

# 2007-2008 ENVIRONMENTAL LAW SURVEY: A SYSTEM IN FLUX

FREEDOM S.N. SMITH\*  
JENNIFER ANDRES\*\*  
ANGELA KRAHULIK\*\*\*

## INTRODUCTION

Here, we survey the federal and state court decisions decided between October 1, 2007, and September 30, 2008, that are most likely to affect the Indiana environmental law practitioner.<sup>1</sup>

Perhaps more than most years, this year's survey period finds the state of environmental law in significant flux. Key cases affecting the Clean Air Act (CAA),<sup>2</sup> environmental remediation, and other areas have been decided, or are pending, at the state and federal level that leave some fundamental issues unresolved and promise heated debate in the near future. As we explain in Part I, several rules promulgated under the CAA have been successfully challenged during the survey period, calling into question emission practices and regulations across the country. In addition, Part II examines key Indiana state court decisions addressing issues of first impression pertaining to the accrual of state law claims for environmental damages. Part III considers the impact of decisions that may impose new restrictions on the ability to recover costs for the remediation of environmental contamination, or to bring citizen suits, under certain federal

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\* Associate, Ice Miller LLP, Indianapolis. B.A., *cum laude*, 2001, DePauw University, Indiana; J.D., *cum laude*, 2004, Indiana University School of Law—Bloomington.

\*\* Associate, Ice Miller LLP, Indianapolis. B.S., 1996, Indiana University; J.D., 2003, Indiana University School of Law—Indianapolis.

\*\*\* Associate, Ice Miller LLP, Indianapolis. B.A., 1997, Indiana University; J.D., *summa cum laude*, 2001, Indiana University School of Law—Indianapolis.

1. For additional decisions that could not be addressed here but that may nonetheless be of interest, see *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670 (7th Cir. 2008) (examining the EPA rule issued under the Clean Air Act), *reh'g denied*; *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) (examining compliance with the National Environmental Policy Act (NEPA)); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008) (same), *cert. denied*, 129 S. Ct. 1002 (2009); *Duncan's Point Lot Owners Associates Inc. v. Federal Energy Regulatory Commission*, 522 F.3d 371 (D.C. Cir. 2008) (holding that the Federal Energy Regulatory Commission did not need an impact statement when determining remedial action plan for a dam operator); *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (holding that the FCC improperly denied a petition for an impact statement regarding the effect of communications towers on migratory birds); *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008) (examining compliance with NEPA); *Nuclear Information and Resource Service v. Nuclear Regulatory Commission*, 509 F.3d 562 (D.C. Cir. 2007) (considering NEPA challenge); *City of Portland v. EPA*, 507 F.3d 706 (D.C. Cir. 2007) (upholding the EPA's Safe Drinking Water Act rules regarding the parasite *Cryptosporidium*).

2. Clean Air Act, 42 U.S.C. §§ 7401-7515 (2006).

environmental laws. Finally, Part IV examines various cases that may impact the practice of environmental law in Indiana on issues of insurance, nuisance, damages, water rights, and hog farm operations.

### I. CHALLENGES TO CLEAN AIR ACT RULES: A NEED TO REVISIT REGULATIONS

In many ways, CAA lawsuits held center stage during this survey period. As we discuss below, the U.S. Environmental Protection Agency (EPA) faced highly publicized—and successful—challenges to its CAA rulemaking in several areas: the regulation of hazardous air pollutants (HAPs) emissions, the regulation of interstate pollutant emissions, and the EPA's restrictions against the creation of additional state and local monitoring requirements for CAA permit holders. Thus, the EPA and many states, including Indiana, must now revisit their air quality regulations, providing stakeholders on every side another opportunity to influence how these new rules will be written.

#### A. *Regulatory Framework of the Clean Air Act*

The CAA requires the EPA to establish National Ambient Air Quality Standards (NAAQS) for listed pollutants found in ambient air as a result of stationary or mobile sources and that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>3</sup> The EPA, so far, has set NAAQS for the following six pollutants, referred to as “criteria” pollutants: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead.<sup>4</sup> The CAA also requires the EPA to divide the country into areas designated as “non attainment,” “attainment,” or “unclassifiable” for each air pollutant, indicating whether the area meets the NAAQS.<sup>5</sup>

Once the EPA sets the NAAQS, each state must develop and submit to the EPA for its approval a state implementation plan (SIP) that establishes how the state will meet the NAAQS for each air pollutant.<sup>6</sup> Under the CAA, the SIP must contain adequate provisions that prohibit any source within the state from emitting an air pollutant that will “contribute significantly” to non attainment in, or will interfere in maintenance by, any other state's compliance with NAAQS.<sup>7</sup> A state is either deemed to be in attainment with the NAAQS—meaning it meets the pollutant level set by the EPA—or in non-attainment—meaning it does not meet the NAAQS.<sup>8</sup> As discussed below, different permit programs apply to

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3. Clean Air Act §§ 108(a)(1)(A) & (B), 42 U.S.C. §§ 7408(a)(1)(A) & (B) (2006).

4. See National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. §§ 50.4-50.12 (2008); see also Six Common Air Pollutants, <http://www.epa.gov/air/urbanair> (last visited Aug. 16, 2009).

5. Clean Air Act §§ 107(c) & (d); 42 U.S.C. §§ 7407(c) & (d) (2006).

6. *North Carolina v. EPA*, 531 F.3d 896, 901-02 (D.C. Cir.) (citing 42 U.S.C. §§ 7407(a), 7410 (2006)), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

7. *Id.* at 902 (citing 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

8. *Id.*

sources in areas based on whether they are in an area in attainment, or not in attainment, with the NAAQS.

Besides requiring state compliance with NAAQS and each state's respective SIP, the CAA also addresses individual air pollution sources through the regulation of specific industries. The CAA does so through New Source Performance Standards (NSPS) that require the installation of the "best available control technology" (BACT) for any new source of air pollution within the designated industry and the use of "reasonably available control technology" (RACT), after considering technological and economic feasibility, for existing major stationary sources of pollution in non-attainment areas.<sup>9</sup> The NSPS provides that major stationary sources and major sources implementing major modifications<sup>10</sup> are required to comply with standards set out in either the New Source Review (NSR) or Prevention of Significant Deterioration (PSD) permit programs.<sup>11</sup> The NSR standards apply to major sources in areas not in attainment with NAAQS; the PSD standards are applied to major sources in areas where emissions are in attainment with NAAQS.<sup>12</sup> The goal of the NSR program is to reduce the aggregate level of criteria pollutants in non-attainment areas by preventing new pollution sources that are not offset by the closing of, or reduction in pollution from, an existing source.<sup>13</sup> The PSD program seeks to maintain attainment status for each criteria pollutant in the area thereby preventing any deterioration of air quality.<sup>14</sup>

The CAA further addresses individual air pollution sources through the regulation of releases of hazardous air pollutants (HAPs)—less widely emitted, but highly dangerous, hazardous, or toxic pollutants that are not covered by the NAAQS or SIPs.<sup>15</sup> Section 112 of the CAA requires the EPA to regulate the emissions of HAPs based upon either the EPA or congressional determination that HAPs have the potential to cause serious health consequences.<sup>16</sup> Over one hundred pollutants have been determined by the EPA to be HAPs. The EPA is required to list all major sources of HAPs and establish an emission standard<sup>17</sup>

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9. Clean Air Act §§ 169(3), 172-73, 42 U.S.C. §§ 7479(3), 7503 (2006).

10. A "modified" source is one that has any physical change or process change that increases a criteria pollutant emission by more than a de minimis amount. Clean Air Act § 111(a), 42 U.S.C. § 7411(a)(4) (2006).

