IN SEARCH OF ACCOUNTABILITY: THE LEGISLATIVE RE-INVENTION OF ENVIRONMENTAL LAW AND POLICY IN INDIANA

ROBERT F. BLOMQUIST*

INTRODUCTION

For we must consider that we shall be as a City upon a hill. The eyes of all people are upon us. Soe that if we shall deal falsely . . . in this work we have undertaken . . . we shall be made a story and a byword throughout the world.[1]

ac•count•a•ble...adj. 1. Answerable. 2. Capable of being explained. — See synonyms at *responsible*.[2]

Cries of inadequate resources will no longer be acceptable. Everyone will be watching the [Indiana Department of Environmental Management]—both opponents and proponents. It's a tremendous burden.[3]

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* 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. My thanks go to Miriam Dant, executive assistant to Governor Evan Bayh, for her generous assistance in providing background information for this Article. I also thank Indiana Department of Environmental Management attorney Joyce Martin for her comments on an earlier draft. I am also indebted to my research assistant, Christina Gackenheimer, for her excellent contributions to this Article. The research and writing of this Article was conducted pursuant to a research grant funded by Valparaiso University School of Law.

1. ROBERT C. WINTHROP, LIFE AND LETTERS OF JOHN WINTHROP 19 (1867), *quoted in* CONGRESSIONAL RESEARCH SERVICE, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 302 (Suzy Platt ed., 1989) [hereinafter CONGRESSIONAL RESEARCH SERVICE DICTIONARY]. John Winthrop was Governor of the Massachusetts Bay Colony when he penned the quoted statement, part of a discourse entitled *A Modell of Christian Charity*, written aboard the ship *Arbella* during his voyage to Massachusetts in 1630. *Id.*

> President-elect John F. Kennedy said, in an address to the Massachusetts Legislature on January 9, 1961: I have been guided by the standard John Winthrop set before his shipmates . . . 331 years ago, as they, too, faced the task of building a government . . . . "We must always consider," he said, "that we shall be as a city upon a hill—the eyes of all people are upon us." Today the eyes of all people are truly upon us—and our governments, in every branch, at every level, national, State, and local, must be as a city upon a hill—constructed and inhabited by [people] aware of their grave trust and their grave responsibilities.

107 CONG. REC. A169 app. (1961), *quoted in* CONGRESSIONAL RESEARCH SERVICE DICTIONARY, *supra*, at 302.

2. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 9 (1969) (certain typeface changed).

3. Kyle Niederpruem, *Environmental Agency Feeling Heat to Improve*, INDIANAPOLIS STAR, Mar. 13, 1994, at A1 [hereinafter *Feeling Heat*] (quoting Representative Brian C. Bosma (R-Indianapolis), as he described the pressure and expectations on the Indiana Department of Environmental Management (IDEM) to improve its performance as a result of increasing funding in the compromise legislation).

In all activities of our Agency, we strive to:

- Be professional, accountable, and deserving of the public's trust.
- Be fair and consistent.
- Continuously improve the products and services we provide to protect our environment.
- Communicate our intent and rationale clearly, both within our Agency and to the people we serve.[4]

The political branches of Indiana State government—the General Assembly and the Governor—turned a monumental policy corner during 1994 by agreeing to substantially increase funding of the Indiana Department of Environmental Management (IDEM) in exchange for increased Agency accountability. Without a doubt, this development—the result of contentious and extended compromise—was one of the key legal stories of the year in Indiana, shaping and influencing vast stretches of the environmental law and policy landscape.[5] A major consequence of the funding-for-enhanced-accountability deal

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4. IDEM, A STRATEGIC COURSE FOR THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT 3 (1994) [hereinafter IDEM STRATEGIC PLAN—1994].

5. This development was extensively analyzed and interpreted in the popular and business presses. *See Feeling Heat, supra* note 3, for a thorough political discussion of the dynamics behind the legislation. As noted in that article:

> Before the legislature convened in January [1994], Gov. Evan Bayh had put the U.S. Environmental Protection Agency on notice: Without adequate funding, three of the states' major regulatory programs would be returned to the federal government.
>
> Using the EPA as bogyman paid off.
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> Though many lawmakers scoffed at the threat, the legislature did approve a funding bill [signed by the governor]. Industries, cities and towns also agreed to pay higher permit fees to discharge their pollutants into Indiana's air, water and land.
>
> Well-known national rankings that put Indiana last and least when it comes to investment in the environment now might change. But it won't be an overnight change, and environmental officials say this funding certainly isn't a permanent fix to all ills.
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> . . . .
>
> At least three groups—two created by recent legislation—will be watching the agency's performance. Also, the agency must publish a report on its progress by January 1995.
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> The governor called that process "overseers overseeing overseers."
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> "It's an additional burden, but one that's understandable . . . I welcome accountability. I want the process to work. All I care about is the end result," Bayh said.
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> Many lawmakers believe that expectations for the agency to suddenly become functional are unrealistic. Nearly two years could pass before enough people are hired and trained to improve the way the agency had operated during its leaner years under two different political administrations.
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> . . . .
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> "The entire agency has a huge influx of cash from here on out," said Blake R. Jeffery, environmental affairs director for the Indiana Manufacturers Association, one of the agency's

was the State of Indiana's retention of "primacy" over federally-delegated program responsibilities in issuing Resource Conservation and Recovery Act (RCRA) permits for hazardous waste management and National Pollution Discharge Elimination System (NPDES) water permits, instead of becoming the first state in American environmental history to voluntarily return to the United States Environmental Protection Agency (EPA)

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most vocal critics. The manufacturers, like other industry groups that lobbied for the funding bill, will be watching carefully.

. . . .

Industry groups and lawmakers insisted on accountability measures. If they were going to fund the agency with higher permit fees, then they wanted guarantees money would be well spent. Translation: Better service and less heavy-handed enforcement.

Starting July 1, 1995, the agency must be able to meet new permit deadlines. A backlog in waste water and solid waste programs has hurt Indiana industry, lobbyists complained. Businesses rely on state permits to be issued in a timely manner to operate or expand.

After that date, if new permit deadlines aren't met, other options kick in, such as allowing the company to hire an outside consultant to review and approve the permit. Regular reports on permit activity must also be filed with the governor and the legislature.

Industry groups loaded up the bill with favorable measures early in the legislative session. They argued for broad amnesty provisions that would have allowed companies to build, operate and pollute without any state oversight. Those kinds of provisions brought swift reaction from [IDEM Commissioner Kathy] Prosser, who testified that they weren't in the best interests of the state.

Eventually, much of industry's wish list was scaled back. But not enough for environmental groups. Many continue to believe that measures in the funding bill have significantly hobbled the agency. They feel so strongly that many are threatening to petition the EPA to take state programs back.

Lack of support from environmentalists has been one of the governor's major disappointments.

"To say a doubling of funding is not progress, well, I have a difference of opinion," Bayh said. "This is not an all or nothing business. Government is the art of the practical. There has to be give and take. It's the nature of democracy."

The money pooled from permit fees, state and federal funds more than doubles funding in three program areas: solid and hazardous waste and waste water.

Feeling Heat, *supra* note 3 at A1, A6. *See also Activists Target New Law*, GARY POST-TRIBUNE, Mar. 4, 1994, at B1 ("Indiana environmentalists have asked the federal government to strip the state of its environmental authority in advance of a new law they say will further weaken an already ineffective agency."); *Environmental Push*, COURIER-JOURNAL, Jan. 29, 1994, at 14A ("After much hand-wringing and a high-powered task force study, the legislature is ready to reinstate the agency's fee collecting authority and give it more money. The Governor triumphantly proclaimed that Indiana may again be up to managing its own environmental affairs."); *IDEM Leader Seeks, But Doesn't Find, Some Environmental Empathy*, GARY POST-TRIBUNE, Apr. 12, 1994, at A-6; Kyle Niederpruem, *Environment Bill Compromise Reached*, INDIANAPOLIS STAR, Jan. 27, 1994, at B1 ("The funding provisions of the bill . . . [were] not contested. That's because a multi-interest task force recommended the same amount of funding [$18.7 million a year] to the legislature . . . ."); *Senate Bill 417 Moves Closer to Passage*, 5 LEGIS. REP., Feb. 18, 1994, at 1 ("Having voiced strong opposition to the bill when it was being considered by the Senate, IDEM now views SB 417 as a reasonable compromise.").

previously delegated environmental powers.[6] Another significant consequence of the legislative compromise is the sunnier prospect for IDEM to be able to achieve some of its ambitious goals for improving the quality of the Hoosier environment, as reflected in its strategic plan promulgated in 1994.[7]

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6. *See generally* Robert F. Blomquist, *"Turning Point": The Foundering of Environmental Law and Policy in Indiana?*, 27 IND. L. REV. 1033, 1033-45 (1994). *See also infra* notes 11-12 and accompanying text.

7. *See* IDEM STRATEGIC PLAN—1994, *supra* note 4. As optimistically noted by IDEM Commissioner Kathy Prosser:

> Actions of the 1994 General Assembly will enable the Indiana Department of Environmental Management to provide better environmental protection than ever before.
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> . . . .
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> . . . IDEM . . . will begin to implement our strategic plan, with goals that include pollution prevention, reducing toxic emissions, meeting surface water and air quality standards, reducing solid waste, protecting groundwater and cleaning up contaminated sites.

2 IND. ENVIR. 2 (1994) [hereinafter IND. ENVIR.] (INDIANA ENVIRONMENT is a newsletter published by IDEM). In general, IDEM selected "eight environmental priorities": to "prevent pollution," "reduce toxic emissions," "meet air quality standards," "meet surface water quality standards," "target Northwest Indiana," "reduce solid waste," "protect groundwater," and "clean up and prevent contaminated sites." IDEM STRATEGIC PLAN—1994, *supra* note 4, at 4 (capitalization in text altered). IDEM's first-mentioned specific strategic plan component—"prevent[ing] pollution"—provides an insight into IDEM's policy priorities for the next several years. IDEM states:

> *Status:* Traditionally, environmental management techniques and regulatory policies have been geared toward the treatment and disposal of toxic wastes. This form of environmental protection is extremely costly for manufacturers in terms of compliance and handling. Secondly, this "end-of-pipe" approach may result in the shifting of wastes from one environmental medium to another (i.e., air to land) and it often fails to take into account the heavy burden placed on the environment as a whole. By preventing pollution, however, industries can avoid the regulatory burdens of treatment and disposal because the waste is never created. Also, industries can gain operating flexibility and avoid civil liability by preventing pollution. More importantly, preventing pollution is the best form of environmental protection. Therefore, we will:
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> A. Continue developing policies and programs to reduce the generation of municipal wastes, toxic materials and hazardous wastes and pollutants, by means of industrial pollution prevention.
>
> B. Continue to increase coordination between the divisions of IDEM and between IDEM and other government regulatory programs with responsibilities and duties related to toxic materials and environmental wastes.
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> C. Continue to operate and expand a state information clearinghouse for pollution prevention.
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> D. Continue providing technical assistance both within IDEM and to other government regulatory programs, local and state government entities and businesses.
>
> E. Continue providing pollution prevention awards, education and training to businesses, and developing publications on pollution prevention techniques.

IDEM STRATEGIC PLAN, *supra* note 4, at 4. *Compare* IDEM STRATEGIC PLAN—1994, *supra* note 4, at 6 (In order to "reduce toxic releases in the state as the second-mentioned IDEM priority, and to meet Indiana's goal of reducing releases of industrial toxics into the environment by 50 percent by the end of 1995—based on a 1988

This Article is divided into three major parts. Given the seminal importance of the legislation—which substantially increased IDEM funding while it mandated an elaborate scheme of oversight and study of the efficiency of the Agency's operations and simultaneously granted selective regulatory concessions to industry—Part I focuses on the background and details of Senate Enrolled Act (SEA) 417—the legislative vehicle implementing the remarkable compromise.[8] Part II discusses other important Indiana environmental and natural resources statutes enacted into law during 1994.[9] Finally, Part III of the Article concludes by analyzing significant state judicial decisions that interpret Indiana environmental and natural resources law and key federal court opinions that address specific Indiana environmental controversies.[10]

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baseline—IDEM will, *inter alia*, [e]ncourage Indiana businesses to participate in a toxics reduction program"; "[c]ontinue to provide technical assistance, pilot awards, education, and training to industries, organizations, and educational institutions in order to find non-toxic substitutes for toxic materials and install clean processes and technologies"; "[i]mplement new federal air toxic regulations with a focus on air toxic releases in urban areas"; "[r]equire toxic reductions necessary to meet the state's surface water quality standards"; and "[f]ully implement the Pollution Prevention and Safe Materials Act . . . [which] requir[es] . . . encouraging regulatory flexibility to promote pollution prevention, increasing coordinating of toxic reduction efforts within IDEM, operating a state information clearinghouse, and establishing the Pollution Prevention and Safe Materials Institute."); IDEM, ENVIRONMENTAL REPORT 4-6 (1993) ("Many of the steps necessary to prevent pollution are the same ones associated with quality control, increased efficiency and reduced costs. Moreover, companies reduce their regulatory liability [by] coming into compliance and saving disposal costs."); Blomquist, *supra* note 6, at 1049-54 (discussing Indiana's pollution prevention legislation passed during 1993); Robert F. Blomquist, *The Evolution of Indiana Environmental Law: A View Toward the Future*, 24 IND. L. REV. 789, 809-12 (1991) (discussing Indiana pollution prevention legislation passed during 1990); *infra* notes 126-30 and accompanying text (discussing Indiana pollution prevention legislation passed during 1994).

8. *See infra* notes 13-104 and accompanying text.

9. By comparison, the United States Congress established a rather bleak record in failing to pass any significant environmental and natural resources legislation at the federal level during 1993-1994, as discussed in *View From the Ivory Tower More Rosy Than Media's*, 52 CONG. Q. 2850 (Oct. 8, 1994).

10. Environmental rulemaking, an important component of the evolving environmental law in Indiana and at the federal level, is beyond the scope of this Article. Moreover, legal developments pertaining to environmental implications of property transfers is beyond the scope of this Article. *See generally* GREAT LAKES ENVIRONMENTAL TRANSACTIONS GUIDE (Robert F. Blomquist gen. ed., 1995). However, because of its importance, the rulemaking action taken by the Indiana Air Pollution Control Board on March 10, 1994, is worthy of brief mention herein. *See generally* 17 Ind. Reg. 1878 (Mar. 10, 1994). The following account is a summary of the Board's action:

> On March 10, 1994, the Indiana Air Pollution Control Board gave final approval to a set of far-reaching changes to the Indiana air permit rules.
>
> Indiana can now assemble its package for USEPA approval.
>
> Best guesses are that EPA will complete its approval process by the end of [1994]. The date of EPA approval starts the 12-month timetable for all who are covered to apply for a Title V operating permit.
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> . . . .
>
> Significant state rule changes include:
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> • Changing the construction permit rule to coordinate with the operating permit; for

sources controlled by rules restricting rate of emissions, thresholds will now be based on allowable instead of "potential, uncontrolled" emissions[;]

- Public involvement is increased; for a new source (or first new Title V operating permit), all neighbors must be notified[;]
- Emergency notification is changed for large sources; any exceedance of any magnitude or duration must be reported to IDEM within 4 hours[;]
- A preventative maintenance plan must be in the Title V permit application[;]
- Establishing fees of $1,500 per year, plus $33 per ton of actual emission with a cap of $150,000 for most permit holders; this rises with the consumer price index.

MEDIATOR, Mar.-Apr. 1994, at 1 (MEDIATOR is a newsletter published by Indiana Environmental Institute, Inc., Indianapolis, Ind.). *Cf.* Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 2 (codified at IND. CODE § 13-1-1-25 (1993)) (establishing a Title V operating permit program trust fund "to provide a source of funds for the implementation, enforcement, and administration of the operating permit program required to implement 42 U.S.C. 7661 through 7661f of the [F]ederal Clean Air Act"). *See also infra* notes 82 to 86 and accompanying text.

