *et. seq.*

93. 2 F.3d 746 (7th Cir. 1993).

94. *Id.* at 747 (citing 42 U.S.C. § 9601 *et. seq.*).

95. *Id.*

party” under CERCLA for chemicals spilled from trucks owned by a common carrier it had hired. In classic Posnerian style, the opinion reasoned:

Detrex was a responsible person with respect to the TCE [hazardous waste] that was spilled by trucks owned by Transport Services only if by hiring Transport Services to carry the stuff to the Elkhart plant, Detrex “arranged with a transporter for transport for disposal or treatment” of TCE. . . . Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart’s premises. Although the statute defines disposal to include spilling, the critical words for present purposes are “arranged for.” The words imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart’s storage tanks. It did not arrange for spilling the stuff on the ground.⁹⁶

The *Amcast* court continued its analysis by remarking about problems of statutory construction.

Statutes sometimes use words in nonstandard senses, and do so without benefit of a definitional section. . . . Elkhart argues that we can tell that Congress was doing that here because the provision in question speaks of “disposal” and we know that “disposal” includes accidentally spilling. But since context determines meaning, the same word can mean different things in different sentences—to monopolize a conversation doesn’t mean the same thing as to monopolize the steel industry—even in the same statute, especially when the statute does not attempt to impose a single meaning by defining the word. *In the context of the operator of a hazardous-waste dump, “disposal” includes accidental spillage; in the context of the shipper who was arranging for the transportation of a product, “disposal” excludes accidental spillage because you do not arrange for an accident except in the Aesopian sense illustrated by the staged accident.*

The words “arranged with a transporter for disposal or treatment” appear to contemplate a case in which a person or institution that wants to get rid of its hazardous wastes hires a transportation company to carry them to a disposal site. If the wastes spill en route, then since spillage is disposal and the shipper had arranged for disposal—though not in that form—the shipper is a responsible person and is therefore liable for clean-up costs.

But when the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product,

96. *Id.* at 751.

*he is not a responsible person within the meaning of the statute and if a mishap occurs en route his liability is governed by other legal doctrines. It would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products.*⁹⁷

Amcast is a significant decision because it defies a trend toward extending liability for all Superfund-related claims. It is just and equitable under the statute that shippers of hazardous materials fall outside the scope of CERCLA.

In another important federal decision issued during the comment period, the United States District Court for the Northern District of Indiana in *United States v. Bethlehem Steel Corp.*⁹⁸ held that the government had established violations by Bethlehem of the Resource Conservation and Recovery Act and Safe Drinking Water Act.⁹⁹ In determining appropriate penalties, the Court concluded that the violations of the underwater injection control permits warranted civil penalties of \$4.2 million and that violations with respect to the landfill on the premises warranted a civil penalty of \$1.8 million.¹⁰⁰

In an extraordinary opinion, representing a *tour de force* of well-reasoned federal environmental penalty principles, including awarding penalties for "economic benefit" enjoyed by a violator while violating permit standards, Judge Lozano concluded that Bethlehem had not made sufficient efforts to comply with environmental standards at its Burns Harbor steel mill. This decision represents an important enforcement milestone in Indiana, particularly for the environmentally stressed Northwestern part of the state.¹⁰¹

*United States v. SCA Services of Indiana Inc.*¹⁰² is the third significant federal case arising out of Indiana to be decided during the review period. In an action brought by the government pursuant to CERCLA, the third party plaintiff and fourteen third-party defendants moved for approval of settlements, and nonsettling third party defendants filed objections. The United States District Court for the Northern District of Indiana held, however, that private parties who settle their CERCLA claims with other private parties are free from claims for contribution by nonsettling parties, albeit liability of nonsettling parties would be reduced by the amount of the settling parties' equitable share of liability, rather than by the actual dollar amounts of the settlement.¹⁰³

97. *Id.* (citations omitted) (emphasis added).

98. 829 F. Supp. 1047 (N.D. Ind. 1993).

99. *Id.* at 1050-51 (citing 42 U.S.C. § 6901 *et. seq.* & 42 U.S.C. § 300f *et. seq.*).

100. *Id.* at 1054-60.

101. See generally PAHLS, INC., *THE ENVIRONMENT OF NORTHWEST INDIANA: CONTRASTS AND DILEMMAS* (1993).

102. 827 F. Supp. 526 (N.D. Ind. 1993).

103. *Id.* at 535-36.

SCA is a significant CERCLA case from a public policy perspective, because it will foster settlement agreements in Indiana by providing defendants with a measure of finality which, in turn, makes settlements more desirable. While CERCLA is silent as to whether claims for contribution are barred when private parties settle with other private parties, the *SCA* court found that in the furtherance of public policy such settlement should be encouraged. This decision is consistent with express statutory provisions in CERCLA protecting settling parties and, to the extent that it goes beyond express statutory language, furthers the policy of CERCLA in fostering cleanup agreements and shifting the cost of cleanups to nonsettling parties, subject to equitable adjustment of liability.

IV. CONCLUSION

Although 1993 saw a ferment in legislative activity dealing with environmental and natural resources issues, and state and federal courts were vigilant in protecting environmental interests with due regard for the procedural rights of the parties, the "big story" of 1993 was the attempt to turnback previously-delegated federal water and hazardous waste administrative responsibilities to the United States Environmental Protection Agency. These developments raise the question of whether Indiana is foundering, despite past progress.

Although Indiana has encountered political turbulence, or crisis, in seeking to carry out its environmental protection responsibilities in tandem with its responsibilities to balance the state budget, it is inappropriate at this juncture to decide the foundering issue in the affirmative. For the time being, at least it can be said that the people of Indiana expect their elected and appointed state and federal government officials to strive to achieve sustainable development so economic progress is not sacrificed to long-range degradation of the human and natural resource bases of the state. No matter what course is ultimately chosen, the next few years will be critical in the environmental history of Indiana.