11. Clean Air Act §§ 160-69, 171-93, 42 U.S.C. §§ 7501-7515, 7470-7492 (2006).

12. See sources cited *supra* note 12.

13. *Id.*

14. *Id.*

15. Clean Air Act § 112, 42 U.S.C. § 7412 (2006).

16. *Id.*

17. The Clean Air Act defines "emission standard" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." Clean Air Act § 302(k), 42 U.S.C. § 7602(k) (2006).

for each HAP that requires the maximum degree of reductions in emissions, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements.<sup>18</sup> These emission controls are typically referred to as the maximum achievable control technology (MACT) standards.<sup>19</sup> Once the EPA has listed a source of HAP under section 112, the EPA has a limited ability to remove a source unless it makes a determination that the emissions of the source are adequate to protect public health and no adverse environmental effect will result from the source emissions.<sup>20</sup>

### *B. Regulation of Mercury Emissions by Electric Utility Generating Units: Starting Over*

*New Jersey v. EPA*,<sup>21</sup> a highly visible case, involved a challenge to two rules promulgated by the EPA under the CAA provision that regulated HAPs emissions from electric utility generating units (EGUs).<sup>22</sup> The first EPA rule at issue, known as the “Delisting Rule,” removed coal- and oil-fired EGUs from regulation under section 112 of CAA.<sup>23</sup> Instead of regulating the EGUs under section 112, the EPA sought to regulate these sources under section 111 of the CAA as the EPA believed it was no longer necessary and appropriate to regulate EGUs under the more stringent emission standards in section 112.<sup>24</sup> Thus, the EPA promulgated the second rule at issue, which established new performance standards for EGUs and established total mercury emission limits for states and tribal governments, and a cap-and-trade program in which new and existing EGUs could voluntarily participate.<sup>25</sup> The second rule promulgated under CAA

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18. *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008) (citing 42 U.S.C. § 7412(d) (2006)).

19. Clean Air Act § 112(g)(2), 42 U.S.C. § 7412(g)(2) (2006).

20. Clean Air Act § 112(c)(9), 42 U.S.C. § 7412(c)(9) (2006).

21. 517 F.3d 574 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009).

22. *Id.* at 577.

23. *Id.* (citing Revision of December 2000 Regulatory Finding (De-listing Rule), 70 Fed. Reg. 15,994 (Mar. 29, 2005) (to be codified at 40 C.F.R. pt. 63)).

24. *Id.* Section 112 requires that new sources adopt “the emission control that is achieved in practice by the best controlled similar source” with existing sources generally being required to “adopt emission controls equal to the ‘average emission limitation achieved by the best performing 12 percent of the existing sources.’” *Id.* at 578 (quoting Clean Air Act § 112(d)(3)(A), 42 U.S.C. § 7412(d)(3)(A) (2006)). In contrast, section 111 standards limit emissions by “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” *Id.* at 580 n.1.

25. *Id.* at 577 (citing Clean Air Act § 111, 42 U.S.C. § 7411 (2006)). The EPA originally determined in 2000 that it was appropriate and necessary to regulate coal- and oil-fired EGUs under section 112 because EGUs were the largest domestic source of mercury and mercury emissions

section 111, was officially titled “Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units” and was generally referred to as the Clean Air Mercury Rule (CAMR).<sup>26</sup> The CAMR established: “[A] mechanism by which [mercury] emissions from new and existing [EGUs] are capped at specified, nation-wide levels. . . . [EGUs] must demonstrate compliance with the standard by holding one ‘allowance’ for each ounce of [mercury] emitted in any given year. Allowances are readily transferrable among all regulated [EGUs].”<sup>27</sup>

The *New Jersey* petitioners claimed that the “Delisting Rule” violated the section 112(c)(9) requirements for delisting EGUs from regulation under section 112.<sup>28</sup> Section 112(c)(9) provides that the EPA can only delist a source if the EPA determines that emissions from no source exceed a level adequate to protect public health with an ample margin of safety and that no adverse environmental effect will be caused by the emissions from that source.<sup>29</sup> The EPA conceded that it had not in fact complied with the requirements of section 112(c)(9) in delisting mercury HAPs by EGUs.<sup>30</sup> It argued instead that compliance was not required because the CAA’s mandate to investigate whether to list EGUs should also be read to allow the EPA to subsequently determine that EGUs did not need to be listed without going through the specific delisting process outlined in section 112.<sup>31</sup> Furthermore, the EPA argued that it was an inherent principle of administrative law that an agency can reverse an earlier determination or ruling whenever an agency has a principled basis for doing so, as it claimed it had there.<sup>32</sup>

The court was not persuaded by the EPA’s arguments, and accordingly

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present significant hazards to human health and to the environment. *Id.* at 579. The EPA reconsidered its regulatory approach to EGUs in 2004 and sought public comment as to whether EGU sources should stay under section 112 or be moved to section 111. *Id.* at 579-80. The EPA ultimately decided it had the authority to de-list EGUs from regulation after it made a subsequent “negative appropriate and necessary finding” under section 112, but did not go through the process of determining that no adverse environmental or health effects would result from the EGUs’ mercury emissions. *Id.* at 580 (citing Delisting Rule, 70 Fed. Reg. 15,994, 16,032 (Mar. 15, 2005) (to be codified at 40 C.F.R. pt. 63)). The EPA also stated that its initial listing was not a final agency action, and it had the ability to reverse its prior decision. *Id.* The EPA’s decision brought about the challenge in this court. *Id.* at 581.

26. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75); *see also New Jersey*, 517 F.3d at 577.

27. 70 Fed. Reg. at 28,606.

28. *New Jersey*, 517 F.3d at 577-78, 581 (citing Clean Air Act § 112 (c)(9), 42 U.S.C. § 7412(c)(9) (2006)).

29. *Id.* at 581 (citing Clean Air Act § 112(c)(9), 42 U.S.C. 7412(c)(9) (2006)).

30. *Id.* at 582.

31. *Id.*

32. *Id.* (citing *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *Dun & Bradstreet Corp. Found. v. USPS*, 946 F.2d 189, 193 (2d Cir. 1991)).

vacated both challenged EPA rules.<sup>33</sup> In so ruling, the court held that the removal of a listed source was governed by section 112(c)(9).<sup>34</sup> As the EPA conceded that it had not followed the de-listing procedures in section 112(c)(9), the court looked at whether the EPA had the authority to de-list EGUs from section 112 without complying with the specific delisting requirements set forth in that section.<sup>35</sup> The court held that the EPA did not have such authority.<sup>36</sup> The statute requiring the EPA to study whether EGUs should be listed does not mention delisting.<sup>37</sup> Further, the court determined that because Congress had specifically excluded EGUs from other statutory provisions, like the exemption of EGUs from strict deadlines under section 12(c)(6) imposed on other sources, but did not do so in section 112, Congress intended that delisting could only occur if the provisions of section 112(c)(9) were followed.<sup>38</sup> Since the EPA did not follow the proper procedures to delist mercury from section 112, the EPA's decision to regulate mercury emissions from EGUs under section 111 was unlawful.<sup>39</sup> The court therefore vacated both rules and remanded them to the EPA for further reconsideration.<sup>40</sup>

Unless the EPA is able to delist mercury emissions from EGUs under section 112(c)(9), which, as discussed above, would be quite difficult because of the specific delisting procedures in section 112 that must be followed, the EPA will have to establish maximum achievable control technology (MACT) standards.<sup>41</sup> Congress has considered legislation that would establish a deadline for EPA action.<sup>42</sup> In the meantime, applicants for permits to construct new EGUs or modify existing EGUs must seek from the EPA or the delegated state agencies, such as the Indiana Department of Environmental Management (IDEM), a case-by-case determination that the proposed units will meet MACT standards.<sup>43</sup>

### C. *Regulating Air Emissions Across State Lines: North Carolina v. EPA*

*North Carolina v. EPA*,<sup>44</sup> brought by various plaintiffs across the country against the EPA challenging the agency's promulgation of the Clean Air

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33. *Id.* at 583-84.

34. *Id.* at 583.