For brief journalistic descriptions of Indiana environmental controversies and developments reported during 1994, *see, e.g.,* Michael Briggs, *EPA Threatens to Halt State's Road Funding*, CHI. SUN-TIMES, Jan. 8, 1994, at 3 (describing the EPAs threats to withhold federal highway aid from Indiana and Illinois unless the states upgrade vehicle emission testing programs in the Chicago area); *Class-Action Suit Filed Against Superfund Site*, CHI. TRIB., May 17, 1994, at 3 (discussing a class-action lawsuit filed in Indianapolis by 40 families who claimed that the Avanti Development company and at least ten other firms contributed to contamination of the site); *Deadline Near for Indiana Clean Air Plan*, CHI. SUN-TIMES, July 26, 1994, at 14 ("Indiana is among nine states facing federal sanctions beginning in September unless it adopts a program to reduce air pollution in Lake and Porter counties."); *Environmental Cleanup Starts at Refinery Site*, CHI. TRIB., Sept. 20, 1994, at 3 (discussing $2 million environmental cleanup of Princeton, Indiana site); *Federal Regulations Close 9 Landfills*, CHI. TRIB., June 21, 1994, at 3 (explaining that nine non-hazardous solid waste landfills around Indiana were forced to close because of strict new federal regulations governing waste disposal); *4 Indiana Cities Off EPA's Ozone List*, CHI. TRIB., June 23, 1994, at 3 (noting that South Bend, Elkhart, Indianapolis & Evansville now meet EPA standards for ground level ozone pollution); Adam W. Keats, *Hammond Facility Top Receiver of Toxic Chemicals*, CHI. TRIB., Apr. 19, 1994, at 2 (discussing report about Rhone-Poulenc Basic Chemical Co.'s Hammond, Indiana facility, which allegedly received more toxic chemical shipments by weight in 1991 than any other facility in the nation—204 million pounds of toxic chemicals—which was 63 million pounds more than the second-ranked facility); *Inland Remains State's Leading Polluter*, GARY POST-TRIB., Apr. 20, 1994, at B1 ("According to EPA numbers, Indiana remained in fifth place among states for toxic chemical releases. . . . Nationwide, the EPA's Toxic Release Inventory for 1992 showed that release of toxic chemicals declined by 6.6 percent, or 224 million pounds, compared to 1991. The discharges dropped by 35 percent compared to the . . . baseline year of 1988."); *Trail Creek Fish Safe, State Declares*, CHI. TRIB., May 5, 1994, at 3 (discussing validity of reports concerning contaminated fish taken from a creek near an allegedly leaking Superfund site); James L. Tyson, *Delicate Ecosystem, Heavy Industry*, CHRISTIAN SCI. MONITOR, Mar. 14, 1994, at 11 (discussing the Great Lakes Commission's Sustainable Development Initiative for Northwest Indiana); *U.S. Will Try Once Again to Clean Up Illegal Dump*, CHI. TRIB., July 18, 1994, at 3 (reporting on EPA's plans to conduct tests to see if "auto fluff" can neutralize cancer-causing PCBs and lead at the H&H dump in Hammond, Indiana).

I. SENATE ENROLLED ACT 417

In a March 1994 letter from Governor Evan Bayh to Carole Browner, Administrator of the United States Environmental Protection Agency, the State notified federal officials that Indiana would not—contrary to earlier communications[11]—be the first state in the nation to voluntarily turn back previously delegated environmental regulatory responsibilities to the federal government:

> As you will recall, in a letter dated September 8, 1993, I informed you of a funding deficiency in Indiana's National Pollutant Discharge Elimination System (NPDES) and Resource Conservation and Recovery Act (RCRA) permitting programs. I also informed you that the state intended to begin the process of voluntarily returning the federally delegated permitting responsibilities in these programs pursuant to 40 CFR 271.23(a) (RCRA) and 40 CFR 123.64(a) (NPDES). I also indicated that if the budget deficiencies were adequately addressed in the 1994 legislative session, the State of Indiana intended to retain primacy over these programs.
>
> I am pleased to inform you that the Indiana General Assembly has addressed the funding crisis for the Indiana Department of Environmental Management. Today, I have signed into law Senate Enrolled Act 417, which provides more than $18 million in funding for permitting functions in the NPDES and RCRA permitting programs.
>
> Therefore, please accept this letter as my formal notification to you that the State of Indiana will maintain primacy over the RCRA and NPDES permitting functions.[12]

The full measure of SEA 417, however, cannot be taken without discussing seven key legislative innovations that, when viewed holistically, represent a fundamental reformulation and re-invention of environmental law and policy in Indiana: (1) increased IDEM funding, (2) enhanced IDEM responsibilities for processing permits, (3) voluntary environmental audit confidentiality, (4) IDEM responsibilities for establishing voluntary compliance programs, (5) amnesty opportunities for non-complying air pollution emitters, (6) establishment of the Environment Rulemaking Study Committee, and (7) establishment of the Environmental Quality Service Council.

A. IDEM Funding

The Indiana General Assembly utilized its collective imagination during 1994 to transcend its previous impasse with the Governor by agreeing on two essential revenue-raising measures: (1) legislatively set fees for NPDES and solid and hazardous waste permits,[13] supplemented by (2) a "mixed" funding approach, which directed that

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11. *See* Blomquist, *supra* note 6, at 1034 (quoting Letter from Governor Evan Bayh to Carole Browner, EPA Administrator (Sept. 8, 1993)).

12. Letter from Governor Evan Bayh to Carole Browner, EPA Administrator (March 17, 1994).

13. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994, § 7 (codified at IND. CODE § 13-7-16.1-1 to -3 (Supp. 1994)).

appropriations for these programs come from both permitting fees and general funds.[14] "With the passage of Senate Enrolled Act 417, IDEM will receive more than $10 million in new permit fees. Combined with existing funds, the additional money available to the agency totals more than $18 million [per year]."[15]

An interesting innovation of SEA 417 is its funneling of environmental permit fees into a dedicated state fund—the newly-minted "environmental management permit operation fund."[16] According to one commentator, "[t]his fund will prevent these fee

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14. *Id.*

15. IND. ENVIR., *supra* note 7, at 2. According to Commissioner Prosser's assessment, these additional funds will result in the following public benefits:

> IDEM will fill 95 vacant positions in our water and solid and hazardous waste offices, and create more than 150 new positions in our water and solid and hazardous waste offices, and create more than 150 new positions in the permitting, inspection and data monitoring functions. The Air Pollution Control Board also approved new air permit fees allowing IDEM to hire 75 new staff immediately, and as many as 75 more by the end of the year.
>
> New revenues provided through the fees will provide for state-of-the-art technology, as well. IDEM will computerize and automate many agency records, providing better access to the public and increasing the efficiency of the regulatory programs. We will improve monitoring Indiana's environment and decrease turn-around time on permit applications. We also will be able to apply Indiana's new water quality standards to wastewater removal applications.
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> . . . .
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> [O]ne of the most important things Senate Enrolled Act 417 allows this agency to do is further invest in staff. Governor Evan Bayh agreed to release $3 million in state revenues to fund salary differentials for IDEM technical and professional staff. This will help IDEM attract and retain quality staff.

IND. ENVIR., *supra* note 7, at 2. *But cf.* the rich tradition of American skepticism toward the desirability and efficacy of increased government spending, as illustrated by remarks of President Grover Cleveland:

> It is the duty of those serving the people in [a] public place closely to limit public expenditures to the actual needs of the government. Economically administered, because this bounds the right of the government to extract tribute from the earnings of labor or the property of the citizen, and because public extravagance begets extravagance among the people. We should never be ashamed of the simplicity and prudential economies which are best suited to the operation of a republican form of government and most compatible with the mission of the American people. Those who are selected for a limited time to manage public affairs are still of the people, and may do much by their example to encourage, consistently with the dignity of their official functions, that plain way of life which among their fellow-citizens aids integrity and promotes thrift and prosperity.

Quoted in CONGRESSIONAL RESEARCH SERVICE DICTIONARY, *supra* note 1, at 154. Calvin Coolidge remarked: "Nothing is easier than spending the public money. It does not appear to belong to anybody. The temptation is overwhelming to bestow it on somebody." *Quoted in* CONGRESSIONAL RESEARCH SERVICE DICTIONARY, *supra* note 1, at 155. Finally, Will Rogers quipped: "Lord, the money we do spend on Government and it's not one bit better than the government we got for one-third the money twenty years ago." *Quoted in* CONGRESSIONAL RESEARCH SERVICE DICTIONARY, *supra* note 1, at 156.

16. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994, § 6 (providing for the creation of a fund) (codified at IND. CODE § 13-7-16-6.5 (Supp. 1994)) & 15 (providing directions on permit fee appropriations) (uncodified).

revenues from reverting to the general fund if they are not spent during a fiscal year. Currently the permit fees go into another dedicated fund, the environmental management special fund, which has more sources of funds (e.g. fines) and more uses."[17] The establishment of the new dedicated fund for environmental permit fees is an astute action by the General Assembly since "[i]t focuses attention on the accountability of the fund for the use [for which] it was collected."[18] A potential problem, however, embedded in the dynamics of the environmental management special fund, is the appearance of impropriety that arises when "environmental fines [are] be used to pay operating expenses for the IDEM enforcement personnel who both define the violations and set the level of the fines."[19] But, given the authority of the newly-constituted Environmental Quality Service Council to explore all major facets of IDEM's operations on an ongoing basis,[20] this conflict of interest will probably be checked.

Arguably, SEA 417's shifting of fee-making authority for NPDES, solid waste, and hazardous waste permits from the various environmental boards established under current Indiana law[21] to the General Assembly constitutes an unwise exercise in environmental

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17. Memorandum from Bill Beranek, President, Indiana Environmental Institute, Inc. to Institute Sponsors 1 (Feb. 11, 1994) (copy on file with author) [hereinafter Beranek Memorandum].

18. *Id.*

19. *Id.* *See* IND. CODE § 13-7-16-16.5(b) (Supp. 1994) ("The fund consists of fees and delinquent charges collected under IC 13-7-16.1.").

20. *See infra* notes 94-103 and accompanying text. *Cf.* IND. CODE 13-7-16-6.5(e) (1993) ("The auditor of state shall make a report on the fund every four (4) months. . . . The auditor of state shall forward copies of the report to the following: (1) [t]he commissioner[;] (2) [t]he standing committees of the house of representatives and the senate concerned with the environment[;] (3) [t]he environmental study committee[;] (4) [t]he state budget committee[;] (5) [t]he environmental quality service council.").

21. MARCIA J. ODDI, INDIANA ENVIRONMENTAL LAW HANDBOOK 1-6 (1994 ed.) [hereinafter INDIANA ENVIRONMENTAL LAW HANDBOOK].

> At the same time [IDEM] was established by state statute in 1985, the Indiana [General Assembly] also created three environmental boards, the water pollution control board, the air pollution control board and the solid waste management board. These new boards replaced the then-existing stream pollution, air pollution and environmental management boards.
>
> These three environmental boards are charged by law with promulgating the rules which [IDEM] is to enforce, and with hearing the appeals of those affected by the department's actions. In other words, these three boards possess both legislative (through rulemaking) and judicial (through adjudicatory) authority in the state environmental arena, while [IDEM] exercises the executive authority.

Id.

The state environmental boards impacted by Senate Enrolled Act No. 417 are the water pollution control board (with authority over NPDES permits) and the solid waste management board (with authority over solid waste and hazardous waste permits). Since the establishment of the three key media environmental regulatory boards in 1985, a plethora of other state environmental boards have also been created by the Indiana General Assembly. Examples of these miscellaneous state environmental boards include the following: the Hazardous Waste Facility Site Approval Authority (the Authority's executive council is charged by IND. CODE § 13-7-8.6-3(b) (1993) with promulgating rules regarding the operation of the Authority and regarding siting criteria); Pollution Prevention Board (charged by IND. CODE § 13-9-2-1 to -14 (Supp. 1994) with identifying problems

policy micro-management by the legislature.[22] However, given the past level of distrust

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and opportunities regarding industrial pollution prevention and working with IDEM and the Indiana Pollution Prevention and Safe Materials Institute on Pollution Prevention Policy); and, the Underground Storage Tank Financial Assurance Board (created by IND. CODE § 13-7-20-35 (1993 & Supp. 1994) to oversee the underground storage tank excess liability fund, to make rules regarding the fund, and to hear appeals from denial by IDEM of request for payments from the fund).

22. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 7 (codified at IND. CODE § 13-7-16.1 (Supp. 1994)). The level of detail in the statute pertaining to specific permit fees is astounding. For example, annual NPDES industrial permits, "other than coal mine permits or stone quarry permits" are assessed as follows:

> The annual base fee per facility is one thousand dollars ($1,000) for a major permit and four hundred dollars ($400) for a minor permit plus the following annual discharge flow fee per facility:
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> | Daily Average Actual Flow in MGD [millions of gallons per day]. | Fee |
> |---|---|
> | .001-.05 | $200 |
> | .051-.1 | $300 |
> | .101-.2 | $700 |
> | .201-.3 | $1,000 |
> | .301-.5 | $1,400 |
> | .501-1.0 | $1,800 |
> | 1.001-2.0 | $3,000 |
> | 2.001-5.0 | $4,500 |
> | 5.001-10.0 | $7,000 |
> | 10.001-15.0 | $10,000 |
> | 15.001-30.0 | $14,000 |
> | 30.001-50.0 | $19,000 |
> | 50.001-100.0 | $24,000 |
> | > 100.0 | $29,000 |
>
> Annual flow fees are reduced by twenty percent (20%) for discharges that are comprised of greater than ninety percent (90%) of non-contact cooling water.

Id.

By way of further illustration of the level of detail in the statute, "new permit or major modification" solid waste permit application fees are established as follows:

	Fee
Sanitary Landfill	$31,300
Construction\Demolition Site	$20,000
Restricted Waste Site	
Type I	$31,300
Type II	$31,300
Type III	$20,000
Processing Facility	
Transfer Station	$12,150
Other	$12,150
Incinerator	$28,650
Waste Tire Storage Registration	$500

regarding these permit fees between industries, municipalities, and IDEM in the months leading up to the Second Regular Session of the 108th General Assembly, as a practical matter it was probably necessary for the legislature to set the fees itself, while brokering a compromise between the various competing interest groups.[23] Moreover, it appears reasonably likely that the Environmental Quality Service Council[24] will be able to adduce information from IDEM and the various state environmental boards about the appropriateness and desirability of future permit fee modifications. In the next five years, or so, however—after the General Assembly has the opportunity to receive input from its novel Environmental Rulemaking Study Committee[25]—it might be wise public policy to return the permit-setting authority to the state environmental boards, or a unified rulemaking environmental board fashioned by the legislature.

A major economic issue arising from the legislatively established environmental permit fees is whether "[t]he aggregate fee increase for small facilities, combining completely new fees in hazardous and solid waste with increases in wastewater fees on top of an anticipated increase in air permit fees could pose an unacceptable new burden to some small businesses."[26] Moreover, a significant political issue regarding the use by IDEM of its enhanced funding is that if it "does not act quickly and effectively to use its new legislated fees to develop and fill full-time staff positions in the appropriate areas, the administration and the 1995 General Assembly will soon find the environmental management permit operation fund to contain a very large dedicated fund surplus and will cut the general fund contribution for the subsequent biennium."[27] Since administrative agencies are typically hobbled by a variety of legal and practical obstacles that get in the way of the agency's taking quick and effective action on any problem, IDEM should plan now to lavishly communicate its staffing advances and setbacks to the Environmental Quality Service Council so that a reasoned explanation of IDEM's progress and difficulties in translating increased funding to increased agency personnel can be proffered to the General Assembly in time for their next biennium budget review.[28]

B. Enhanced IDEM Permitting Responsibilities

As a partial quid pro quo for increasing IDEM's funding,[29] SEA 417—in nine and a half turgid pages of mechanistic prose reminiscent of tax regulations, security rules and

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Waste Tire Processing	$200
Waste Tire Transportation	$25

Id.