35. *Id.* at 581 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

36. *Id.* at 582.

37. *Id.*

38. *Id.*

39. *Id.* at 583.

40. *Id.* at 583-84.

41. Clean Air Act § 112(g)(2), 42 U.S.C. § 7412(g)(2) (2006).

42. *See, e.g.*, Mercury Emissions Control Act, S. 2643, 110th Cong. (2008); Mercury Emissions Reduction Act, H.R. 1087, 110th Cong. (2007).

43. Clean Air Act § 112(g)(2), 42 U.S.C. § 7412(g)(2) (2006).

44. 531 F.3d 896 (D.C. Cir.), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

Interstate Rule (CAIR),<sup>45</sup> attempted to regulate the emissions of the criteria pollutants sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>)<sup>46</sup> under the CAA.<sup>47</sup> The purpose of CAIR was to reduce or eliminate the impact of upwind sources of pollutants that “contribute significantly” to out-of-state, downwind nonattainment of fine particulate matter (PM<sub>2.5</sub>) and ozone NAAQS.<sup>48</sup> The EPA determined that NO<sub>x</sub> and SO<sub>2</sub> were precursors to PM<sub>2.5</sub> formation, and that NO<sub>x</sub> was a precursor to ozone formation.<sup>49</sup> As a result, under CAIR, the EPA required states that were upwind of areas of nonattainment for PM<sub>2.5</sub> and/or ozone NAAQS to implement changes to SIPs to include control measures to reduce emissions of NO<sub>x</sub> and SO<sub>2</sub> if they “contribute significantly” to that state’s nonattainment.<sup>50</sup> CAIR allowed states to reduce SO<sub>2</sub> and NO<sub>x</sub> emissions in phases and implement an interstate emission trading system for NO<sub>x</sub> and SO<sub>2</sub>.<sup>51</sup>

At issue in *North Carolina v. EPA* was the ability of states to comply with the NAAQS set by the EPA for PM<sub>2.5</sub> and ozone.<sup>52</sup> The plaintiffs challenged various aspects of CAIR. The primary plaintiff, the State of North Carolina, objected to the trading programs, the EPA’s interpretation of the “interfere with maintenance” language in 42 U.S.C. § 7410(a)(2)(D)(i)(I), the 2015 compliance date for Phase Two of CAIR, the NO<sub>x</sub> Compliance Supplement Pool, the EPA’s interpretation of “will” in the phrase “will contribute significantly,” and PM<sub>2.5</sub>’s quality threshold.<sup>53</sup> Also, electric company plaintiffs challenged the EPA’s authority “to limit the number of emission allowances in circulation, to set state SO<sub>2</sub> budgets as a percentage reduction in Title IV allowances, and to require exempt from Title IV acquire Title IV allowances” for the cap and trade programs.<sup>54</sup> Other challenges included whether the EPA had the “authority to base state NO<sub>x</sub> budgets on the number of coal-, oil-, and gas-fired facilities a state has compared to other states in the CAIR region,”<sup>55</sup> as well as the start date for Phase I of the NO<sub>x</sub> restrictions and whether certain states should have been

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45. Clean Air Interstate Rule, 70 Fed. Reg. 25,162, 25,165 (May 12, 2005) (codified at scattered sections of 40 C.F.R.).

46. *North Carolina*, 531 F.3d at 901-03 (citing 42 U.S.C. §§ 7408(a)(1)(A), (B) (2006)).

47. Clean Air Act §§ 401-16, 42 U.S.C. §§ 7651-7651o (2006).

48. *North Carolina*, 531 F.3d at 903.

49. *Id.* (citing Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005)).

50. *Id.* at 903. States that “contribute significantly” to another state’s non-attainment for ozone were subject to ozone season limits for NO<sub>x</sub> and those that “contribute significantly” to non-attainment for PM<sub>2.5</sub> were subject to annual limits for NO<sub>x</sub> and SO<sub>2</sub> under CAIR. *Id.* at 904.

51. *Id.* at 903-05. A cap-and-trade system was already in place for NO<sub>x</sub> and SO<sub>2</sub>. *Id.* at 902. NO<sub>x</sub> cap and trade was put in place in 1998 under the NO<sub>x</sub> SIP Call, and SO<sub>2</sub> cap and trade was part of Title IV of the Clean Air Act, which is commonly known as the Acid Rain Program. *Id.* CAIR revised the NO<sub>x</sub> SIP Call and Acid Rain Program. *Id.* at 903.

52. *Id.* at 905.

53. *Id.*

54. *Id.*

55. *Id.*

excluded from CAIR.<sup>56</sup>

1. *North Carolina's Challenges to CAIR.*—The court reviewed three issues raised by North Carolina: (1) the CAIR's emission trading program,<sup>57</sup> (2) the EPA's interpretation of the "interference with maintenance" language in 42 U.S.C. § 7410(a)(2)(D)(i)(I),<sup>58</sup> and (3) the 2015 compliance deadline for Phase Two of CAIR.<sup>59</sup> First, with regard to CAIR's emission trading program, North Carolina did not contend that emission trading was per se unlawful, but argued instead that CAIR lacked reasonable measures to verify that upwind states were properly abating their emissions as required under the CAA.<sup>60</sup> Under CAIR, a state received an emission cap based upon, among other things, the types of sources located in that state.<sup>61</sup> Sources in each state were then allocated a certain emission allowance limit.<sup>62</sup> Sources in one state could then sell or purchase emission credits from sources in other states, which North Carolina argued could potentially result in a state emitting more emissions than allowed under its cap.<sup>63</sup>

The court agreed with North Carolina and held that the emission trading system for SO<sub>2</sub> and NO<sub>x</sub> impermissibly failed to consider what an individual state's contribution of pollutants to downwind non-attainment areas would be and whether the impact of these pollutant emissions contributed significantly to the non-attainment of another state with air standards.<sup>64</sup> In particular, the court stated:

CAIR must do more than achieve something measurable; it must actually require elimination of emissions from sources that contribute significantly and interfere with maintenance in downwind non attainment areas. To do so, it must measure each state's "significant contribution" to downwind nonattainment even if that measurement does not directly correlate with each state's individualized air quality impact on downwind nonattainment relative to other upwind states.<sup>65</sup>

Second, North Carolina argued that the EPA unlawfully ignored the "interfere with maintenance" language when developing the CAIR rule<sup>66</sup> as the EPA failed to afford protection to areas that, although currently in attainment, are

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56. *Id.*

57. *Id.* at 906-09.

58. *Id.* at 909-11.

59. *Id.* at 911-12.

60. *Id.* at 907.

61. *Id.* at 904.

62. *Id.* at 907.

63. *Id.*

64. *Id.*

65. *Id.* at 908 (citing *Michigan v. EPA*, 213 F.3d 663, 679 (D.C. Cir. 2000)).

66. *Id.* at 908-09. The Clean Air Act requires the "EPA to ensure that SIPs 'contain adequate provisions'" that prohibit sources in a State from emitting air pollutants in an amount which will contribute significantly to non-attainment in "or interfere with maintenance by, any other State with respect to any [NAAQS]." *Id.* at 908 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).



at risk for becoming in nonattainment due to interference from upwind sources.<sup>67</sup> The EPA disagreed and argued that “interfere with maintenance” was an issue only when the EPA or a state could “reasonably determine or project, based on available data, that an area in a downwind state [would] achieve attainment, but due to emissions growth or other relevant factors is likely to fall back into nonattainment.”<sup>68</sup>

The court again agreed with North Carolina because the EPA’s interpretation essentially gave no meaning to the phrase “interfere with maintenance” as a means of separately identifying possible upwind sources that could affect downwind attainment status.<sup>69</sup> The EPA’s interpretation therefore violated the CAA’s plain language requiring a SIP to prevent any source “from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state.”<sup>70</sup> Consequently, the court held that the EPA was required to determine what level of emissions constitutes an upwind state’s “significant contribution” to a downwind non-attainment area as well as the potential for an upwind source to interfere with the maintenance of a downwind state’s attainment status.<sup>71</sup>

Lastly, North Carolina argued that the compliance deadline set forth in CAIR for upwind sources was generally inconsistent with the compliance deadlines set forth in the NAAQS, as CAIR gave upwind sources five more years to comply with PM<sub>2.5</sub> and ozone NAAQS than that required by North Carolina.<sup>72</sup> The EPA tried to justify its actions by arguing that the CAA did not require the EPA to have the same CAIR compliance timeframes as those found for NAAQS.<sup>73</sup> The court disagreed and found that the EPA did not make any effort to “harmonize” the deadlines for upwind sources to eliminate their contribution with the attainment deadlines for downwind areas, forcing downwind areas to make greater reductions than required by the CAA.<sup>74</sup>

2. *Electric Company Challenges to CAIR: Emission Allowances and Budgets.*—The electric utilities challenged CAIR’s allocation of the SO<sub>2</sub> and NO<sub>x</sub> emission budgets, arguing that the EPA never explained how the budgets it set for the states related to the prohibition of significant contribution of emissions to downwind non-attainment.<sup>75</sup> The EPA argued that it had properly set the state SO<sub>2</sub> emission budget limits based on the amount of emissions that sources using “highly cost-effective” controls, and any allowances provided

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67. *Id.* at 909.

68. *Id.* (citing Clean Air Interstate Rule, 70 Fed. Reg. 25,162, 25,193 n.45 (May 12, 2005) (codified in scattered sections of 40 C.F.R.)).

69. *Id.* at 909-10.

70. *Id.* (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

71. *Id.* at 910-11.

72. *Id.* at 911.

73. *Id.*

74. *Id.* at 912.

75. *Id.* at 916.

under Title IV of the CAA, could eliminate.<sup>76</sup> The EPA also argued that it properly allocated NO<sub>x</sub> budgets based on a “fuel factor” analysis, considering the type of fuel used for various sources within a state, such as power plants, in order to achieve what it considered a more equitable distribution of allowances to account for the variable costs of sources to comply.<sup>77</sup>

The court disagreed with the EPA, noting the allowances set under Title IV were not designed to address the non-attainment of PM<sub>2.5</sub>.<sup>78</sup> As such, the EPA’s failure to explain how the allowances in Title IV would achieve the goals of reducing significant contribution to downwind sources, as well as how it arrived at the reduction figures for future levels of the PM<sub>2.5</sub> precursors,<sup>79</sup> rendered its SO<sub>2</sub> budget allowance arbitrary and capricious.<sup>80</sup> Similarly, with regard to NO<sub>x</sub> budgets, the court found the EPA’s adjustment to the amount and type of fuel used for sources was arbitrary and capricious, as it failed to correlate with how that adjustment would reduce a state’s contribution to downwind non-attainment.<sup>81</sup> Furthermore, the court held that the EPA’s approach of allocating allowances based on fuel type would potentially result in states subsidizing the emission controls of other states, which violates the requirement of the CAA that each state be responsible for eliminating its own significant contribution to downwind pollution.<sup>82</sup>

3. *State Challenges to CAIR.*—Three states challenged their inclusion in CAIR: Texas, Florida, and Minnesota.<sup>83</sup> Texas argued that the EPA should consider the emissions from West Texas separately from the rest of the state based on the state’s size, location, and other factors.<sup>84</sup> The EPA disagreed, in part because of a fear of creating “in-state pollution havens.”<sup>85</sup> The court held that there was no duty for the EPA to divide Texas into separate areas.<sup>86</sup> Florida argued that the screening method used by the EPA to determine whether Florida should be included in CAIR was improper.<sup>87</sup> The court disagreed, finding that the EPA treated Florida like every other state and that the data supported

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76. *Id.* at 916-17.

77. *Id.* at 918.

78. *Id.* at 917.

79. *Id.*

80. *Id.* at 918.

81. *Id.* at 919. The court acknowledged that the EPA’s attempt to permit more allowances in areas with coal-fired power plants was meant to help ease the economic burden of those sources to meet emission limits; however, the court held it unfairly resulted in a penalty to states with oil-burned power plants, as coal-fired EGUs could obtain additional credits if needed from the emission trading market. *Id.* at 919-20.

82. *Id.* at 921. The court also found that there was nothing in the Clean Air Act that would allow the EPA to remove Title IV emission allowances from the Title IV market. *Id.* at 922.

83. *Id.* at 905.

84. *Id.* at 923.

85. *Id.* at 924.

86. *Id.*

87. *Id.*

including Florida in CAIR for ozone and PM<sub>2.5</sub>.<sup>88</sup> Finally, Minnesota argued that it should not have been included in CAIR, because the EPA never properly calculated its emission contribution potential because when it performed several analyses of the emissions from Minnesota, the EPA came up with a different contribution number each time and these numbers were borderline to the baseline standard the EPA had set for inclusion in CAIR.<sup>89</sup> The court agreed with the state, finding that the inclusion of Minnesota in CAIR was “a borderline call,” that the actual downwind contribution was still uncertain, and that the EPA needed to respond to Minnesota’s calculation concerns.<sup>90</sup>

Although various remedies were presented to remedy CAIR’s alleged deficiencies, the court ultimately found CAIR so fundamentally flawed that the court could not choose which portions of CAIR should be saved; therefore, the entire CAIR rule had to be vacated.<sup>91</sup> On rehearing, in an opinion outside the survey period, the court stayed its vacatur of CAIR until the EPA promulgated a revised rule consistent with the court’s prior ruling, but noted that such a stay was not indefinite.<sup>92</sup> Nonetheless, the EPA must re-analyze the emission cap, reconsider which states should be included in CAIR, determine what the compliance date will be, and re-write the cap and trade program, which essentially requires a complete overhaul of the rule as originally written.<sup>93</sup>

#### *D. Challenges to State Authority to Supplement Title V Permit Requirements*

The EPA faced yet another challenge to its rulemaking authority in *Sierra Club v. EPA*,<sup>94</sup> which involved a challenge to an EPA rule that prevented state and local authorities from adding additional monitoring requirements to air permits issued under Title V of the CAA.<sup>95</sup> Title V of the CAA established a national permit regime for issuing permits to stationary sources of air pollution that included emission limits and monitoring requirements, and gave the EPA the authority to identify the minimum elements of the permit program, to establish compliance procedures, and to object to permits it deems not to comply with the CAA.<sup>96</sup> The EPA can delegate responsibility of issuing the Title V permits to the state and local authorities.<sup>97</sup> At issue in *Sierra Club* was whether the monitoring

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88. *Id.* at 925-26.

89. *Id.* at 926-27.

90. *Id.* at 928.

91. *Id.* at 929.

92. *North Carolina v. EPA*, 550 F.3d 1176, 1177-78 (D.C. Cir. 2008).

93. *North Carolina*, 531 F.3d at 929-30.

94. 536 F.3d 673 (D.C. Cir. 2008).

95. *Id.* at 674.

96. *Id.* (citing 42 U.S.C. § 7661 (2006)).