23. *See generally* Beranek Memorandum, *supra* note 17, at 2 (discussing negotiated adjustments in the agency-established fee schedules).

24. *See infra* notes 95-104 and accompanying text.

25. *See infra* notes 88-94 and accompanying text.

26. Beranek Memorandum, *supra* note 17, at 3.

27. Beranek Memorandum, *supra* note 17, at 3.

28. According to Dr. Beranek, "[w]e must also understand the difficulty the agency [staff persons] have to create new positions, recruit and train the staff and do it all with legislative scrutiny." Beranek Memorandum, *supra* note 17, at 3.

29. *See supra* notes 13-28 and accompanying text.

RCRA's hammer provisions[30]—sets forth numerous specific deadlines and requirements for IDEM review and action on various state environmental permits.[31] The legislation creates, on the one hand, a sweeping general rule mandating IDEM approval or denial of permit applications. Seven time frames for agency action on various environmental permit applications are established by the statute:[32] 365 days,[33] 270 days,[34]

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30. *See generally* Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992K (1988 & Supp. 1993) (setting forth legislatively imposed deadlines for EPA to promulgate rules regulating various aspects of hazardous wastes and imposing legislative solutions if the EPA missed the deadlines).

31. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 4 (codified at IND. CODE § 13-7-10.1 (Supp. 1994)).

32. IND. CODE § 13-7-10.1-5 (Supp. 1994). For purposes of calculating the time period for IDEM action on environmental permits, the time:

> (1) begins on the earlier of the date:
>
> (A) an application and any required fee is received and stamped received by the department; or
>
> (B) marked by the department on a certified mail return receipt accompanying an application and any required fee; and
>
> (2) ends on the date a decision is issued to approve or deny the application . . . .

Id.

33. The 365-day period—the most time allowed IDEM under the statute—is reserved for the following applications: "[a] new hazardous waste or solid waste landfill"; "[a] new hazardous waste or solid waste incinerator"; "[a] major modification of a solid waste landfill"; "[a] major modification of a solid waste incinerator"; "[a] new hazardous waste treatment or storage facility"; "[a] new Part B permit issued under 40 CFR 270 *et. seq.* for an existing hazardous waste treatment or storage facility"; and "[a] Class 3 modification under 40 CFR 270.42 to a hazardous waste landfill." IND. CODE § 13-7-10.1-4(a)(2) (1993). For purposes of the permit accountability statute, "major modification" is a phrase-of-art applicable to solid waste permits only. The phrase refers to:

> [a]ny change in a permitted solid waste facility that would:
>
> (1) increase the facility's permitted capacity to process or dispose of solid waste by the lesser of:
>
> (A) more than ten percent (10%); or
>
> (B) five hundred thousand (500,000) cubic yards; or
>
> (2) change the permitted footprint of the landfill by more than one (1) acre.

IND. CODE § 13-7-10.1-2 (Supp. 1994). *Query:* What is a "footprint" of a landfill?

34. The 270-day deadline for IDEM permit processing pertains to the following two types of permit applications: "[a] Class 3 modification under 40 CFR 270.42 of a hazardous waste treatment or storage facility"; and "[a] major new National Pollutant Discharge Elimination System permit." IND. CODE § 13-7-10.1-4(a)(2) (1993).

The legislative draftsmanship of the language "[a] major new National Pollutant Discharge Elimination System permit" in § 4 of Senate Enrolled Act No. 417 is deficient. No definition of the term is contained therein. *But see* § 7 of the Act—addressing permit fees—where, for purposes of § 7, "major permit" is defined as "a NPDES permit":

> (1) as classified by the Region V Regional Administrator of the [USEPA] and the commissioner; and
>
> (2) as set forth in the Major Dischargers List developed by the [USEPA] and the department in

180 days,[35] 120 days,[36] 90 days,[37] 60 days,[38] and an administratively set period of time for certain air permits.[39] On the other hand, the Act allows for a variety of time stretch-outs,[40] time changes by rule,[41] time changes by agreement,[42] and time suspensions.[43]

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the "National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Indiana and EPA Region V" dated July 22, 1977.

Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 7 (codified at IND. CODE § 13-7-16.1 (Supp. 1994). *Query:* Is "[a] major new National Pollutant Discharge Elimination System permit" in § 4 of the Act equivalent to a "major permit" in § 7 of the Act? If not, what is the basis for the distinction? What effect would there be on IDEM's permit processing time mandates under the statute in the event of a statutory ambiguity? Presumably IDEM might consider adopting a rule under IND. CODE § 4-22-2 (1993 & Supp. 1994) that "changes a period of time" prescribed in § 4 of the Act, since a significant statutory ambiguity would probably constitute "some other significant factor concerning a class of applications [that] makes it infeasible for the commissioner to approve or deny the application within the period of time." *Id.* § 4 (codified at IND. CODE § 13-7-10.1 (1993 & Supp. 1994)).

35. The 180-day mandate for IDEM to process environmental permits addresses the following classifications of applications: "[a] new solid waste processing or recycling facility"; "[a] minor new National Pollutant Discharge Elimination System permit"; and "[a] permit concerning the land application of wastewater." IND. CODE § 13-7-10.1-4(a)(3) (1993). *Query:* What is "[a] minor new National Pollutant Discharge Elimination System permit" under the statute?

36. The 120-day deadline for IDEM to handle environmental permits focuses on two types of applications: "[a] Class 2 modification under 40 CFR 270.42 to a hazardous waste facility;" and "[a] wastewater facility or water facility construction permit." IND. CODE § 13-7-10.1-4(a)(4) (Supp. 1994).

37. The 90-day mandate for IDEM to process environmental permits addresses a single type of application "concerning a minor modification to a solid waste landfill or incinerator permit." IND. CODE § 13-7-10.1-4(a)(5) (Supp. 1994).

38. The 60-day deadline—the shortest specific time period deadline in the legislation—for IDEM action regarding an application for a permit addresses the following:

(A) A Class 1 modification under 40 CFR 270.42 requiring prior written approval, to a hazardous waste:
  (i) landfill;
  (ii) incinerator;
  (iii) treatment facility; or
  (iv) storage facility.
(B) Certification of a special waste.
(C) Any other permit not specifically described in this subsection for which the application fee exceeds one hundred dollars ($100) and for which a time frame has not been established under subsection (c) [dealing with "a new requirement concerning a class of applications that makes it infeasible . . . to approve or deny [the permit within] the period of time."].

IND. CODE § 13-7-10.1-4(a)(7) (Supp. 1994).

39. The legislation incorporates by reference "[t]he amount of time provided for in rules adopted by the air pollution control board" for various types of air permits. IND. CODE § 13-7-10.1-4(a)(6) (1993).

40. IND. CODE § 13-7-10.1-4(b) (Supp. 1994) (providing for a 30-day extension of time period, which may be made by IDEM if a public hearing is held, but which is inapplicable to some permit applications).

41. IND. CODE § 13-7-10.1-4(c) (Supp. 1994). This subsection provides that:

A [state environmental] board may, after consulting with the environmental study committee

An innovative feature of the Act is the allowance of IDEM and a permit applicant to agree "to have a consultant review an application" at the applicant's expense to facilitate the expedited processing of the permit.[44] This provision is sensible and flexible and—by privatizing some of IDEM's initial review responsibilities—holds promise for achieving a level of public cost savings in reviewing environmental permits. By keeping ultimate review authority with IDEM, it is not likely that private interests will be able to subvert public environmental standards; consultants will still be accountable to IDEM.

The complex options spelled out in the Act in the event that IDEM does not issue or deny an environmental permit within the aforementioned specific time frames[45] are unnecessarily complicated and counterproductive. The statute states, in general terms:

> After reaching an agreement with . . . [IDEM] or after consulting with . . . [IDEM] for thirty (30) days and failing to reach an agreement, the applicant may choose to proceed under one (1) of the following alternatives [if the commissioner does not issue or deny a permit within the time specified]:

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established [in this legislation], adopt a rule under IC 4-22-2 that changes a period of time described [in the general provisions of the statute] within which the commissioner must approve or deny an application:

(1) if:
  (A) the general assembly enacts a statute;
  (B) a board adopts a rule; or
  (C) a federal statute or regulation;

that imposes a new requirement concerning a class of applications that makes it infeasible for the commissioner to approve or deny the application within the period of time;

(2) if:
  (A) the general assembly enacts a statute;
  (B) a board adopts a rule; or
  (C) a federal statute or regulation;

that establishes a new permit program for which a period of time is not described under subsection (a); or

(3) if some other significant factor concerning a class of applications makes it infeasible for the commissioner to approve or deny the application within the period of time.

If a board adopts an emergency rule under this subsection, the time period described [in the general rule] is suspended during the emergency rulemaking process.

Id.

42. IND. CODE § 13-7-10.1-6(a) (Supp. 1994) (mandating that the agreement between IDEM commissioner and applicant be in writing).

43. *Id.* § 13-7-10.1-7(b). This subsection delineates an assortment of potential exigencies that may give rise to time suspension, including incomplete applications, request by the applicant for withdrawal or deferral of processing, the need to submit a permit application to the USEPA for review by state officials, and emergency rulemaking by a state environmental board to revise a processing time period.

44. *Id.* § 13-7-10.1-6.

45. *See supra* notes 32-43 and accompanying text.

(1) The:
  (A) applicant may request and receive a refund of a permit application fee paid by the applicant; and
  (B) commissioner shall do the following:
    (i) Continue to review the application.
    (ii) Approve or deny the application as soon as practicable.
    (iii) Refund the applicant's application fee within twenty-five (25) working days after the receipt of the applicant's request.

(2) The:
  (A) applicant may:
    (i) Request and receive a refund of a permit application fee paid by the applicant; and
    (ii) submit to the department a draft permit and any required supporting technical justification for the permit; and
  (B) commissioner shall do the following:
    (i) Review the draft permit.
    (ii) Approve, with or without revision, or deny the draft permit in accordance with Section 10 of this chapter.
    (iii) Refund the applicant's application fee within twenty-five (25) working days after the receipt of the applicant's request.

(3) The:
  (A) applicant may require that the department use the permit application fee and any additional money needed to hire an outside consultant to prepare a draft permit and any required supporting technical justification for the permit; and
  (B) commissioner shall review the draft permit and approve, with or without revision, or deny the draft permit in accordance with Section 10 of this chapter.

  If additional money is needed to hire an outside consultant under this subdivision, the applicant shall pay the additional money needed to hire the outside consultant.[46]

A variety of specific exceptions, qualifications, and provisos to the general rule of alternative permit processing, however, create ambiguities and uncertainties in the meaning of the enactment.[47] It would be ironic, indeed, if the prolix statutory

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46. IND. CODE § 13-7-10.1-8(a) (Supp. 1994).

47. *See, e.g., id.* § 13-7-10.1-8(b) ("Notwithstanding [the general rule,] an applicant may not receive a refund of a permit application fee if the permit application concerned the renewal of a permit."); IND. CODE § 13-7-10.1-8(c) (1993) ("The applicant may not proceed under [one of the provisions of the general rule] if the commissioner determines that a qualified consultant is not available. The commissioner's determination under this subsection is subject to appeal and review under [administrative review standards of Indiana law]."); *Id.* § 13-7-10.1-8(d) ("The applicant may not proceed under any of the [alternative] options [for permit processing] if construction or operation of the equipment or facility described in the permit application has already begun, unless construction or operation before obtaining the permit is authorized by a board rule or state statute.").

Senate Enrolled Act No. 417 creates a body of arcane rules focusing on the use and limitations of

rules—designed to expedite and facilitate environmental permit processing in Indiana—served to create barriers to more efficient and effective administrative review of permit applications.

An overarching administrative accountability measure under the Act regarding IDEM's newly defined permitting responsibilities, is the requirement that IDEM submit

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consultants in the permit-expediting process. Illustrative language of these rules is as follows:

> If an applicant chooses to proceed under [one of the alternative permit application procedures authorized, IDEM] shall:
>
> (1) select a consultant that has the appropriate background to review the applicant's application; and
>
> (2) authorize the consultant to begin work;
>
> within fifteen (15) working days after the department receives notice that the applicant has chosen to proceed under [this alternative provision]. The commissioner may consult with the applicant regarding the advisability of proceeding under this section and may document such communications.

Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 4 (codified at IND. CODE § 13-7-10.1-9 (Supp. 1994)).

Under another prolix provision dealing with the use of consultants in alternative permitting situations, the legislation provides as follows:

> If an applicant chooses to proceed under [an alternative permit processing procedure authorized under this statute], the applicant or a consultant shall prepare and submit to the commissioner the draft permit and required supporting technical justification for the permit within thirty-five (35) working days after:
>
> (1) the applicant has notified the commissioner that the applicant has chosen to proceed under [this alternative section]; or
>
> (2) the department has authorized a consultant to begin work under [an alternative provision of this law].
>
> (b) The commissioner shall do the following:
>
> (1) Approve, with or without revision, or deny the draft permit within twenty-five (25) working days after receiving the draft permit. If the notice of opportunity for public comment or public hearing is required under applicable law before a permit decision can be issued, the commissioner shall comply with all public participation requirements . . . .
>
> (c) If an applicant has elected to have a draft permit prepared under [one of the alternative permit processing provisions of the statute] and:
>
> (1) the consultant fails to submit a draft permit and supporting technical justification to the commissioner; or
>
> (2) the commissioner fails to approve or deny the draft permit;
>
> within the applicable time specified . . . the department shall refund the applicant's permit application fee within twenty-five (25) working days after expiration of the applicable time period.

Id. (codified at IND. CODE § 13-7-10.1-10 (Supp. 1994)). Moreover, IND. CODE § 13-7-10.1-13 (Supp. 1994) indicates that a disgruntled permit applicant can always take his complaint to court for judicial review of IDEM's action: "The remedies provided in this chapter are not the exclusive remedies available to a permit applicant. A permit applicant's election of a remedy under this chapter does not preclude the permit applicant from seeking other remedies available at law or in equity."

an annual report "that contains an evaluation of the actions taken by the department to improve the department's process of issuing permits."[48] Embedded in the Act's annual report requirements are a number of specific informational mandates designed to force IDEM to make the most efficient and effective use of its new funding. Thus, IDEM's annual permit processing report must contain the following: (1) "[a] description of a reduction or increase in the backlog of permit applications in each . . . permit program during the preceding twelve (12) month period"; (2) the amount of permit fees collected and expenditures made from fee revenue; (3) analysis of reasons for the increase or decrease in operating costs for each permit program and inspection program; (4) a review of the actions taken by IDEM to improve the permit and inspection programs; (5) the time spent by IDEM in conducting appeal hearings and objection hearings under administration law principles; (6) the number of suspension notices issued by IDEM; (7) the operational goals of IDEM for the next year; and (8) a "permit status report" discussion that includes information regarding "[t]he facility name and type of each permit application pending on January 1 of the previous year, and the date each application was filed with the department," action taken on each application by the end of the previous year, and other miscellaneous permit information.[49]

On balance, SEA 417's provisions regarding enhanced IDEM permitting responsibilities go too far in legislating the minutiae of administrative procedure and operation of environmental programs. While IDEM is bound to generate a plethora of interesting and useful policy data regarding its permit and enforcing functions under Indiana and federal environmental laws, key players in the new, legislatively invented permitting game (including IDEM personnel, permit applicants, private permit consultants, members of the public, and the courts) are likely to experience considerable confusion and uncertainty with the details of the statute.

C. Confidentiality of Voluntary Environmental Audits

SEA 417 contains a separate set of provisions addressing "environmental audits" and a new privilege for an "environmental audit report."[50] The definition of "environmental audit" under the statute is

> a voluntary, an internal, and a comprehensive evaluation of:
>
> (1) A facility or an activity at a facility regulated under:
>
> (A) [Indiana Code] 13;
>
> (B) a rule or standard adopted under [Indiana Code] 13;

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48. IND. CODE § 13-7-10.1-12(a) (Supp. 1994). This report must be submitted to the following: (1) the governor; (2) the General Assembly; (3) the state environmental boards; and (4) the environmental study committee. *Id.* For a brief review of IDEM's efforts through September 1994 in improving and trying to improve its permitting operations, *see* Tim Method, *IDEM Seeks Input on Improved Permit Service*, IND. ENVTL. BRIEFS, Sept. 1994 (INDIANA ENVIRONMENTAL BRIEFS is a newsletter published by Environmental Quality Control, Inc., Indianapolis, Ind.).