97. *Id.* A first notice for a CAIR replacement rule was published in the Indiana Register in October 2008. Development of New Rules Concerning Nitrogen Oxide and Sulfur Dioxide Emissions from Fossil Fuel-Fired Power Plants, Ind. Legis. Servs. Agency Doc. 08-817 (proposed Oct. 22, 2008), available at <http://www.in.gov/legislative/iac/20081022-IR-326080817FNA>.

requirements in Title V permits were sufficient to assure compliance with permit terms and conditions required by the CAA, and whether it was the EPA or the permitting authority's (i.e. the state's) responsibility to make sure the monitoring requirements were in fact sufficient to assure compliance.<sup>98</sup>

In 1990, the EPA set forth the rules establishing the minimum requirements for administering the Title V program,<sup>99</sup> which required that a Title V permit identify "[a]ll monitoring . . . required under applicable monitoring and testing requirements," but if an applicable requirement did not contain periodic testing, then the Title V permit must include "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit."<sup>100</sup> The rule also provided that all permits contain monitoring requirements sufficient to assure compliance with the terms and conditions of the Title V permit to address concerns that periodic emissions monitoring would not be sufficient to ensure compliance with permit requirements.<sup>101</sup> In its 2006 rule, the EPA determined that only it could set monitoring requirements and that state and local authorities did not have the power to insert a monitoring requirement into a source's Title V permit.<sup>102</sup>

In evaluating the EPA's rule, the court looked at the EPA's historical treatment of this issue, which showed that the EPA had at one time allowed state and local permitting authorities to supplement periodic monitoring requirements to assure compliance.<sup>103</sup> In determining that the EPA's 2006 rule violated the CAA, the court examined the language of the EPA rule and found that the EPA's monitoring requirement was insufficient "to assure compliance" with emission limits and needed to be supplemented with a more rigorous standard.<sup>104</sup> The court also noted that the EPA could have fixed the inadequate monitoring in one of two ways: (1) through a rulemaking process before any permits were issued under Title V, which it did not do; or (2) by "[authorizing] permitting authorities to supplement inadequate monitoring requirements on a case-by-case basis."<sup>105</sup> Yet, because the EPA had previously chosen to allow permitting authorities to supplement monitoring requirements before the promulgation of the challenged 2006 rule, instead of implementing its own rules to fix the inadequate monitoring, if state and local authorities did not continue to supplement monitoring requirements there would be permits that did not fully comply with Title V.<sup>106</sup> The court held this violated the CAA requirement that each permit issued under Title V have adequate monitoring requirements to assure

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xml.html (last visited Aug. 1, 2009).

98. *Sierra Club*, 536 F.3d at 675 (citing 42 U.S.C. § 7661c(c) (2006)).

99. *See* Clean Air Act § 504, 42 U.S.C. § 7661a(b) (2006).

100. *Sierra Club*, 536 F.3d at 675 (citing 40 C.F.R. §§ 70.6(a)(3)(i)(A) & (B) (2008)).

101. *Id.* (citing 40 C.F.R. § 70.6(c)(1)).

102. *Id.* at 676.

103. *Id.*

104. *Id.* at 677 (citing 40 C.F.R. § 70.6(c)(1)).

105. *Id.*

106. *Id.*

compliance.<sup>107</sup> The court acknowledged that the EPA could have solved the problem by fixing the inadequate monitoring requirements prior to the issuance of any Title V permit, but failed to do so, and therefore the state and local authorities must be allowed to fix the monitoring inadequacies before the permits could be issued.<sup>108</sup> Therefore, *Sierra Club* allows a permitting authority to supplement an inadequate monitoring requirement and therefore comply with the CAA.<sup>109</sup>

### *E. In the Wings: Decisions to Examine Going Forward*

As a preview for next year's survey article, we note that the court in *United States v. Cinergy Corp.*,<sup>110</sup> issued an opinion outside the survey period that significantly expanded the scope, and type, of relief available to the government for permit requirements violations under the New Source Review program.<sup>111</sup> Similarly, *Sierra Club v. EPA (Sierra II)*,<sup>112</sup> pending before the District of Columbia Circuit Court of Appeals during the survey period, addressed a challenge to an EPA rule exempting major sources of HAPs from normal emission standards during periods of startups, shutdowns, and malfunctions (SSM), and instead imposed less burdensome alternative requirements in the place of the normal emission standards.<sup>113</sup> Finally, standing and permit violations under the PSD program were addressed in *Sierra Club v. Franklin County Power of Illinois, LLC*.<sup>114</sup>

## II. CHANGING RULES FOR OBTAINING COSTS FOR ENVIRONMENTAL CONTAMINATION: INDIANA COURTS ADDRESS KEY STATUTE OF LIMITATIONS ISSUES FOR STATE LAW ACTIONS

The Indiana Supreme Court recently clarified Indiana law with regard to the accrual of two key types of claims for environmental damages:<sup>115</sup> (1) claims

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107. *Id.*

108. *Id.* at 678-79.

109. *Id.* at 680.

110. 582 F. Supp. 2d. 1055 (S.D. Ind. 2008).

111. *Id.* at 1066.

112. 551 F.3d 1019 (D.C. Cir. 2008).

113. *Id.* at 1028. In an opinion issued after the survey period, the D.C. Circuit Court vacated the EPA's rule, holding that SSM exemption violated the Clean Air Act § 112 requirement that certain emission standards apply continuously. *Id.* at 1027-28.

114. 546 F.3d 918, 922 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2866 (2009).

115. Under Indiana's discovery rule, a cause of action accrues, and the statute of limitation begins to run, when a claimant knows, or in exercise of ordinary diligence should have known, of the injury. *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 842-43 (Ind. 1992). The discovery rule is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring her cause of action during a limited period in which, even with due diligence, she could not be aware that a cause of action exists. *New Welton Homes v. Eckmant*, 830 N.E.2d 32, 37 (Ind. 2005) (Rucker, J., dissenting) (citing *Baines v. A.H. Robins Co.*, 476 N.E.2d 84, 86 (Ind.

brought pursuant to the Indiana Underground Storage Tank Act (USTA);<sup>116</sup> and (2) claims for “stigma damages”—damages resulting from the stigma of environmental contamination.<sup>117</sup> Furthermore, the court is set to address statute of limitations issues associated with the Environmental Legal Action statute (ELA), as well as common law tort claims for environmental costs.

A. *Pflanz v. Foster: Underground Storage Tank Act and Stigma Damages*

On June 19, 2008, the Indiana Supreme Court ruled in *Pflanz v. Foster*<sup>118</sup> that the statute of limitations for a cost recovery action under the USTA is ten years,<sup>119</sup> which did not begin to run until after a party was ordered to clean up the property “regardless of whether an owner earlier knew or should have known about the need for cleanup.”<sup>120</sup> The court also ruled that a claim for environmental stigma damages was subject to a six-year statute of limitations that only accrued after remediation had been substantially completed.<sup>121</sup> As such, *Pflanz* arguably gave a significant victory to entities seeking to recover clean-up costs.

Under the USTA, an owner or operator of an underground storage tank (UST) is generally liable to the State of Indiana “for the actual costs of any corrective action taken . . . involving [a UST].”<sup>122</sup> Such owners and operators are also “responsible for undertaking any corrective action, including undertaking an exposure assessment, ordered . . . or required” by the State.<sup>123</sup> In addition, any person who pays the State of Indiana to take corrective action regarding a UST, or who undertakes such corrective action on his own, is entitled to contribution from the person who owned or operated the tank when the release occurred.<sup>124</sup> The USTA applies to contamination that occurred prior to the enactment of the statute, as well as releases occurring after the statute’s enactment.<sup>125</sup>

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1985)).

116. IND. CODE § 13-23-13-8 (2004).

117. *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 95 (Ind. Ct. App. 1995).

118. 888 N.E.2d 756 (Ind. 2008).

119. *Id.* at 758. Contributions claims under the USTA had been previously recognized as having a ten-year statute of limitations. *Comm’r, Ind. Dep’t of Env’tl. Mgmt. v. Bourbon Mini-Mart, Inc.*, 741 N.E.2d 361, 371-72 (Ind. Ct. App. 2000), *aff’d in relevant part by* 783 N.E.2d 253, 257 (Ind. 2003).

120. *Pflanz*, 888 N.E.2d at 757.

121. *Id.* at 758-60.

122. IND. CODE § 13-23-13-8(a) (2004). Indiana’s USTA statute exempts owners and operators that “can prove that a release from an underground storage tank was caused solely by: (1) an act of God; (2) an act of war; (3) negligence on the part of the state or the United States government; or (4) any combination of the causes set forth in subdivisions (1) through (3),” from liability. *Id.*

123. *Id.*

124. *Id.* § 13-23-13-8(b).