49. IND. CODE § 13-7-10.1-12 (Supp. 1994).

50. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 8 (codified at IND. CODE §§ 13-10-3-1 to -12 (Supp. 1994)).

(C) any determination, permit, or order made or issued by the commissioner of the department of environmental management under [Indiana Code] 13; or
(D) federal law; or
(2) management systems related to a facility or an activity;

that is designed to identify and prevent noncompliance with laws and improved compliance with laws and is conducted by an owner or operator of a facility or an activity by an employee of the owner or operator or by an independent contractor.[51]

The definition of "environmental audit report" under the statute is

a set of documents prepared as a result of an environmental audit and labeled "Environmental Audit Report; Privileged Document" that
(1) includes field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs, and surveys collected or developed for the primary purpose of preparing an environmental audit; and
(2) includes, when completed, the following three (3) components:
(A) An audit report prepared by the auditor that includes:
(i) the scope of the audit;
(ii) the information gained in the audit;
(iii) conclusions and recommendations; and
(iv) exhibits and appendices.
(B) Memoranda and documents analyzing a portion of or all of the audit report and discussing implementation issues.
(C) An implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.[52]

The general privilege created by the statute provides that, with certain enumerated exceptions,[53] "an environmental audit report is privileged and is not admissible as evidence in a civil, a criminal, or an administrative legal action including enforcement actions under [Indiana Code] 13-7-11."[54] Two key, mutually exclusive exceptions to the privileged status are: (1) material scrutinized in a civil or administrative proceeding which, after *in camera* judicial study, is found to be subject to disclosure;[55] and (2)

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51. IND. CODE § 13-10-3-1 (Supp. 1994).
52. *Id.* § 13-10-3-2.
53. *See infra* notes 55-62 and accompanying text.
54. IND. CODE § 13-10-3-3 (Supp. 1994).
55. *Id.* § 13-10-3-4(a). The specific language of this exception is as follows:

In a civil or an administrative proceeding, a court of record, after an in camera review, shall require disclosure of material for which the privilege described . . . is asserted, if the court determines that both subdivisions (1) and (2) apply:

(1) The environmental audit report was first issued after July 1, 1994.

material scrutinized in a criminal proceeding which, after *in camera* judicial review, is found to be subject to disclosure.[56] Consistent with usual practice, the party asserting the "environmental audit report privilege" has the "burden of proving that the party may exercise the privilege."[57]

Other provisions of the legislation address the following specific issues: the ability of a prosecutor to obtain an otherwise privileged environmental audit report when the prosecutor can demonstrate that he or she has obtained information "from a source independent of an environmental audit report" and "has probable cause to believe" that an environmental crime has been committed,[58] the severability of non-privileged parts of an environmental audit report from the privileged parts of the report,[59] conditions for

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(2) One of the following apply:
(A) The privilege is asserted for a fraudulent purpose.
(B) The material is not subject to the privilege.
(C) The material is subject to the privilege and the material shows evidence of noncompliance with:
(i)this title or a rule or standard adopted by one (1) of the boards;
(ii)a determination, permit, or order issued by the commissioner under this title; or
(iii)the federal, regional or local counterpart of items (i) or (ii); and
the person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence.

Id.

56. *Id.* § 13-10-3-4(b). The specific language of this exemption is as follows:
If the noncompliance described in subsection (a)(2)(C) constitutes a failure to obtain a required permit, the person is deemed to have made appropriate efforts to achieve compliance if the person filed an application for the required permit not later than ninety (90) days after the date the person became aware of the noncompliance.

Id. See also id. § 13-10-3-11 (creating provisos to the inapplicability of the environmental audit report privilege regarding documents and information required to be maintained and reported according to state or federal law and regarding data and information obtained by a state agency by observation or from an independent source); *infra* note 57 and accompanying text (discussing exception for prosecutors in criminal matters who can establish that they obtained initial information from a source independent of the environmental audit report).

57. *Id.* § 13-10-3-6. Unique burden of proof provisions exist for special circumstances. First, if "the evidence indicates that the person [attempting to assert the privilege] was in noncompliance" of relevant environmental standards, then the proponent of the privilege has the burden of showing that he or she "made appropriate efforts to achieve compliance," as described in *id.* §§ 13-10-3-4(b), -5(b).

Second, if the party seeking disclosure of material in an environmental audit report asserts that the privilege is "being asserted for a fraudulent purpose," the party seeking disclosure has "the burden of proving that the privilege is being asserted for a fraudulent purpose." *Id.* § 13-10-3-6(c).

Finally, in a criminal proceeding, a prosecutor seeking disclosure of material in an environmental audit report that is relevant to the commission of an environmental offense, under *id.* § 13-10-3-5(a)(2)(D), has the "burden of proving the conditions for disclosure." *Id.* § 13-10-3-6(d).

58. *Id.* § 13-10-3-7.

59. *Id.* § 13-10-3-8.

waiver and non-waiver of the environmental audit report privilege,[60] rights of the parties to stipulate the applicability or non-applicability of the environmental audit report privilege,[61] and retention and separate applicability of "the work product doctrine and the attorney client privilege."[62]

An exhaustive analysis of Indiana's new environmental audit report privilege is beyond the scope of this Article and is worthy of a separate law review article or student note. Suffice it to say that some first-order rhetorical questions raised by the statute establishing the environmental audit report privilege are as follows. First, is the narrow definition of "environmental audit report," coupled with a relatively stringent allocation of the burden of proof to the person seeking to exercise the privilege,[63] likely to create judicial hesitancy in recognizing the exercise of the privilege? Second, assuming the eventual favorable reception by the state judiciary of the Indiana environmental audit report privilege report, is this privilege really a trap for the unwary, in light of the prospect for parallel federal environmental enforcement proceedings and the ability of federal courts to independently resolve questions of privilege according to "principles of the common law as they may be interpreted by the *courts of the United States* in the light of reason and experience"?[64] Third, since a wide assortment of environmental information is presently subject to mandatory disclosure and reporting requirements,[65] is it not likely

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60. IND. CODE § 13-10-3-9 (1993).

61. *Id.* § 13-10-3-10.

62. *Id.* § 13-10-3-12.

63. *See supra* note 57 and accompanying text.

64. FED. R. EVID. 501 (emphasis added). At the present time, federal environmental enforcement officials seem to take an approach that is arguably hostile to the concept of an environmental audit report privilege. As explained in a recent article:

> [T]he [federal] government's primarily enforcement- and punishment-oriented approach undercuts the putative incentives to compliance provided by [other federal policies seeking to encourage companies to voluntarily undertake environmental compliance auditing]. In the case of EPA's audit policy, the failure to provide any real assurance that EPA would not seek to use a company's voluntary audit reports in an enforcement action against the company or protect audit results from disclosure to other private parties—audit reports would provide road maps to the violations at issue—stimulated a number of thoughtful commentators to counsel companies against undertaking voluntary audits. Similarly, the government's refusal to assure that it would respect claims of attorney/client privilege or work product as to audit results, as well as the significant potential that voluntary disclosure could be used against a company in enforcement have undoubtedly undercut the inclination of companies to voluntarily disclose environmental offenses under the Justice Department policy.

Kevin A. Gaynor & Thomas R. Bartman, *Here's the Stick, But Where's the Carrot?: The Latest Draft Environmental Sentencing Guidelines' Severity Vitiates Their Compliance Incentives*, *in* 1 AMERICAN BAR ASSOCIATION, SECTION ON NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, SECOND FALL MEETING (Sept.-Oct. 1994) at Tab 6-13 to 14 [hereinafter 1994 SONREEL MATERIALS] (citing Environmental Auditing Policy Statement, 51 Fed. Reg. 25004-25010 (1986) & UNITED STATES DEPARTMENT OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTION VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (June 3, 1991)).

65. *See generally* Robert F. Blomquist, *Information Disclosure and Access*, *in* ENVIRONMENTAL LAW

the prosecutor's exception to the environmental audit report privilege[66] will tend to swallow the privilege—at least with regard to criminal prosecutions?

D. IDEM's Voluntary Compliance Program Mandate

"Within the last several years, the states have begun to experiment with 'voluntary' [environmental compliance] programs that depend on private initiative and minimal or greatly reduced government oversight."[67] State experimentation with voluntary compliance programs has been stimulated by government's realization of the lack of public resources to fully "remediate or even pursue by enforcement" actions at major problem sites throughout the country.[68] Moreover, "the private marketplace for property and business acquisitions and financing increasingly demands assurances that properties meet governmental standards, and that the governmental agency has 'signed off' in some way that will cut-off or minimize future liabilities."[69]

During 1993, the Indiana General Assembly and the Governor passed into law SEA 394 which, among other things, created the alternative of new voluntary cleanup provisions to ensure compliance.[70] During 1994, in an evolutionary expansion of voluntary environmental compliance concepts, the General Assembly and the Governor enacted SEA 417, which added a "voluntary compliance program" to IDEM's environmental responsibilities under state law.[71]

SEA 417 creates an Office of Voluntary Compliance within IDEM to enable businesses and municipalities subject to state environmental regulation to attain compliance, while promoting cooperation and technical assistance between IDEM and regulated entities. The technical and compliance assistance initiative established by the Act mandates an assortment of programmatic ends and means, including the following new IDEM responsibilities: establishment of an "ombudsman to the regulated community to assist . . . with specific regulatory or permit matters"; provision of "assistance to new and existing businesses and small municipalities in identifying applicable environmental

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PRACTICE GUIDE § 4 (M. Gerrard ed., 1992); Robert F. Blomquist, *The Logic and Limits of Public Information Mandates Under Federal Hazardous Waste Law: A Policy Analysis*, 14 VT. L. REV. 559 (1990).

66. *See supra* note 57 and accompanying text.

67. Michael L. Rodburg, *State Voluntary Cleanup Programs in* 2 1994 SONREEL MATERIALS, *supra* note 64, at Tab. 2.

68. *Rodburg*, *supra* note 67.

69. *Rodburg*, *supra* note 67.

70. Ind. S. 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) (Supp. 1994)). Under this 1993 statute, a party must submit a $1,000 fee and an application, which describes a site's physical characteristics, operational history, nature of contamination, and potential for human exposure. *Id.* §§ 13-7-8.9-7, -8. Upon acceptance of the application, the party is required to undertake an investigation and to propose a voluntary remediation work plan. *Id.* § 13-7-8.9-12. IDEM then reviews and evaluates the work plan and may approve, modify and approve, or reject it. *Id.* § 13-7-8.9-14, -15. Prior to approval of a voluntary response action plan under the statute, a party must enter a voluntary remediation agreement, which spells out the terms of evaluation and implementation of the work plan. The agreement must include, *inter alia*, a cost estimate and schedule for IDEM review. IND. CODE § 13-7-8.9-13 (1993).

71. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 8 (codified at IND. CODE §§ 13-10-1-1 to 13-10-4-3 (Supp. 1994)).

regulations [and] permit requirements"; and development and distribution of educational materials regarding "environmental requirements," "compliance methods," pollution prevention techniques, "voluntary environmental audits," and "pollution control technologies . . . including standardized forms and procedures for completing permit applications."[72] To ensure that these mandates are carried out, the legislation requires IDEM to prepare yet another annual report of its activities—in this instance, the program's performance.[73]

In an ambiguous set of concluding provisions regarding the voluntary compliance program, the Act states that "[i]nquiries made to the program by regulated entities and responses to regulated entities by employees of the program are *confidential*,"[74] yet IDEM "may contract with another entity to provide some or all of the [voluntary compliance] services"[75] required by the legislation. In light of the juxtaposition and similarity of these provisions with the "voluntary environmental audit" provisions of the Act,[76] it is probable that courts will eventually be faced with the vexing interpretational problem of whether the "confidential" status of "inquiries made to the program by regulated entities"[77] may constitute a separate evidentiary privilege under Indiana law, a potential expansion of the environmental audit report privilege contained elsewhere in the Act,[78] or be deemed not to be an evidentiary privilege at all. Assuming that the independent confidentiality provision of "inquiries made to the program by regulated entities"[79] is recognized to provide some evidential privilege, a subsidiary interpretational question also arises: May a party achieve a safe harbor from future potential civil or criminal environmental actions by extensively reporting information and making inquiries to IDEM's voluntary compliance program? In this regard, unless the statutory language addressing voluntary compliance inquiries is deemed by the judiciary to be an independent evidentiary privilege,[80] the exceptions and limitations contained in the environmental audit report privilege section of the statute would prevent an unreasonably expansive interpretation of the theoretically available voluntary compliance disclosure privilege.[81]

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72. IND. CODE § 13-10-2-2 (Supp. 1994).

73. *Id.* § 13-10-2-3.

74. *Id.* § 13-10-2-4 (emphasis added) ("Information concerning inquiries made to the program . . . may not be made available for use by other divisions of the department without the consent of the regulated entity that made the inquiry and received the response.").

75. *Id.* § 13-10-2-5.

76. *See supra* notes 50-66 and accompanying text.

77. *See supra* notes 74-75 and accompanying text.

78. *See supra* notes 50-66 and accompanying text.

79. *See supra* notes 74-75 and accompanying text.

80. *See supra* notes 77-78 and accompanying text.

81. *See supra* notes 55-66 and accompanying text. The problem of ambiguity regarding the confidentiality language in Ind. S. Enrolled Act No. 417 is not resolved by the confusing amendment to this language brought about by Indiana House Enrolled Act No. 1182 § 27, Pub. L. No. 82-1994 § 27 (codified at IND. CODE § 13-10-2-4 (Supp. 1994)), which amends the language of Ind. S. Enrolled Act 417 to read as follows:

> Inquiries made to the program *by regulated entities and responses to regulated entities by employees* of the program are confidential. Information concerning inquiries *made to the program*

E. Air Pollution Amnesty

SEA 417 creates amnesty conditions, with limited maximum penalties, for firms not in compliance with air permit requirements. Statutory amnesty, however, is not available to sources that never obtained an operating permit and that have the potential to emit one hundred tons or more per year of a covered pollutant for which the state Air Pollution Control Board had established permit requirements prior to January 1, 1994.[82] To qualify for amnesty, all of the following conditions must be met by the applicant: (1) a complete application for either a Title V operating permit, a Federally Enforceable State Operating Permit (FESOP), or an enforceable operating agreement, which must be submitted no later than March 16, 1996; (2) specific identification of each facility and source for which amnesty is claimed; (3) construction or modification of the emitting facility or source prior to the amnesty cutoff date of January 1, 1994; and (4) qualification for amnesty consideration by not having been the subject of a completed administrative or civil action during the five-year period between January 1, 1989 and January 1, 1994 for the applicant's failure to obtain necessary air construction or operating permits, or the subject of a pending administrative or civil action.[83]

Assuming an applicant is successful in satisfying the aforementioned criteria, the Act sets a single civil penalty of $3000 per application with respect to a Title V operating permit and a single civil penalty of $2000 per FESOP application.[84] In both cases, the air pollution amnesty applicant must also pay the relevant annual operation fees for all of its unpermitted facilities for the years of noncompliance.[85] The air pollution amnesty is limited in scope: The cap on liability merely applies to judicial or administrative enforcement actions for failure to obtain required air permits or registrations. The amnesty cap does not limit or excuse the following: criminal liability; violation of health or technology-based standards; prevention of significant deterioration or new source construction permit violations; state enforcement seeking to abate conditions alleged to present an "imminent and substantial endangerment to health or welfare," or to present an "unreasonable and emergency risk to the health and safety" of citizens; or private civil tort suits.[86]

Given the circumscribed reach of the air pollution amnesty provisions of SEA 417 and the incentive created by the legislation for unpermitted sources to seek proper approval for air emissions (with modest financial penalties inuring to the benefit of the state), this legislative mechanism constitutes good public policy. Amnesty provisions

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by regulated entities and responses to regulated entities by employees of the program may not be made available for use by other divisions of the department without the consent of the *regulated entity that* made the inquiry *and received the response.*

IND. CODE § 13-10-2-4 (Supp. 1994) (emphasis added).

82. Ind. S. Enrolled Act No. 417 § 8, Pub. L. No. 16-1994 (codified at IND. CODE § 13-10-4-1 to -3 (Supp. 1994)).

83. IND. CODE § 13-10-4-1(c) (Supp. 1994).

84. *Id.* § 13-10-4-1(g).

85. *Id.*

86. *Id.* § 13-10-4-1(d).

with penalty caps, after all, are simply market-based regulatory alternatives to traditional command and control environmental laws.[87]

F. Environmental Rulemaking Study Committee

SEA 417 establishes a twenty-one-member Environmental Rulemaking Study Committee—consisting of four members from the Senate, four members from the House of Representatives, the IDEM Commissioner, and twelve other individuals representing local government, environmental organizations, business, and agricultural interests.[88] The Rulemaking Study Committee is charged in the legislation with studying and evaluating issues regarding "the organization and rulemaking procedures" of the three principal state environmental regulatory boards: the Air Pollution Control Board, the Solid Waste Management Board, and the Water Pollution Control Board.[89] A specific, and somewhat surprising, legislative request for evaluation in the statute is a directive to the Rulemaking Study Committee to consider "the feasibility of replacing" the three principal environmental regulatory boards with "two (2) independent boards that concern: (A) rulemaking and development of environmental policy; and (B) adjudicatory matters related to environmental law."[90]

The Rulemaking Study Committee held its inaugural meeting in July, with follow-up meetings scheduled for August 1994.[91] Specific policy issues that emerged at this meeting included concerns that: (1) the structure of the environmental boards may have become obsolete and unable to keep pace with the need to issue a multiplicity of rules followed up by more enforcement and adjudicatory hearings; (2) political considerations often displace sound science in board deliberations; (3) the environmental boards require more accountability for efficient and effective operations; (4) conflict of interest provisions for environmental board members need to be strengthened; (5) the boards need their own independent staff; and, (6) proxy voting by board members should not be allowed.[92]

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87. *See generally* ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 345-77 (3d. ed. 1991).

88. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 13 (uncodified).

89. *Id.* § 13(f)(1).

90. *Id.* § 13(f)(2). Interestingly, it appears that the policy idea of two state environmental boards—one with unified responsibility over all environmental rulemaking, the other with unified adjudicatory responsibility over all appeals from environmental administrative decisions—originated with the 1992 deliberations of the Governor's Operations Committee—Environmental Cluster Study. *See generally Short History of IDEM*, MEDIATOR, July-Aug. 1994, at 2 (MEDIATOR is a newsletter published by the Indiana Environmental Institute, Inc., Indianapolis, Ind.). *See also* INDIANA GOVERNMENT OPERATIONS COMMITTEE, ENVIRONMENTAL CLUSTER DRAFT REPORT ¶ A(4) (March 22, 1992).

91. *Environmental Rulemaking Study Committee First Meeting*, IND. ENVTL. BRIEFS, Aug. 1994, at 2 (INDIANA ENVIRONMENTAL BRIEFS is a newsletter published by Environmental Quality Control, Inc., Indianapolis, Ind.).

92. Dr. William Beranek, Jr., President of the Indiana Environmental Institute, Inc., has written a thoughtful and detailed critique of what he refers to as state "citizen boards" in the establishment and implementation of environmental law and policy in Indiana. *See* William Beranek, Jr., *Thoughts to Improve Indiana Rulemaking*, MEDIATOR, July-Aug. 1994, at 2-3. *See also supra* note 90. This brief article, worthy of extensive quotation, argues as follows:

The Indiana legislature's Environmental Rulemaking Committee has an important opportunity to correct serious barriers to fair rulemaking by the current Board structure.

I believe that the citizen board as presently constituted to oversee environmental policy in Indiana no longer works. In the 1990's, understanding the basics of most of the complex environmental laws, regulations and policies is beyond what can be expected of or is achieved by most citizen Board members for most issues.

Increasingly, the Indiana citizen environmental board itself adds little substantive input to the public environmental policy debate.

Board decisions are made by gut instinct, by special interest lobbying or, most often, by advice of the technical staff of IDEM as consistent with an official administration position formulated offstage (either deep in the bureaucracy or high in politically-sensitive echelons).

The original purpose of the boards—to guarantee enhanced public involvement in the regulatory process—is not occurring.

Most of Indiana environmental regulations are essentially passed-through from the federal government; it is the few that originate from the General Assembly, IDEM staff or citizen petition as new rule[s] or additions to the federal for which the Indiana rulemaking procedures need improvements.

. . . .

The environmental boards are hampered by:

1. *No staff of their own.* The Boards are often asked to decide on technical matters on a disagreement between a public and the IDEM staff without the benefit of a technical staff of their own serving strictly the interest of each Board member in the manner that the Legislative Service Agency staff serves legislative committees.
2. *No attorney of its own.* The Boards make legally delicate decisions procedurally and substantively without advice from their own independent lawyer serving them without conflict. Usually, the lawyers giving them advice are the IDEM Office of Legal Counsel or the Attorney General, both of which could be representing parties with different interests.
3. *No single hearing officer for rulemaking.* The two public hearings for rulemaking now occur before the entire Board, once at the Board meeting at which the preliminary adoption vote is scheduled to occur and the second at the Board meeting at which the final adoption decision is scheduled to occur. Gone is expectation of a single Board hearing officer to hear and assimilate formal public comments at hearings throughout the state months prior to final Board deliberations; all Board members serving as hearing officers on complex topics (and then deciding within hours on the rule language) will mean none serve effectively in that capacity. Any assimilation of public comments is now at the discretion of the IDEM staff in private and public meetings of their choosing.
4. *Ex-Officio agency heads represented as voting members.* The Department of Health, Lieutenant Governor and Department of Natural Resources have ex-officio representation on each board. That they are present is good for interagency communication. That they vote is bad for true policy discussion. For any politically controversial decision, there is pressure for them to become a caucus vote for the position of their sister agency or of the Governor's office. This inhibits difficult calls from being discussed openly and being decided on their merits. Together with point one, this puts all power in the Governor's office when it wants and in the agency staff hands when it does not. Politics is important. My preference is that the General Assembly be the spot where politics decides policy. The Boards and the agency

According to one report, the Rulemaking Study Committee held a "final meeting" and voted unanimously to recommend two key legislative proposals to the 1995 General Assembly: (1) that Administrative Law Judges who propose decisions to the state environmental boards on appeals from orders by the IDEM Commissioner be retained but removed from IDEM employment, as is currently the case, and (2) that "a new environmental appellate panel comprised of three attorneys appointed by the governor be established to hear appeals of Administrative Law Judges' decisions."[93] Apparently, the Rulemaking Study Committee will recommend the functional equivalent of an independent and unified state adjudicatory board to hear appeals from IDEM permitting enforcement decisions; however, it appears to have concluded, by default, that a unified rulemaking and policymaking state environmental board—with jurisdiction over air, water, and solid waste matters—is not advisable at the present time.

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professionals should execute that policy free of politics.

5. *No requirement for public hearing weeks or months in advance of final board decision.* The rulemaking procedures recently adopted by the General Assembly eliminate the requirement for public hearings after preliminary adoption and well before the Board meeting for final adoption. This was the place where all parties could hear what each other is saying to the state and respond later in writing. [Hearings] were required in different parts of the state, for the convenience of the public. Any public meetings now are purely at the discretion of the agency. There will be a tendency for the parties to talk directly with the agency in private. The only time sides will hear each other's final arguments directly could be in the mandated public hearing in the hours before the Board makes its final decision. This procedure does not foster informed discussion.

USEPA does not use citizen boards in its rulemaking, but uses professional staff dedicated for years at a time, internal agency checks and balances, a thorough, open public hearing process, high quality special interest involvement [from] all sides throughout the process, and external legal and procedural oversight such as provided by Office of Management and Budget.

Id.

93. *Environmental Rulemaking May be Changing for Indiana*, IND. ENVTL. BRIEFS, Nov. 1994, at 3. *See supra* note 91. Under current Indiana law, the IDEM Commissioner has jurisdiction to issue an enforcement order dealing with air, water, and solid and hazardous waste programs administered by IDEM. Unless the notice provides otherwise (or is styled as an emergency order), the enforcement order takes effect 20 days after the alleged violator receives it unless the order is appealed. IND. CODE § 13-7-11-2(d) (Supp. 1994).

An order or final decision of the IDEM Commissioner under *id.* § 13-7-11-5 may be appealed to the relevant state environmental board for an administrative hearing. *Id.* § 4-21.5. The administrative appellant must request a review of the order "before the twentieth day after receiving the notice by filing a written request with the [IDEM] Commissioner." *Id.* § 13-7-11-2(d).

The administrative appeal proceeds with the IDEM Commissioner appointing an administrative law judge to conduct the review proceedings on behalf of the relevant board under IND. CODE § 4-21.5. While the administrative law judge makes a recommended decision, the relevant board is the "ultimate authority" in the administrative appeal process under IND. CODE § 4-21.5. A final order or determination of one of the state environmental boards, however, is subject to judicial review by the intermediate appellate court. *See* IND. CODE §§ 4-21.5-5; 13-7-11-2(g) (Supp. 1994).

Since the legislative process often works at a slow and incremental pace, it is probably unrealistic to expect major reform of both adjudicatory and rulemaking functions of the state environmental boards during the 1995 General Assembly. However, given the increasing complexity of state environmental policy, coupled with the growing importance of fair and efficient administration of environmental law to Indiana's continued economic prosperity, it is imperative that state lawmakers engage in "a comprehensive and serious public debate"[94] of both adjudicatory and rulemaking reform within the next few years.

G. Environmental Quality Service Council

The General Assembly complemented its formation of the Rulemaking Study Committee[95] by establishing a similarly configured, twenty-one member Environmental Quality Service Council—with typical diverse representation—in SEA 417.[96] Yet, in terms of political importance, the legislative creation of the latter study group—with a charge to help improve the quality of IDEM performance—was an order of magnitude greater than the former study group, since the latter group was charged with responsibility for examining the structure of citizen boards in state environmental law and policy. Indeed, from the standpoint of industry, the emergence of the Environmental Quality Service Council was an essential quid pro quo for increased public funding of IDEM operations. Importantly:

> The Council was established in controversy. The idea was promoted by those in industry who wanted an assurance that the higher annual permit fees they were being asked to pay would be used to provide a higher level of service from IDEM. . . . Another group in the regulated community promoted the idea of a study committee because they believed that perhaps even more resources might be needed in the future to bring the agency to an adequate level of professionalism; this group believed that justification for such an increase in fees or tax revenues would demand rigorous, credible, independent proof that it was absolutely needed.
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> In opposition originally were the environmentalist community and the IDEM administration who were fearful that the study committee would interfere with and, at worst, intentionally weaken IDEM operations.[97]

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94. Beranek, *supra* note 92, at 3.

95. *See supra* notes 88-94 and accompanying text. A third legislatively created environmental study committee—the Environmental Management Evaluation Committee—played a more subdued role during 1994. That Committee submitted its report in May 1994. The report described staffing and funding for the major IDEM permit areas along with an estimate of permit backlogs. The report also provided a description of funding of state and federal hazardous substance cleanup and remediation activities for Indiana. *See Indiana General Assembly Studies IDEM*, MEDIATOR, July-Aug. 1994, at 1. *See also supra* note 90.

96. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 14 (uncodified).

97. *Environmental Quality Service Council*, MEDIATOR, July-Aug. 1994, at 1. *See also supra* note 90. Spurred, perhaps, by so much political attention, IDEM restructured its operations in July, 1994. Under this restructuring, two new Deputy Commissioner positions were administratively created and staffed: a Deputy Commissioner for Public Policy and Planning and a Deputy Commissioner for Administration. These two new

Ostensibly, the legislature expects the Council to achieve great things by the time the Council files its "final report" by November 1, 1995.[98] The Council's final report must analyze and evaluate IDEM's progress, or lack of progress, in: (1) reviewing and issuing permits on a timely basis; (2) providing "consistency" in issuing permits "to avoid overregulation"; (3) achieving "[e]fficient and effective implementation of federal and state laws"; (4) attaining "[e]ffective technical assistance capability"; and (5) "[d]evelop[ing] . . . permittee assistance programs."[99] As part of the aforementioned analysis and evaluation, the Council must provide "[a] description of the systems used to evaluate" IDEM operations.[100] Presumably, this analytical constraint on the Council's report was inserted in the legislative package to protect IDEM from general and unsubstantiated criticisms by the Council. The Council, in turn, will be assisted in its information-gathering activities by a legislative directive to IDEM to report monthly to the Council regarding IDEM's permitting programs, proposed rulemakings, financial status, and "[a]ny additional matters requested by the [C]ouncil."[101]

The most important power delegated to the Council, however, transcends its role in reporting on the policy minutiae of IDEM operations. The Council's most important power is to report "[a]n estimate of *funding levels* required by [IDEM]."[102] In justifying the appropriate recommended funding levels for IDEM, the Council will be able to exercise broad discretion under the Act in interpreting the ambiguous meaning of such broad statutory evaluative parameters as providing "consistency" in issuing permits "to avoid overregulation," achieving "[e]fficient and effective implementation of federal and state laws," and attaining "[e]ffective technical assistance capability."[103] To the extent that the Council's discretionary authority under SEA 417 is informed, fair, and balanced,

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upper management positions at IDEM—reporting directly to the IDEM Commissioner—complement two preexisting deputy commissioner slots (a Deputy Commissioner for Environmental and Regulatory Affairs and a Deputy Commissioner for Enforcement and Legal Affairs), for a total of four deputy commissioners. During 1994, IDEM established an "Operational Planning Task Force"—with the advice of a consultant—to reorganize permitting functions and increase operational efficiency. During 1994, IDEM also worked with its consultant on reorganizing its air program and reviewed water and solid waste permitting programs. *See IDEM Restructures Management*, MEDIATOR, July-Aug. 1994, at 1. *See also supra* note 90.

98. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 14 (uncodified). *See generally* Kyle Niederpruem, *State Environmental Agency Will Soon be Looked at by New Oversight Board*, INDIANAPOLIS STAR, May 15, 1994, at B-1. Interestingly enough, the legislation establishing the Rulemaking Study Committee, discussed *supra* notes 88-94 and accompanying text, expired on December 31, 1994. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 13 (uncodified). Presumably, the General Assembly concluded that a longer study period was justified in the case of IDEM operations than with regard to the operations of the state environmental boards.

99. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 14(j)(1) (uncodified).

100. *Id.* § 14(j)(4)(A).

101. *Id.* § 14(k)(4). One of the key strategic problems of the Council in performing its responsibilities will be to cope with "infoglut." *See, e.g., Environmental Quality Service Council's Inaugural Meeting*, IND. ENVTL. BRIEFS, Aug. 1994, at 2. (describing the plethora of reports and information transmitted by IDEM officials to Council).

102. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994, § 14(j)(4)(B) (emphasis added).

103. *See supra* note 98 and accompanying text.

IDEM—in the company of the citizens of the State of Indiana—will benefit from more efficient and effective environmental protection efforts. To the extent, however, that the Council's exercise of its discretionary power is arbitrary and capricious, the citizens of Indiana will gain nothing and lose a golden opportunity to transform environmental law and policy to enhance, rather than detract from, continued economic prosperity.[104]

II. MISCELLANEOUS INDIANA ENVIRONMENTAL AND NATURAL RESOURCES LEGISLATION, 1994

Besides enacting SEA 417, the bulk of environmental legislative action during the session,[105] Indiana's 1994 Second Regular Session of the 108th General Assembly enacted a miscellany of significant bills pertaining to the environment. These bills addressed the following six issues: (1) automobile emission testing improvements; (2) solid waste management district powers; (3) time limitations regarding IDEM administrative enforcement actions; (4) regulation of surface coal mining; (5) pollution prevention policy; and (6) mixing zones for discharges into Lake Michigan.[106]

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104. *See generally* Blomquist, *supra* note 6, at 1037 n.10 (discussing the low national rankings of Indiana regarding numerous measures of environmental quality and commitment with the implication of eventual long-term detrimental economic consequences from such failings).