125. *Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., Inc.*, 783 N.E.2d 253, 261 (Ind. 2003).

Indiana law permits recovery of stigma damages for losses in the fair market value of property after remediation of environmental contamination.<sup>126</sup> Stigma damages are warranted where the claimant can demonstrate that an imperfect market rendered her property less valuable despite complete restoration.<sup>127</sup>

In *Pflanz*, the plaintiffs purchased a former gas station from the defendant Foster in 1984.<sup>128</sup> The Pflanzes alleged that before the sale, Foster informed them that there were underground storage tanks on the property but the tanks were not in use and had been properly emptied and sealed.<sup>129</sup> In 2001, the Pflanzes learned that the tanks were leaking fuel, and were ordered by IDEM to clean up the property.<sup>130</sup> Three years later, and twenty years after purchasing the property, the Pflanzes filed suit against Foster seeking the costs of the clean-up for the leaking tanks under the USTA and property damage for the stigma of environmental contamination.<sup>131</sup> The parties agreed that the general ten-year statute of limitations applied to the Pflanzes' USTA contribution claim; however, they disagreed on when the statute of limitations began to run.<sup>132</sup>

Foster moved to dismiss the Pflanzes' claims on statute of limitations grounds, arguing that the Pflanzes' claims began to run when the USTA was first enacted.<sup>133</sup> After the trial court dismissed the Pflanzes' claims, the Indiana Court of Appeals affirmed the dismissal.<sup>134</sup> The Indiana Court of Appeals concluded that "the Pflanzes, in the exercise of reasonable diligence, should have tested the property for contamination" when Indiana enacted and amended the USTA's contribution statute in 1987 and 1991.<sup>135</sup> Furthermore, the court found that the Pflanzes' claims had to be filed no later than 1997, which was six years after the enactment of certain amendments to the USTA.<sup>136</sup>

The Indiana Supreme Court reversed, holding that the ten year statute of limitations for a cost recovery action under the USTA did not begin to run "until

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126. *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 95 (Ind. Ct. App. 1995).

127. *Id.* at 93. *Terra-Products, Inc.*, was a PCB contamination case in which the Indiana Court of Appeals recognized the right to recover damages for a loss in the fair market value of property due to stigma if the party could demonstrate that an imperfect market rendered its property less valuable despite complete restoration. *Id.* (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 797 (3d Cir. 1994)). The court applied a three-element test for a stigma damages claims: "(1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land." *Id.* (citing *In re Paoli*, 35 F.3d at 797-98).

128. *Pflanz v. Foster*, 888 N.E.2d 756, 758 (Ind. 2008).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

after the Pflanzes were ordered to clean up the property.”<sup>137</sup> In this regard, the court noted that

in contribution or indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party. That is why, generally, parties bringing contribution and indemnification claims must wait until after the obligation to pay is incurred, for otherwise the claim would lack the essential damage element.<sup>138</sup>

Therefore, the court held that because IDEM’s order regarding the Pflanz property was issued in 2001, the Pflanzes’ lawsuit was well within the ten-year statute of limitation, and that passage of the USTA did not, as a matter of law, automatically put landowners on notice that they should inspect and monitor their property for underground storage tanks.<sup>139</sup> In addition, the court officially recognized claims for stigma damages and noted that they were subject to a six-year statute of limitations that could not “ripen until remediation has been substantially completed because only then can the impact of the former environmental contamination on property value be determined.”<sup>140</sup>

#### *B. Indiana Supreme Court to Review Statute of Limitations for Environmental Legal Action and State Tort Claims*

On November 20, 2007, the Indiana Supreme Court granted transfer in *Cooper Industries, LLC v. City of South Bend*,<sup>141</sup> to address the applicable statute of limitation for environmental contamination claims alleging common law trespass and nuisance as well as claims brought under the Environmental Legal Action statute (ELA).<sup>142</sup> The Indiana Supreme Court issued its opinion in *Cooper*, outside the survey period, but before the publication of this Article. A full analysis of the court’s opinion will be provided in the next survey article. In short, the court reversed the decision of the Indiana Court of Appeals, in part, holding that the City of South Bend’s claims for property damage claims brought under the ELA were timely as South Bend did not have a complete cause of action until the ELA became effective and that the statute of limitations did not begin to accrue until that date.<sup>143</sup>

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137. *Id.* at 759.

138. *Id.* (citing Comm’r, Ind. Dep’t of Env’tl. Mgmt. v. Bourbon Mini-Mart, Inc., 741 N.E.2d 361, 372 n.9 (Ind. Ct. App. 2000), *aff’d in relevant part by* 783 N.E.2d 253, 257 (Ind. 2003)).

139. *Id.* at 759-60.

140. *Id.* at 760 (citing Allgood v. Gen. Motors Corp., No. 102-CV-1077-DFH-TAB, 2006 WL 2669337, at \*36 (S.D. Ind. Sept. 18, 2006)); *see also* IND. CODE § 34-11-2-7 (2008).

141. 863 N.E.2d 1253 (Ind. Ct. App.), *trans. granted*, 878 N.E.2d 219 (Ind. 2007), *vacated*, 899 N.E.2d 1274 (Ind. 2009).

142. *Id.*; *see also* IND. CODE § 13-30-9-2 (2008).

143. *Cooper Indus. v. City of S. Bend*, 899 N.E.2d 1274, 1279, 1285-86 (Ind. 2009).



### III. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

In 1976, the Resource Conservation and Recovery Act (RCRA)<sup>144</sup> was enacted to regulate ongoing hazardous waste disposal and handling.<sup>145</sup> Four years later Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>146</sup> to shore up a perceived gap in the protection provided under RCRA for inactive, abandoned hazardous waste sites<sup>147</sup> and to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”<sup>148</sup> The CERCLA regulates enumerated “hazardous wastes,” but specifically excludes petroleum wastes from its ambit.<sup>149</sup>

Under CERCLA, the Federal Government may clean up a contaminated area itself or may compel responsible parties to perform the cleanup.<sup>150</sup> In either case, the Government may recover its response costs under CERCLA section 107, 42 U.S.C. § 9607, the “cost recovery” section of CERCLA.<sup>151</sup> Section 107(a) lists four classes of potentially responsible persons (PRPs)<sup>152</sup> and provides that they

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144. 42 U.S.C. § 6972 (2006).

145. *Id.*

146. 42 U.S.C. §§ 9601-9675 (2006).

147. *See generally* Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 826-27 (7th Cir. 2007), *reh'g denied*; Wilshire Westwood Assoc. v. Atl. Richfield, 881 F.2d 801, 805-08 (9th Cir. 1989); Commercial Logistics Corp. v. ACF Indus., Inc., 2006 U.S. Dist. LEXIS 84338, at \*10-11 (S.D. Ind. July 18, 2006), *vacated on other grounds*, 316 F. App'x 499 (7th Cir. 2009).

148. H.R.7020, 96th Cong., 2d Sess. (1980). The Seventh Circuit has explained that CERCLA was enacted for two reasons: (1) to “establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites”; and (2) “to shift the costs of cleanup to the parties responsible for the contamination.” *Metro. Water Reclamation Dist.*, 473 F.3d at 827 (quoting H.R. REP. 96-1016, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125).

149. 42 U.S.C. § 9601(14) (2006); *see generally* Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 720 (S.D. Ind. 1991), *modified*, 796 F. Supp. 1164 (S.D. Ind. 1992).

150. *See* 42 U.S.C. §§ 9604, 9606(a) (2006); *see also* Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994). CERCLA allows the EPA the option to commence cleanup of a particular property or site on its own using monies from the Hazardous Substances Superfund. 42 U.S.C. § 9604(c)(1) (2006). The Hazardous Substances Superfund is a fund established by CERCLA and financed through a combination of appropriations, EPA fees, and industry taxes. 26 U.S.C. § 9507(b) (2006); *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8th Cir. 2001).