105. *See supra* notes 11-104 and accompanying text.

106. Less important environmental and natural resources legislation, also passed during 1994 include: Ind. H. Enrolled Act No. 1038, Pub. L. No. 1-1994 (codified at various portions of IND. CODE (Supp. 1994)) (providing technical corrections regarding environmental law and other types of law in the Indiana Code); Ind. H. Enrolled Act No. 1213, Pub. L. No. 123-1994 (codified at various portions of IND. CODE (Supp. 1994)) (establishing, among other things, a Renewable Transportation Fuels Task Force to be appointed by the Governor to provide policy analysis and recommendations on developing ethanol and renewable transportation fuels in Indiana); Ind. H. Enrolled Act No. 1263, Pub. L. No. 88-1994 (codified at IND. CODE §§ 13-8-10-1; 13-8-15-2 (Supp. 1994)) (establishing criminal offenses for failure of an owner of an oil or gas well who ceases operations to properly plug and abandon the affected well; providing additional powers to Natural Resources Commission to unilaterally plug and abandon oil or gas wells and apply the owner's bond or other security for the remedial action); various portions of Ind. H. Enrolled Act No. 1182, Pub. L. No. 19-1994 (codified at IND. CODE §§ 13-1-1-3, -4, -26; 13-1-1.2-1; 13-7-5-2, -7, -8; 13-7-13-1; 13-7-23-10.3; 13-7-23-11, -20 (Supp. 1994)). The General Assembly Committee Report Synopsis for House Enrolled Act No. 1182 states:

> [The Act] adopts language concerning conflicts of interest required by the [F]ederal Clean Air Act. Provides parameters for fee structures adopted by the air quality board. Permits public utilities to conduct open burning under certain circumstances. Permits the [IDEM Commissioner] to issue orders addressing multiple sites. . . . Changes the distribution of waste tire management fund. . . . Establishes the voluntary compliance fund, transfers money from the environmental management special fund to the voluntary compliance fund, and appropriates money in the voluntary compliance fund to the [IDEM]. Provides that [IDEM's] office of voluntary compliance operates the technical and compliance assistance program. . . . [and adds] non-Title V sources to the cap on civil penalties for failure to possess a permit registration. Provides that the environmental service quality counsel evaluate implementation of the voluntary compliance program.

INDIANA LEGISLATIVE COUNCIL, DIGEST OF ACTS 44 (1994). The General Assemply further passed Ind. S. Enrolled Act No. 307, Pub. L. No. 86-1994 (codified at IND. CODE §§ 13-3-3-6, -6.5, -22, -22.5; 13-3-4-4 (Supp.

A. Automobile Emission Testing Improvements

SEA 285[107] was passed to avoid the continuing problem of federal sanctions against Indiana under the Clean Air Act Amendments of 1990 for failure to have an adequate "enhanced" automobile emissions testing program for parts of the state deemed to be "serious" ozone pollution areas.[108] The legislation effects three policy changes that should enable Indiana to finally meet federal auto emissions testing mandates. First, instead of limiting implementation of the automobile inspection program to Indiana Vocational Technical College students under the direction of their instructors—as mandated by prior law—SEA 285 shifts supervision of the program to IDEM, while authorizing the agency

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1994)) (providing the procedure for adding areas to existing state conservancy districts and requiring the state Natural Resources Commission to make determinations regarding whether the proposed district can be operated in a manner compatible with established regional water and sewer districts); Ind. H. Enrolled Act No. 1382, Pub. L. No. 56-1994 (codified, *inter alia*, at IND. CODE § 8-10-9 (Supp. 1994)) (a special piece of legislation establishing a "waterway management district" in "a city having a population of more than thirty-three thousand eight hundred fifty (33,850) but less than thirty-five thousand (35,000) persons in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000) persons"); Ind. H. Enrolled Act No. 1398, § 11, Pub. L. No. 44-1994 (codified at IND. CODE § 36-7-29-1, -23 (Supp. 1994)) (establishing special legislation limited to "[a] city having a population of more than five thousand six hundred fifty (5,650) but less than five thousand seven hundred eight (5,708)" and "[a] county having a population of more than one hundred twenty-nine thousand five hundred (129,500) but less than one hundred thirty thousand six hundred (130,600)" to establish "local environmental response financing board[s]" and collect taxes to clean up hazardous substances).

107. Ind. S. Enrolled Act No. 285, Pub. L. No. 83-1994 (codified at IND. CODE §§ 13-1-1-11, -11.3, -12) (Supp. 1994)).

108. *See* 42 U.S.C. § 7511a(c)(3) (Supp. 1994). In December 1993, the USEPA indicated that it was considering imposing discretionary sanctions against Indiana because of the state's failure to provide a commitment for a vehicle inspection and maintenance program, as required by the Clean Air Act Amendments of 1990, for Clark, Floyd, Lake and Porter Counties—non-attainment areas for ozone. The potential EPA-imposed penalties under consideration in January 1994 included federal highway construction fund restrictions for the state. *See* EPA Notice of Proposed Sanctions, 59 Fed. Reg. 3544 (Jan. 24, 1994).

> IDEM originally agreed to adopt the required I/M program by November 15, 1993. This commitment included an implementation schedule. Because the Indiana General Assembly adjourned on June 30, 1993, without taking action necessary to implement an enhanced I/M program, Indiana failed to meet these deadlines. According to its [January 1994] notice, EPA intend[ed] to impose sanctions, including loss of highway funding sanctions and a 2-for-1 growth offset in areas required to have a permit program under the new source review provisions of the [Clean Air Act Amendments], on May 15, 1994. The notice recognizes, however, that EPA would lift temporarily the highway and offset sanctions if the Indiana General Assembly passes, and the governor signs, legislation authorizing an enhanced I/M program consistent with the [Clean Air Act Amendments] requirements. The 1994 General Assembly enacted SEA 285 as part of an effort to avoid the sanctions described by the EPA in its notice.

Charlie Grandy, *Indiana Faces Clean Air Act Sanctions*, IND. ENVTL. COMPLIANCE UPDATE, March, 1994, at 5-6. *See supra* note 107.

to contract with other private firms to conduct the inspection program.[109] Second, the Act requires IDEM to annually advise the General Assembly's budget committee regarding the adequacy of the state and federal funding to implement a proper motor vehicle emissions testing program in the state.[110] Third, SEA 285 directs IDEM to immediately notify the governor and the General Assembly's budget committee if aggregate state and federal funding "become insufficient to implement a motor vehicle emissions testing program."[111]

B. Solid Waste Management District Modifications

SEA 239[112] makes three significant changes in solid waste planning and management law in Indiana.[113] Initially, the statute mandates that a solid waste management district meet on an annual basis, "not later than September 15," for the purpose of "fix[ing] the budget, tax rate, and tax levy" of the district "for the ensuing . . . year."[114] Moreover, any solid waste management fees promulgated by a district may be established only after public notice and hearing, while budgets of solid waste management districts must be sent to the executive and the fiscal body of each county and municipality within the district prior to adoption by the solid waste management board.[115] SEA 239 introduces a second significant change in existing law by enhancing the powers of solid waste management districts in several specific ways. New provisions delineated in the statute include the power: (1) to run promotional and educational programs about solid waste and recycling; (2) to make grants or loans to promote composting and similar projects; (3) to engage in a small quantity hazardous waste generator collection and disposal project; and (4) to form a non-reverting capital fund, to which a maximum of five percent of the district's total annual budget may be transferred.[116] Third, SEA 239 establishes a "Solid Waste Management Districts Study Commission," charged with studying a variety of questions regarding solid waste management policy. Among the policy issues that the Commission is expected to study and report on are the following: (1) the nature, methods, and relevance of the state's solid waste management goals and means utilized to reach those goals in light of the environmental and economic needs of the state; (2) a comparison of benefits and results of the private and public sectors in meeting Indiana's solid waste management goals; (3) the role of IDEM in achieving the state's solid waste management goals; and (4) methane production facilities and yard waste disposition questions.[117]

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109. Ind. S. Enrolled Act No. 285, Pub. L. No. 83-1994 § 1 (codified at IND. CODE § 13-1-1-11 (Supp. 1994)).

110. *Id.* § 2(a) (codified at IND. CODE § 13-1-1-11.3(a) (Supp. 1994)).

111. *Id.* § 2(b) (codified at IND. CODE § 13-1-1-11.3(b) (Supp. 1994)).

112. Ind. S. Enrolled Act No. 239, Pub. L. No. 34-1994 (codified at IND. CODE §§ 6-1.1-17-3, -5, 13-9.5-2-11, -14, -2; 13-9.5-9-2 (Supp. 1994); certain provisions of act are uncodified).

113. For a history of solid waste planning, management and recycling legislation in Indiana, *see* Blomquist, *supra* note 6, at 1045 n.39.

114. Ind. S. Enrolled Act No. 239, Pub. L. No. 34-1994 § 2 (codified at IND. CODE § 6-1.1-17-5 (Supp. 1994)).

115. *Id.* §§ 1, 4 (codified at IND. CODE §§ 6-1.1-17-3; 13-9.5-2-14 (Supp. 1994)).

116. *Id.* § 3 (codified at IND. CODE § 13-9.5-2-11 (Supp. 1994)).

117. *Id.* § 7 (uncodified).

On balance, SEA 239 adds sophistication to existing solid waste management statutes by providing for a more nuanced level of detail regarding solid waste management district financial responsibilities and governmental powers. One wonders, however, about the limits of usefulness for the General Assembly's seemingly insatiable appetite for the creation of study commissions—like the Solid Waste Management Districts Study Commission—charged with a multitude of tasks and given unrealistically short timeframes to prepare relevant reports.[118]

C. Regulation of Underground Coal Mining

SEA 408 fills gaps in Indiana law by providing standards for dealing with environmental damage caused by underground coal mining operations.[119] The key section in this new legislation mandates that for any underground coal mining operations conducted after June 30, 1994, the operator must "[p]romptly repair or compensate for material damage resulting from subsidence" damages to "occupied residential dwelling[s]" or "noncommercial building[s]"; moreover, the operator must "[p]romptly replace any drinking, domestic, or residential water supply from a well or spring that . . has been affected by contamination, diminution, or interruption resulting from the mining operation."[120] In addition, SEA 408 also modifies certain administrative procedures by the Indiana Department of Natural Resources (DNR) regarding suspension or revocation of coal mining permits and forfeiture of bonds.[121]

D. IDEM's Statute of Limitations

House Enrolled Act (HEA) 1182,[122] among other things, specifies that for an IDEM administrative enforcement action to be timely, it must be commenced "not more than three (3) years after the date [IDEM] discovers the event or the last of a series of events that serves as the basis" for the enforcement action.[123] An enforcement action brought after the newly defined limitation period is void.

A special transition section of HEA 1182 addresses those cases where the "events" discovered by IDEM are discovered before July 1, 1994.[124] To prevent a gap in the statute of limitations—which might otherwise be interpreted to impose no limits on the commencement of IDEM administrative enforcement actions for events discovered pre-July 1, 1994—Section 31 of HEA 1182 provides that IDEM administrative enforcement actions for these earlier events must be commenced before July 1, 1997.[125]

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118. The Solid Waste Management Districts Study Commission was directed to file its report by December 1, 1994. *See id.*

119. Ind. S. Enrolled Act No. 408, Pub. L. No. 85-1994 (codified at IND. CODE §§ 13-2-22.2-16; 13-4.1-6-9; 13-4.1-9-2.5; 13-4.1-11-6 (Supp. 1994)).

120. *Id.* § 3 (codified at IND. CODE § 13-4.1-9-2.5 (Supp. 1994)).

121. *Id.* §§ 2, 4 (codified at IND. CODE §§ 13-4.1-6-9; 13-4.1-11-6 (Supp. 1994)).

122. Ind. H. Enrolled Act No. 1182, Pub. L. No. 82-1994 (codified at IND. CODE § 13-7-5-5 (Supp. 1994)).

123. *Id.* § 8.

124. *Id.* § 31 (uncodified).

125. *Id.*

The three-year statute of limitations period for IDEM's commencement of administrative enforcement actions is good public policy. The limitation period fashions a fair and consistent cutoff point regarding liability for, what would otherwise be, stale environmental infractions. Prior to the enactment of the new legislation, the limitation period was in doubt, and the judiciary was ultimately responsible for attempting to find an appropriate limitation period by implication. In addition, the administrative enforcement limitations period—imposing accountability for IDEM enforcement of environmental laws—dovetails with the newly imposed permit review and issuance accountability rules for IDEM.

E. Pollution Prevention Policy

Other sections of HEA 1182 seek to amplify and enhance pollution prevention policy in Indiana, while altering administrative details of solid waste reduction in the state.[126] Section 18 of the Act requires IDEM's Office of Pollution Prevention and Technical Assistance to provide technical assistance regarding source reduction and recycling, while overseeing the state recycling grants program.[127] With this new provision juxtaposed with earlier statutory directives to IDEM, the General Assembly has gone too far by intermingling industrial pollution prevention efforts by IDEM's Office of Pollution Prevention and Technical Assistance—typically calling for review of hazardous waste issues—with nonhazardous municipal solid waste efforts. Industrial pollution prevention policy and municipal solid waste policy are quite distinct problems. It may be unwise to mix these problems into a single IDEM office without ensuring that the office's programmatic needs for current responsibilities are fully met. Indeed, in the future, it may be appropriate for the General Assembly to direct IDEM to create separate administrative offices for industrial pollution prevention and for municipal solid waste reduction policy.

Section 19 of HEA 1182 requires the Indiana Pollution Prevention Board to explicitly assume various fiscal responsibilities.[128] Additional responsibilities now borne by the Board include its approval of the Indiana Pollution Prevention and Safe Materials Institute's proposed biennial budget request, preparation of budget forms to the State Budget Agency, and presentation of the Board's biennial budget request in public meetings concerning the budget.[129] In light of the increasing complexity and importance of state industrial pollution prevention law and policy,[130] these new fiscal accountability provisions should help the Board better manage pollution prevention programs and projects in the state.

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126. *Id.* §§ 18, 19 (codified at IND. CODE §§ 13-9-2-5; 13-9-3-8 (Supp. 1994)). For an analysis and discussion of earlier legislation regarding pollution prevention policy in Indiana, *see* Blomquist, *supra* note 6, at 1049-54.

127. Ind. H. Enrolled Act No. 1182, Pub. L. No. 82-1994 (codified at IND. CODE § 13-9-2-5 (Supp. 1994)).

128. *Id.* § 19 (codified at IND. CODE § 13-9-3-8 (Supp. 1994)).

129. *Id.*

130. *See generally* Robert F. Blomquist, *Government's Role Regarding Industrial Pollution Prevention in the United States*, 29 GA. L. REV. 349 (1995).

F. Lake Michigan Discharges and Mixing Zones

In a controversial change to existing state water pollution control law, achieved by the lobbying efforts of Amoco so that its Whiting, Indiana refinery could become eligible for a mixing zone for its discharge into Lake Michigan,[131] HEA 1126, among other things, instructs IDEM to allow for a "mixing zone" in water pollution permits involving discharges into Lake Michigan[132] if the permittee "demonstrate[s] to [IDEM] that the mixing zone will not cause harm to human health or aquatic life."[133] As a precautionary measure under the Act, even when mixing zones are otherwise found to be permissible for discharges into Lake Michigan, "surface water quality standards for bioaccumulative chemicals of concern" must be applied by IDEM to the undiluted discharge rather than at a point outside the mixing zone.[134]

While special interest environmental legislation is not unheard of in the annals of American environmental law and policy,[135] the idea of fashioning a legislative standard for the benefit of one entity is unsavory, at best. On balance, however, it is difficult to ascertain whether HEA 1126 really is special interest legislation or a mere concession to the greater dilutional capacity of Lake Michigan, in comparison with smaller bodies of water in Indiana. If premised on the latter assumption, joined with a strategic concern about an important industry to Indiana's economy, the action by the General Assembly in passing and the Governor in signing HEA 1126 is probably justified, assuming a more stringent federal technological standard would not apply and the dilutional allowance does not represent backsliding by Indiana of its water quality standards.