151. Comprehensive Environmental Response, Compensation, and Liability Act § 107, 42 U.S.C. § 9607 (2006).

152. Comprehensive Environmental Response, Compensation, and Liability Act § 107(a), 42 U.S.C. § 9607(a) (2006) divides potentially responsible parties into the following four categories:

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or

“shall be liable” for, among other things, “all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan.”<sup>153</sup>

Section 107(a) further provides that PRPs shall be liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.”<sup>154</sup> For PRPs, liability under section 107(a) has generally be held to be strict, joint, and several.<sup>155</sup> In 1986, Congress amended CERCLA to include the Superfund Amendments and Reauthorization Act (SARA),<sup>156</sup> which added an express right of contribution to CERCLA that provides, “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.”<sup>157</sup> In addition, SARA at section 113(f)(3)(B) provides,

[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement.<sup>158</sup>

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operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

153. 42 U.S.C. § 9607(a)(4)(A) (2006). The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the EPA pursuant to CERCLA § 105 or 42 U.S.C. § 9605 (2006). The plan is codified at 40 C.F.R. §§ 300.1 to .1105 (2008).

154. 42 U.S.C. § 9607(a)(4)(B) (2006).

155. *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824, 827 (7th Cir. 2007), *reh'g denied*.

156. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

157. 42 U.S.C. § 9613(f)(1) (2006).

158. *Id.* § 9613(f)(3)(B). Before the enactment of SARA, courts had held that section 107(a)(4)(B) allowed certain PRPs that voluntarily incurred response costs and were not subject to suit to recover costs from other PRPs. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir. 1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985). Courts also held that even though CERCLA did not provide expressly for a right of contribution, a PRP who was to commence cleanup or repay response costs under section 107(a) had an implied right to obtain contribution from other responsible parties. *See, e.g., United States v. New Castle*

In *Cooper Industries v. Aviall Services, Inc.*,<sup>159</sup> the U.S. Supreme Court held that a private party could seek contribution under section 113(f)(1) only after being sued under section 106 or section 107(a).<sup>160</sup> However, the Court later held in *United States v. Atlantic Research Corp.*<sup>161</sup> that PRPs could pursue a cause of action to recover costs from other PRPs under section 107(a).<sup>162</sup>

The Supreme Court's opinion in *Atlantic Research* clarified that there are two distinct causes of action under CERCLA. The first is a cause of action for cost recovery, which may be brought under CERCLA section 107 by a party that has incurred costs in cleaning up a contaminated site. The second is a cause of action for contribution, which may be pursued under CERCLA section 113 by a defendant in a CERCLA lawsuit or by a person at least partially responsible for contaminating the site.<sup>163</sup> These actions are brought pursuant to CERCLA sections 107(a), 113(f)(1), or 113(f)(3).<sup>164</sup>

#### A. Possible New Restrictions on Rights to Contribution Under CERCLA Section 113

The decision of the United States District Court for the Northern District of Indiana in *City of Gary v. Shafer*<sup>165</sup> has added heightened scrutiny to whether PRPs can obtain costs under CERCLA section 113(f)(3) following entry into a remediation agreement with the State of Indiana. In *Shafer*, the City of Gary obtained contaminated property as part of a settlement with a company for delinquent taxes, and filed suit against former owners of the property to recover

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County, 642 F. Supp. 1258, 1263-69 (D. Del. 1986) (contribution right arises under federal common law); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (finding that contribution right is implied from section 107(e)(2)).

159. 543 U.S. 157 (2004).

160. *Id.* at 161.

161. 551 U.S. 128 (2007).

162. *Id.* at 141.

163. *Id.* at 138-39; *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1041 (E.D. Wis. 2008). It should be noted that CERCLA provides either a three- or a six-year statute of limitation, depending on the type of action and the nature of the cleanup activities performed at the site. See *Northstar Partners v. S&S Consultants, Inc.*, 2004 U.S. Dist. LEXIS 7799, at \*8-9 (S.D. Ind. Mar. 31, 2004) (interpreting 42 U.S.C. §§ 9607(a), 9613(f)(1) (2006)).

164. *Atl. Research Corp.*, 551 U.S. at 138-39. *Atlantic Research* further held that when a PRP pays a judgment or discharges its obligation under a settlement agreement, recovery of those costs must be pursued under section 113(f), rather than section 107. *Id.* CERCLA section 113(f)(3)(B) permits a PRP to seek contribution after it "has resolved its liability to the United States or a State in an administrative or judicially approved settlement." *Id.* at 139 n.5 (citing 42 U.S.C. § 9613(f)(3)(B) (2006)). Moreover, a PRP's right to contribution under section 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties. *Id.* at 139; see also *Appleton Papers Inc.*, 572 F. Supp. 2d at 1041 (holding contribution claim was appropriate to recover excess payments made by the two PRPs from other PRPs).

165. No. 2:07-CV-56-PRC, 2007 U.S. Dist. LEXIS 75503 (N.D. Ind. Oct. 4, 2007).

remediation costs pursuant to CERCLA sections 107 and 113.<sup>166</sup> The defendants moved to dismiss Gary's claims under section 113(f) on the ground that Gary could not maintain a section 113 claim.<sup>167</sup> Gary argued that it could bring a contribution claim against the defendants pursuant to section 113(f)(3)(B) because it had "resolved any potential liability to the state and federal government with regard to the Property through a Voluntary Remediation Agreement [(VRA)]" reached with the State of Indiana via IDEM.<sup>168</sup>

The *Shafer* court disagreed and dismissed the City's CERCLA section 113 claim, because the VRA did not resolve all of Gary's CERCLA liability.<sup>169</sup> In reaching this conclusion, the court noted that Section 113(f)(3)(B) is concerned with potential CERCLA liability resolution with the state and federal government.<sup>170</sup> Consequently, because "section 113(f)(3)(B) [creates] a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims is resolved," an agreement with a State that leaves open any possibility of CERCLA liability prohibits a party from obtaining contribution under section 113(f)(3)(B).<sup>171</sup> The court went on to note that Gary's settlement agreement with the State of Indiana contained two provisions that left Gary's CERCLA liability unresolved:

First, the Compliance with Applicable Laws section of the VRA, paragraph 28 provides:

Nothing in this Agreement, the Certificate of Completion, or the Covenant Not to Sue shall be construed to relieve the [City of Gary] of any natural resource damage liability arising from contaminants, even if addressed by the Remediation Work Plan, including under the following authorities: 42 U.S.C. § 9601 . . . (CERCLA).

Second, the Reservation of Rights section of the VRA, paragraph fifty-nine provides:

IDEM reserves the right to bring an action, including an administrative action, against [the City of Gary] for any violations of statutes or regulations except for the specific violations or releases that are being remediated in the Remediation Work Plan.<sup>172</sup>

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166. *Id.* at \*4-7.

167. *Id.* at \*18.

168. *Id.* at \*18-19.

169. *Id.* at \*24-25.

170. *Id.* at \*19-20 (quoting *City of Waukesha v. Viacom Int'l Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wis. 2005)).

171. *Id.* (quoting *City of Waukesha.*, 404 F. Supp. 2d at 1115)).

172. *Id.* at \*21.