III. CASE LAW DEVELOPMENTS

During the 1994 Survey period, Indiana state courts and federal courts, addressing problems that arose within Indiana, issued a number of opinions on a variety of interesting

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131. *See, e.g.*, Marsha Hahney, *Valpo Senator Plans Fight to Repeal Controversial Pollutant-Leeway Law*, GARY POST-TRIB., Nov. 10, 1994, at B7 (describing the statute as "special legislation of the worst kind," according to Senator William Alexa); Stevenson Swanson & Bonnie Miller Rubin, *Amoco Refinery Seeking a Pass on Salt Dumping*, CHI. TRIB., April 13, 1994, at B1 (discussing discontent among environmentalists regarding mixing zone allowance for Amoco).

132. Ind. H. Enrolled Act No. 1126, Pub. L. No. 84-1994 (codified at IND. CODE §§ 13-1-3-20; 13-1-3-21 (Supp. 1994)).

133. *Id.* § 1(a) (codified at IND. CODE § 13-1-3-20(a) (Supp. 1994)).

134. *Id.* § 1(b) (codified at IND. CODE § 13-1-3-20(b) (Supp. 1994)). The legislation also directs IDEM, when issuing permits authorizing mixing of discharges, to "allow for mixing initiated by the use of submerged, high rate diffuser outfall structures or the functional equivalent" thereto. *Id.* § 2(b) (codified at IND. CODE § 13-1-3-21(b) (Supp. 1994)).

135. *See, e.g.*, CASES AND MATERIALS ON ENVIRONMENTAL LAW, *supra* note 87, at 281-82 n.1 (describing how Congress passed "special case" legislation in response to federal court opinions that upheld an administrative interpretation that the Clean Water Act did not allow the EPA to vary the technology-based effluent limitations solely because water quality would not be measurably improved by compliance; explaining that Congress enacted legislation exempting two paper mill plants in California, but no other plants, from the pH and BOD requirements).

environmental and natural resources issues. Five significant published opinions—three state and two federal—are worthy of further comment.[136]

A. State Opinions

In *Natural Resources Commission v. Amax Coal Co.*,[137] the Indiana Supreme Court decided an important state administrative law decision that upheld the power of the DNR to regulate surface coal mine operators' use of ground water as an aspect of the Department's statutory authority to control surface coal mining.[138] In consolidated cases, the Indiana Supreme Court, in a 3-2 opinion, reversed and vacated a decision by the Court of Appeals, Fourth District,[139] which had upheld the Marion Superior Court's orders holding that the DNR was precluded from conditioning the issuance of coal companies' strip mining permits upon demonstration that dewatering plans would not harm adjacent landowners.[140]

At the outset of its *Amax Coal* opinion, the Supreme Court observed that the question presented for appellate review was whether the DNR possessed the statutory authority, pursuant to the Indiana Surface Mining Control and Reclamation Act (I-SMCRA),[141] "to place restrictions upon mining companies when pumping ground water from beneath property in which those companies have property rights."[142] In resolving the question, the

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136. Other "honorable mention" decisions decided during 1994 by state and federal courts include the following: United States v. Bethlehem Steel Corp., 38 F.3d 862 (7th Cir. 1994) (affirming district court's finding that Bethlehem violated RCRA and SDWA by failing to comply with the corrective action conditions required by two UIC permits for its underground injection wells; however, reversing and vacating the portion of the district court opinion that granted partial summary judgment and injunctive relief against Bethlehem regarding Bethlehem's F006 hazardous waste since the sludges in Bethlehem's lagoons and landfills were not subject to RCRA Subtitle C requirements as a listed hazardous waste); United States v. SCA Svcs. of Ind., 849 F. Supp. 1264 (N.D. Ind. 1994) (holding that cost recovery claimant who had performed cleanup efforts at waste disposal site could proceed under another section of CERCLA allowing recovery of response costs); United States v. Wedzeb Enter. Inc., 844 F. Supp. 1328 (S.D. Ind. 1994) (holding that (1) district court had original jurisdiction over controversy arising under CERCLA; (2) capacitors containing PCBs that were sold by defendants to broker for resale were not waste, as required for liability; and (3) event that caused release of PCBs into environment was not disposal that defendants arranged for, but unanticipated fire); and Auburn Foundry, Inc. v. State Bd. of Tax Comm'rs, 628 N.E.2d 1260 (Tax Ct. Ind. 1994) (holding that taxpayer, a foundry, appealing a decision of the State Board of Tax Commissioners which had reduced property tax deduction granted to the taxpayer for resource recovery system by IDEM was without statutory authority to overrule the decision by IDEM granting property tax deduction under the statute).

137. 638 N.E.2d 418 (Ind. 1994).

138. *Id.* at 431.

139. 603 N.E.2d 1349 (Ind. Ct. App. 1993).

140. *Amax Coal Co.*, 638 N.E.2d at 420-22.

141. IND. CODE § 13-4.1-1-2 (1990). The court linked I-SMCRA with the federal Surface Mining Control and Reclamation Act of 1977 (F-SMCRA), 30 U.S.C. §§ 1201-1328 (1988 & Supp. 1993). According to the Supreme Court of Indiana, both the state and federal statutes "recogniz[e] the need to protect society and the environment, as well as to assure the rights of surface landowners and others, by preventing and minimizing the adverse effects of surface mining operations." *Amax Coal Co.*, 638 N.E.2d at 419.

142. *Amax Coal Co.*, 638 N.E.2d at 423.

Indiana Supreme Court first examined the express provisions of I-SMCRA that "directly apply to water resources protection and the prevention of offsite damage."[143]

The Indiana Supreme Court discerned a number of pertinent statutory provisions, in this regard, which included, among others, the following: a surface coal mining permit application requirement that the applicant demonstrate "the probable hydrologic consequences of [its] surface coal mining and reclamation operation, both on and off the mine site";[144] a permit application requirement that a coal mine operator submit a detailed reclamation plan demonstrating measures that will "assure the protection of . . . the quality of surface and ground water systems, both onsite and offsite, from adverse effects of the mining and reclamation process," while showing that "the rights of present users to that water" will be protected;[145] a statutorily-imposed "burden upon an applicant . . . to establish the existence of certain conditions . . . aimed at preserving the hydrologic balance in the area surrounding that being mined;"[146] and legislative empowerment of the DNR to halt coal mining operations in the face of "imminent danger to the health or safety of the public," amplified by the power to impose additional "affirmative obligations on the operator."[147] Moreover, the Indiana Supreme Court concluded that these specific statutory powers were supplemented by DNR's "promulgat[ion] [of] many regulations, through the administrative rulemaking process, to aid in enforcing the statutes."[148] Accordingly, the Indiana Supreme Court held that the DNR was acting within its statutory authority when ordering the coal mining operators to meet protective conditions as a prerequisite to receiving agency approval of the operators' permit revision applications.[149]

The Indiana Supreme Court next undertook a second level of inquiry in *Amax Coal*—beyond the express statutory provisions authorizing the DNR to place various restrictions on coal mining operations under state statute—in order to ascertain whether "I-SMCRA expressly preserves the common law water rights system that existed when I-SMCRA became effective."[150] Rejecting the coal mining companies' argument that a 1983 state court decision,[151] coupled with a statutory reservation of rights provision,[152] established a doctrine of absolute use of ground water in Indiana, the Indiana Supreme Court reasoned that recent state statutory and administrative changes had undercut that 1983 precedent.[153] The culmination of the opinion was the Indiana Supreme Court's response to the coal operators' Takings Clause argument under the Fifth Amendment to

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143. *Id.* at 424.

144. *Id.* (quoting IND. CODE § 13-4.1-3-3(a)(11) (Supp. 1993)).

145. *Id.* (quoting IND. CODE § 13-4.1-3-4(a) (Supp. 1993)).

146. *Id.* (citing IND. CODE §§ 13-4.1-4-3(a); 13-4.1-8-1 (Supp. 1993)).

147. *Id.* at 426 (quoting IND. CODE § 13-4.1-11-5 (1990)).

148. *Id.*

149. *Id.* at 427.

150. *Id.*

151. Wiggins v. Brazil Coal and Clay Corp., 452 N.E.2d 958 (Ind. 1983).

152. IND. CODE § 13-4.1-8-1(25) (Supp. 1993). The statute states: "Nothing in this article shall be construed as affecting in any way the right of any person to enforce or protect under applicable law the person's interest in water resources affected by a surface coal mining operation." *Id.*

153. *Amax Coal Co.*, 638 N.E.2d at 428.

the United States Constitution.[154] Finding that imposing regulatory controls on ground water, which can be potentially harmed by surface coal mining operations, was "a legitimate exercise of the police power,"[155] the crux of the constitutional issue—as analyzed in the opinion—boiled down to whether the Indiana statutory scheme, as it affected ground water rights, went too far and, therefore, constituted a "regulatory taking."[156] Relying on a constitutional test emanating from the United States Supreme Court's opinion in *Nollan v. California Coastal Commission*,[157] the Indiana Supreme Court reasoned that "a land use regulation will not effect a taking if it substantially advances a legitimate state interest and does not deprive an owner of economically viable use of his property."[158] Applying this test to the facts, the *Amax Coal* Court reiterated its view that DNR's actions were in full compliance with the purposes of I-SMCRA and went on to conclude that the ground water conditions on the coal mining permits were intended by the State to prevent potential serious offsite damage.[159] Therefore, the court found no regulatory taking had occurred.[160]

The reasoning in *Amax Coal* is incomplete because the opinion fails to cite—let alone discuss—the 1992 landmark decision by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*.[161] Importantly, the *Lucas* Court asserted an aggressive anti-regulatory approach to Takings jurisprudence by holding that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use . . . it may resist compensation only if 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."[162] A proviso to this rule, however, is the existence of "background principles of nuisance and property law" that made the proposed land use "always unlawful."[163] While the omission of a *Lucas* analysis in *Amax Coal* is problematic, it appears to be a harmless judicial error by the Indiana Supreme Court since extant Indiana nuisance precedent would seem to afford ample "background principles" to limit ground water use to protect offsite property

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154. U.S. CONST. amend. V.

155. *Amax Coal Co.*, 638 N.E.2d at 430.

156. *Id.*

157. 483 U.S. 825, 834 (1987).

158. *Amax Coal Co.*, 638 N.E.2d at 430 (citing DNR v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989) (citing *Nollan*, 483 U.S. at 834)).

159. *Id.*

160. *Id.* at 430-31. Justice Givan issued a one-sentence dissent, urging that "[t]he trial court and the Court of Appeals were correct." *Id.* at 430. Justice Dickson dissented without opinion. *Id.*

161. 112 S. Ct. 2886 (1992).

162. *Id.* at 2899.

163. *Id.* at 2900-01.

owners,[164] even assuming, arguendo, that the coal operators could be said to have enjoyed extensive property title rights to the subterranean ground water.

In *Wright Motors, Inc. v. Marathon Oil Co.*,[165] the Indiana Court of Appeals, First District, issued a significant opinion interpreting the extent of a contractual release "from all liability for environmental contamination."[166] Marathon Oil Company ("Marathon") had operated a gasoline service station for many years on property it leased from Wright Motors, Inc. ("Wright Motors") under a ground lease.[167] In 1976, Wright Motors consented to Marathon's assignment of the lease to Green Construction of Indiana, Inc. ("Green Construction"). In the Assignment Agreement—signed by all three parties—Wright Motors also agreed to release Marathon from any liability under the terms of the lease from December 19, 1979 forward.[168] One week after signing the Assignment Agreement, Marathon sold its underground storage tanks, previously installed on the property, to Green Construction.[169]

After Marathon's assignment to Green Construction, the underground storage tanks beneath the service station were discovered to have leaked petroleum hydrocarbons into the surrounding soils.[170] After incurring more than $80,000 in remediation costs to clean up the contamination, Wright then brought a contribution action for those costs against Marathon and Green Construction pursuant to the Indiana Underground Storage Tanks Act[171] and common law theories of contribution and waste.[172] At the trial court level, Marathon moved for summary judgment, claiming that when Wright Motors consented to Marathon's assignment of its lease to a third party, Wright Motors also released Marathon from all liability under the lease, including liability for environmental contamination.[173] The trial court agreed with Marathon's motion and entered summary judgment in Marathon's favor.[174] On appeal, the court of appeals reversed, relying

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164. *See, e.g.*, Central Ind. Ry. v. Mikesell, 221 N.E.2d 192 (Ind. App. 1966) (holding that evidence sustained finding that plaintiff's property damages resulted from sudden release of the great volume of surface water backed up behind railroad's embankment, and not from the water itself); Northern Ind. Pub. Serv. Co. v. W.J. & M.S. Vesey, 200 N.E. 620 (Ind. 1936) (holding that the owner of greenhouses was entitled to recover all damages due to continuous operation of gas plant emitting poisonous fumes, where the court found that the plant could not be so operated as not to emit fumes and it would be of less damage than to permit them to enjoin operation of the plant).

165. 631 N.E.2d 923 (Ind. Ct. App. 1994).

166. *Id.* at 927.

167. *Id.* at 924.

168. *Id.* at 925. Paragraph 4 of the Agreement provided: "Landlord expressly agrees that Assignor shall have *no further liability of any nature whatsoever under the terms of the Lease* from and after December 19, 1979, the expiration of the primary term thereunder." *Id.*

169. *Id.* at 924.

170. *Id.*

171. IND. CODE § 13-7-20-21 (Supp. 1994).

172. *Wright Motors, Inc.*, 631 N.E.2d at 924-25.

173. *Id.* at 924.

174. *Id.*

principally on the contractual release phrase "under the terms of the Lease" as "expressly qualif[ying] *the extent of the liability released to liability under the lease terms.*"[175]

The *Wright Motors* court declined to accept Marathon's "broad interpretation of the release" or its assertion that a federal district court opinion construing similar language in another agreement was dispositive.[176] Distinguishing the release language in the federal case, *Rodenbeck v. Marathon Petroleum Co.*,[177] the Indiana Court of Appeals noted that release language at issue in the federal case had broadly released "claims and obligations of any character or nature whatsoever arising out of or in connection with said agreements," while the release language in the case at bar demonstrated "that the release was merely a release of contractual obligations under the lease."[178] Since the Indiana General Assembly provided for a statutory cause of action for contribution against Marathon as a past owner or operator of a leaking underground storage tank,[179] and since under common law "the owner or a person with an interest in real property may bring an action for waste for the destruction, misuse, alteration or neglect of the premises by one lawfully in possession of the premises,"[180] as a matter of law, Marathon was not released from all liability for environmental contamination.[181] Accordingly, summary judgment in favor of Marathon by the trial court was deemed to be in error.[182]

Wright Motors is an important case in the developing environmental transactional law of Indiana.[183] The decision is faithful to diverse sources of law that may impact on a property transaction, including contract law, statutory law, and common law tort principles. The lesson of the case, and other analogous cases, is that transactional lawyers should pay close attention to the precise language used in transactional documents to effectuate the true intent of their clients and to protect their clients' interests.

In *Great Lakes Chemical Corp. v. International Surplus Lines Insurance Co.*,[184] the Indiana Court of Appeals, Fourth District, had the occasion to grapple with a vexing interpretational question at the intersection of insurance law and environmental law.[185] Great Lakes Chemical Corporation ("Great Lakes") brought an action seeking a declaratory judgment that International Surplus Lines Insurance Company (ISLIC) and

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175. *Id.* at 925 (emphasis added).

176. *Id.* at 926.

177. 742 F. Supp. 1448 (N.D. Ind. 1990).

178. *Wright Motors, Inc.*, 631 N.E.2d at 926.

179. *Id.* at 927 (citing IND. CODE § 13-7-20-21(b) (Supp. 1994)).

180. *Id.* at n.3 (citations omitted).

181. *Id.* at 927.

182. *Id.*

183. *See generally* GREAT LAKES ENVIRONMENTAL TRANSACTIONS GUIDE, *supra* note 10.

184. 638 N.E.2d 847 (Ind. App. Ct. 1994).

185. The Indiana Supreme Court has agreed to grant a transfer petition in Indiana v. Kiger d/b/a Kiger's Sunoco (Ind. No. 32505-9409-CV-836, petition granted September 2, 1994). In this case, the Indiana Supreme Court "may definitively resolve two key environmental insurance issues—the proper construction of the 'sudden and accidental' and 'absolute pollution exclusions' in comprehensive general liability (CGL) policies." 9 Tx. L. Rep. 468 (September 28, 1994). "The case, which involves a leaking underground storage tank, will also answer the novel question whether gasoline held for retail is a 'pollutant' under the absolute exclusion." *Id.*

First State Insurance Company ("First State") had respective duties to defend and indemnify Great Lakes in thirteen underlying lawsuits filed against Great Lakes.[186]

Background to the litigation reached back several years. In the 1960s, Great Lakes commenced manufacturing and selling pesticide products containing a chemical compound known as ethylene dibromide (EDB).[187] Great Lakes registered these products, according to applicable law, with both state and federal authorities.[188] The EDB products manufactured by Great Lakes were intended to be used as a "soil fumigant pesticide to control nematodes and other pests."[189] The EDB was applied by injecting the pesticide directly into the ground using a tractor-driven applicator.[190] In 1983, the USEPA banned the use of EDB as a soil fumigant pesticide.[191] Thereafter, assorted litigants brought lawsuits for damages against Great Lakes, claiming soil and groundwater contamination caused by EDB.[192] Great Lakes, in turn, sought indemnity and defense costs against its excess liability insurers, ISLIC and First State, under various excess liability insurance policies that had been issued from 1971 to 1979.[193] The parties made cross motions for summary judgment. The trial court granted summary judgment in favor of the insurers, finding as a matter of law that there was no duty to defend or indemnify Great Lakes regarding any of the underlying lawsuits.[194]

On appeal, the pollution exclusion clause contained in various policies written by First State and ISLIC initially caught the attention of the court of appeals.[195] Nevertheless, the court ultimately concluded that this clause did not exclude insurance coverage because "Great Lakes is in the business of manufacturing and selling chemical compounds."[196] Like EDB, Great Lakes had obtained proper pesticide approvals for the manufacture and sale of the pesticides, and "EDB was neither a manufacturing *by-product [nor] a waste product* of Great Lakes"; instead, "EDB was the actual end-product of the manufacturing

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186. *Great Lakes Chem. Corp.*, 638 N.E.2d at 849.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. The pollution exclusion clause contained in the First State and certain ISLIC policies excludes coverage for:

> Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

The pollution exclusion clause contained in the remainder of the ISLIC policies provides: "It is agreed this policy shall not apply to liability for contamination or pollution of land, water, air or real or personal property or any injuries or damages resulting therefrom caused by an occurrence." *Id.* at 850.

196. *Id.* at 851.

process."[197] In a trenchant paragraph of analysis, the court of appeals did a commendable job in effectively discerning the intent of the parties in entering the excess liability insurance contracts:

> Great Lakes, like most manufacturers, purchased liability insurance to protect itself from damage caused by its products. Here, because of the nature of the product and its intended use, the damage caused by EDB was environmental pollution. However, simply because the damage alleged in the underlying lawsuits is environmental damage does not mean that the pollution exclusion clauses should automatically apply to exclude coverage. In this case, the underlying claims against Great Lakes are not in the nature of intentional or negligent environmental pollution; they are essentially product liability claims. To hold that the pollution exclusion clauses bar coverage to Great Lakes for the EDB claims would render the insurance coverage purchased by Great Lakes illusory. We hold that under the facts of this case, the EDB claims against Great Lakes are not excluded by the policies' pollution exclusion clauses.[198]

B. Federal Opinions

In two opinions issued during 1994, the United States Court of Appeals for the Seventh Circuit rendered important environmental decisions in the area of hazardous waste law. Both opinions addressed issues arising out of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[199]

In *Akzo Coatings, Inc. v. Aigner Corp.*,[200] the court took pains to distinguish the meaning and importance of statutory contribution actions from direct cost recovery actions. The facts of the case are richly textured. Between 1972 and 1985, more than 200 firms generated hazardous wastes that were ultimately disposed of at various facilities within an industrial park in Kingsbury, Indiana.[201] Among the facilities within the Kingsbury Industrial Park, known globally as the Fisher-Calo site, was the Two-Line Road facility, where Fisher-Calo Chemicals and Solvents, Inc. and its predecessors had conducted recycling operations from 1981 through 1985.[202] In 1988, the USEPA concluded that the waste stored at the Two-Line Road facility posed an imminent danger to the environment and issued a unilateral administrative order requiring Akzo and approximately twenty other potentially responsible parties (PRPs) to conduct emergency

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197. *Id.* (emphasis added).

198. *Id.* In footnote 3 to the opinion, the Court of Appeals noted that:

> The parties and the four amicus who filed briefs in this appeal expend considerable discussion on the issue of whether or not the phrase "sudden and accidental," as used within one of the pollution exclusion clauses, is ambiguous. Because we hold that in this case the exclusions themselves do not apply to exclude coverage, we leave the resolution of that issue for another day.

Id. at 851 n.3.

199. 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1993).

200. 30 F.3d 761 (7th Cir. 1994).

201. *Id.* at 762.

202. *Id.*

removal activities at the Two-Line Road site.[203] Akzo obeyed EPA's order; in the process of complying, however, Akzo incurred costs in excess of $1.2 million.[204] In December 1991, after several years of negotiations and preparation of a Record of Decision (ROD), the USEPA filed suit against over 200 PRPs to obtain complete cleanup of the overall Fisher-Calo site. About a year later, in 1992, a consent decree was approved by the district court.[205] Aigner was a party to this overarching consent decree, but Akzo was not. After the district court's approval of the consent decree, Aigner moved to dismiss a pending CERCLA contribution action that had been brought by Akzo in 1991 for contribution to the emergency response expenses Akzo had incurred in the 1980s at the Two-Line Road facility.[206] The district court granted Aigner's dispositive motion on the grounds that Akzo sought contribution for a "matter addressed" in the 1992 EPA consent decree and, therefore, was barred by Section 113(f) of CERCLA,[207] which provides in pertinent part:

> (2) Settlement
>
> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.[208]

In reviewing the district court's ruling, the Seventh Circuit initially focused on the nature of Akzo's claim against Aigner and concluded that "Akzo's claim is one for contribution."[209] In reaching this result, the court of appeals reasoned as follows:

> Akzo argues that its suit is really a direct cost recovery action brought under Section 107(a) rather than a suit for contribution under Section 113(f)(1); and it is true that Section 107(a) permits any "person"—not just the federal or state governments—to seek recovery of appropriate costs incurred in cleaning up a hazardous waste site. . . . Yet, Akzo has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a)—it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands. Instead,

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203. *Id.* at 762. The EPA issued this order pursuant to its power under 42 U.S.C. § 9606 (1988 & Supp. 1993).

204. *Akzo Coatings*, 30 F.3d at 763.

205. *Id.*

206. *Id.*

207. *Id.* (citing Akzo Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380 (N.D. Ind. 1992) & 42 U.S.C.A. § 9613(f) (Supp. 1994)). Aigner's dispositive motion was brought as a motion to dismiss pursuant to FED. R. CIV. P. 12(b); this was converted by the district court into a summary judgment motion. *See* FED. R. CIV. P. 12(b). Although the district court's ruling did not dispose of all of Akzo's claims, the district court certified its ruling for immediate appeal pursuant to FED. R. CIV. P. 54(b). *Akzo Coatings*, 30 F.3d at 763-64.

208. 42 U.S.C. § 9613(f) (1988 & Supp. 1993).

209. *Akzo Coatings*, 30 F.3d at 764.

> Akzo itself is a party liable in some measure for the contamination at the Fisher-Calo site, and the gist of Akzo's claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible. . . . That is a quintessential claim for contribution. . . . Section 113(f)(1) confirms as much by permitting a firm to seek contribution from "any other" party held liable under sections 106 or 107. Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f).[210]

In turning to the second and crucial question presented for review, which addressed "whether the contribution that Akzo seeks is for 'matters addressed' by the consent decree that Aigner signed,"[211] the Seventh Circuit opined that "[t]he statute itself does not specify how [courts] are to determine what particular 'matters' a consent decree addresses."[212] Choosing to utilize a "flexible approach to contribution claims"[213] and eschewing "any bright lines,"[214] the court of appeals scrutinized the terms of the 1992 consent order, which Aigner had signed, in juxtaposition with the emergency removal action undertaken by Akzo in the late 1980s. Noting that "[u]ltimately, the 'matters addressed' by a consent decree must be addressed in a manner consistent with both the reasonable expectations of the signatories and the equitable apportionment of costs that Congress has envisioned,"[215] the *Akzo Coatings* court held that "[b]ecause Akzo's preliminary clean-up work [was] . . . so clearly distinct from the long-range remedial matters addressed by the decree, Akzo [was] entitled to seek contribution from the settling PRPs under section 113(f)(1)."[216] However, the court went on to hold that its "conclusion is different with respect to the voluntary costs that Akzo incurred in conjunction with other PRPs in attempting to anticipate the claims that might be asserted against them by the EPA."[217] The court drew the distinction because:

> In contrast to the limited nature of the initial removal work required by the EPA's 1988 order, the focus of these efforts [by Akzo] was on the long-term remedial action necessary to effect a permanent cleanup of the site. In essence, Akzo and its fellow PRPs were attempting to predict, and perhaps shape, the provisions of the consent decree. In that sense, these efforts were necessarily "matters addressed" by the decree, and in the absence of some indication that they accomplished tasks distinct from what the consent decree called for, claims for contribution based on these efforts are barred by section 113(f)(2).[218]

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210. *Id.* (citations omitted).
211. *Id.* at 765 (citation omitted).
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 766 (citation omitted).
216. *Id.* at 767 (footnote omitted).
217. *Id.*
218. *Id.*

In an opinion, concurring in part and dissenting in part, Judge Easterbrook upbraided the panel decision in *Akzo Coatings* by arguing that it was improper to "pluck" equitable considerations, delineated in Section 113(f)(1), and import those considerations into the straightforward settlement provisions of Section 113(f)(2).[219] Moreover, drawing in part on policy analysis from a recent United States Supreme Court admiralty opinion that concluded that contribution actions against parties that have settled are undesirable,[220] Judge Easterbrook engaged in a lively and scholarly critique of the majority opinion. Judge Easterbrook's criticism notwithstanding, however, the majority opinion in *Akzo Coatings* is essentially sound on the facts since the government's agreement not to pursue the parties to a consent decree did not evince an intent to foreclose non-settling parties from seeking contribution. Indeed, "[i]f the covenant not to sue alone were held to be determinative of the scope of contribution protection, the United States would not be free to release settling parties from further litigation with the United States, without unavoidably cutting off all private party claims for response costs."[221] Judge Easterbrook, however, articulates a compelling concern about the dangers of a too-narrow judicial interpretation of section 113(f)(2) which might, on other facts, discourage Superfund settlement agreements for cleanup of abandoned hazardous waste sites.[222]

Town of Munster, Indiana v. Sherwin-Williams Co.[223] addressed the controversial question of whether CERCLA permits equitable, non-statutory affirmative defenses to section 107 liability under CERCLA. In concluding that laches could not be properly maintained as an affirmative defense to CERCLA liability, the court of appeals held that Congress had clearly evinced an intent to "restrict the [traditional] equitable powers of the federal courts" in the plain language of section 107.[224] Importantly, the *Town of Munster* court saw "nothing illogical or untenable about a statutory scheme that bars equitable *defenses* to liability but allows consideration of equitable *factors* in apportioning costs between various responsible parties"[225] under section 113(f)(1).[226] Rather, the court construed section 107(b)'s limited defenses "as addressing the causation element of the underlying [statutory] tort and negating the plaintiff's prima facie showing of liability."[227] Yet, the court went out of its way to point out that its preclusion of the defense of laches in CERCLA litigation did not necessarily preclude other matters—such as statute of limitations, res judicata and hold harmless agreements—which, in the court's opinion, could be better characterized as "legal or statutory shield[s] against having to litigate"[228] and were colorably supported by other specific statutory sections of CERCLA. In conclusion, the Seventh Circuit ruled that Munster's cost recovery claim should be

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219. *Id.* at 771 (Easterbrook, J., dissenting in part, concurring in part).

220. *Id.* at 773 (Easterbrook, J., dissenting in part, concurring in part) (citing McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1467 (1994)).

221. *Id.* at 776 (citing U.S. Amicus Br. at 19).

222. *Id.* at 774 (Easterbrook, J., dissenting in part, concurring in part).

223. 27 F.3d 1268 (7th Cir. 1994).

224. *Id.* at 1271 (citing 42 U.S.C.A. § 9607 (Supp. 1994)).

225. *Id.* at 1272 (footnote omitted).

226. 42 U.S.C.A. § 9613(f)(1) (Supp. 1994) (emphasis added).

227. *Town of Munster*, 27 F.3d at 1272.

228. *Id.*

reinstated "for a determination of liability and, if necessary, apportionment."[229] According to the court, equitable factors would be appropriate considerations at the apportionment stage.[230]

The *Town of Munster* court's reasoning accords with the majority of federal circuit court of appeals that have considered the question of the availability of non-statutory equitable defenses to CERCLA section 107 liability.[231] The *Town of Munster* opinion properly distinguishes between the strictly limited causation-based defenses to CERCLA liability set forth in section 107(b) and the broad equitable factors for apportioning liability in section 113(f)(1) of the statute. Viewed in conjunction with the *Akzo Coatings* case,[232] *Town of Munster* adds important judicial insights about the delicate balance between legal and equitable considerations in resolving CERCLA litigation.

CONCLUSION

In 1993, the State of Indiana came close to foundering in its commitment to environmental law and policy because of a lack of commitment by the General Assembly to adequately fund IDEM.[233] However, during 1994, the General Assembly exhibited its commitment to IDEM and the governor signed new legislation that substantially increased IDEM's funding for carrying out key environmental programs. The quid pro quo for this commitment, however, was the General Assembly's insistence on a series of strict accountability measures in reviewing the performance of the state environmental agency. On the surface, this exchange seems to be a fair compromise between competing political interests in the state. Moreover, the reform legislation holds promise in improving IDEM's operations and sense of priorities. However, only time will tell whether the specific accountability measures imposed on IDEM will be successful in achieving effective and efficient environmental protection for the citizens of the State of Indiana.

In addition to an assortment of miscellaneous environmental and natural resources legislation also enacted into state law during 1994, the state and federal courts issued several important decisions addressing such matters as the power of state agencies to condition coal mining permits in order to protect offsite contamination, to questions of defenses to liability and settlement protections under CERCLA. In many ways, 1994 was the most important year in the development of environmental policy in Indiana in the last decade.

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229. *Id.* at 1274.

230. *Id.*

231. *See* Velsicol Chem. Corp. v. Enenco, Inc., 9 F.3d 524, 530 (6th Cir. 1993) (holding that the doctrine of laches may not bar a CERCLA cost recovery action); General Elec. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991) (holding that CERCLA does not provide for an unclean hands defense to liability); Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (concluding that under CERCLA the doctrine of *caveat emptor* is not a defense to liability for contribution but may be considered in mitigation of the amount due).

232. *See supra* notes 183-98 and accompanying text.

233. *See generally* Blomquist, *supra* note 6.