The court found that these paragraphs failed to relieve Gary of all CERCLA liability for environmental damage for the properties at issue.<sup>173</sup> Furthermore, the court stated that Indiana's Memorandum of Agreement with the EPA did not help, because Gary did not have a Certificate of Completion showing remediation was complete and the Memorandum of Agreement allowed the EPA to bring an action under CERCLA if the "site poses an imminent and substantial threat to human health or the environment."<sup>174</sup> Whether the property was an exceptional circumstance that would warrant CERCLA prosecution by the EPA was a question not before the court.<sup>175</sup>

As such, under *Shafer*, settlement with the State of Indiana will no longer automatically be sufficient to show that CERCLA liability for natural resource or other damages has been resolved allowing a party to obtain contribution costs under CERCLA section 113 (f)(3)(B). As it is common for remediation agreements with the State of Indiana and federal entities not to resolve liability for natural resource damages under CERCLA, *Shafer* presents a potential obstacle for PRPs in Indiana. Nonetheless, *Shafer* leaves open the possibility that the receipt of a Certificate of Completion for a property, as well as a factual showing that no imminent or substantial threat to human health exists, when presented along with an agreement with the State of Indiana pertaining to liability may be sufficient to allow the recovery of costs under section 113(f)(3)(B).

### B. Other Developments in CERCLA and RCRA

The Seventh Circuit recently held that courts do not have jurisdiction under CERCLA to address citizen suit challenges to cleanup efforts while cleanup efforts are underway. In *Pollack v. United States Department of Defense*,<sup>176</sup> a citizen plaintiff filed suit against defendants under CERCLA contending that the military had "improperly transferred ownership" of a contaminated property in violation of CERCLA.<sup>177</sup> After the Army closed its operations on the property, it transferred control of part of the property, but retained "responsibility and liability for environmental restoration of the property."<sup>178</sup> After the EPA discovered waste from the property spilling out into the air and water, the Army,

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173. *Id.* at \*21-22.

174. *Id.* at \*23-24.

175. *Id.* The Eastern District of Missouri reached a conclusion similar to the *Shafer* court, holding that a PRP could not pursue a contribution claim under CERCLA section 113(f) following an entry into an agreement with the State of Missouri because Missouri had "no CERCLA authority absent specific agreement with the federal Environmental Protection Agency" and the agreement that was entered into could be terminated at any time. *Westinghouse Elec. Co. v. United States*, No. 4:03-CV-861-SNL, 2008 U.S. Dist. LEXIS 57232, at \*10-15 (E.D. Mo. July 29, 2008) (quoting *Niagra Mohawk Power Corp. v. Consol. Rail Corp.*, 436 F. Supp. 2d 398, 402 (N.D.N.Y. 2006)).

176. 507 F.3d 522 (7th Cir. 2007).

177. *Id.* at 523.

178. *Id.* at 524.

along with the U.S. and Illinois EPAs developed and implemented an interim plan to address the contamination.<sup>179</sup> After the transfers, plaintiff sued alleging a violation of CERCLA as the EPA had “not [signed] off on the Army’s cleanup plan before the property changed hands.”<sup>180</sup> In dismissing the plaintiff’s suit, the court held that CERCLA section 113(h) deprived the court of jurisdiction to address citizen suit challenges to ongoing cleanup efforts and that jurisdiction over such citizen suits are limited to those brought after the challenged cleanup is completed.<sup>181</sup>

Similarly, in a case of first impression, a district court dismissed a citizen’s suit brought under the Resource Conservation and Recovery Act (RCRA) after the defendant entered into an Administrative Order on Consent (AOC) with the EPA to clean up the site under CERCLA.<sup>182</sup> Citing CERCLA’s pre-enforcement bar, the District Court of the Northern District of Illinois held, in *River Village West LLC v. Peoples Gas Light & Coke Co.*,<sup>183</sup> that the AOC served to bar the citizen’s suit as a challenge to a remedial or removal action being supervised by the EPA, despite the fact that the AOC was negotiated and signed years after the RCRA case was originally filed.<sup>184</sup>

In the last year, the Northern District of Illinois also interpreted the meaning of “disposal” and “solid waste” under CERCLA and RCRA in its *Sycamore Industrial Park Associates v. Ericsson, Inc.*<sup>185</sup> decision. In *Sycamore Industries*, the plaintiff sought to compel the defendant, Ericsson, Inc., to remove asbestos insulation located in an old unused boiler system at a site purchased by the plaintiffs and to pay costs incurred by the plaintiff in removing the asbestos.<sup>186</sup> In particular, the plaintiff claimed that by discontinuing use of the boiler-based heating system containing asbestos insulation but not removing it from the property, Ericsson abandoned it, thereby disposing of hazardous waste under the terms of CERCLA and RCRA.<sup>187</sup> In granting summary judgment, the trial court stated that although Ericsson had abandoned the asbestos boiler system on the property, the boiler system was not a “solid waste” and had not been “disposed” of by Ericsson under CERCLA through the property sale because “the sale of a

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179. *Id.* Later, the Army submitted a proposed final remedial plan to the Illinois EPA for review and comment. *Id.*

180. *Id.* (citing 42 U.S.C. § 9620(h) (2006)).

181. *Id.* at 523, 525.

182. *River Vill. W. LLC v. Peoples Gas Light & Coke Co.*, 618 F. Supp. 2d 847, 855 (N.D. Ill. 2008).

183. *Id.* at 852-54 (“Plaintiffs provide no support, nor does it seem that any exists, for their contention that RCRA bars only those actions filed *after* an AOC has been entered with the EPA . . . . A plain language reading of § 113(h) demonstrates that the provision makes no reference to the timing issues presented by Plaintiffs and speaks in general terms of the inability of federal courts to hear challenges to removal or remedial actions.”).

184. *Id.* at 854-55.

185. 2008 U.S. Dist. LEXIS 1533 (N.D. Ill. Jan. 9, 2008), *aff’d*, 546 F.3d 847 (7th Cir. 2008).

186. *Id.* at \*1-4.

187. *Id.* at \*5.

product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal.”<sup>188</sup> Similarly, the court stated that no liability existed under RCRA because the boiler system was not “discarded material” or solid waste as it was instead materials fixed to a building itself.<sup>189</sup> Furthermore, the court noted that the sales contract for the property did not require Ericsson to remove the boiler system.<sup>190</sup> During the survey period this case was pending review before the Seventh Circuit.<sup>191</sup>

### C. Significant Changes Possible in the Next Year

In its next term, the U.S. Supreme Court will decide a liability question previously believed to have been known—when liability under CERCLA is “joint and several” and when it can be “reasonably apportioned.”<sup>192</sup> The position of the EPA, the U.S. Department of Justice, and the Seventh Circuit has long been that liability under CERCLA is joint and several, except where a party can provide that the harm is divisible.<sup>193</sup> Most liable parties, and their lawyers, have come to accept this liability scheme as unchangeable. But an oil company and two railroads, on the hook for a multi-million dollar cleanup, have urged the U.S. Supreme Court to limit how most courts and the federal government approach liability under CERCLA. The Court will consider this issue in its review of the consolidated decisions of *Burlington Northern & Santa Fe Railway Co. v. United States* and *Shell Oil Co. v. United States*.<sup>194</sup> These two cases contain challenges to the federal government on two issues: when so-called arranger liability can be imposed, and whether and when liability may be apportioned among multiple parties potentially liable for a cleanup.<sup>195</sup>

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188. *Id.* at \*7 (citation omitted).

189. *Id.* at \*16.

190. *Id.* at \*4-5.

191. In an opinion outside the survey period, the Seventh Circuit affirmed the trial court’s decision. *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2002 (2009).

192. The CERCLA statute does not state that liability is joint and several, and the question of whether that is what Congress intended has never been decided by the Supreme Court.

193. *See Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007) (“For . . . PRPs, liability under § 107(a) is strict, joint and several. In other words, by invoking § 107(a), the EPA may recover its costs in full from any responsible party, regardless of that party’s relative fault.”), *reh’g denied*.

194. Certiorari was granted by the Court in October 2008. *See Shell Oil Co. v. United States*, 129 S. Ct. 30 (2008); *Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 30 (2008). The lower court decision is *United States v. Burlington North & Santa Fe Railway Co.*, 520 F.3d 918 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 30 (2008).

195. *Burlington*, 520 F.3d at 948. *Burlington* involves a cost recovery action brought by the EPA and a state environmental agency under CERCLA to recover costs spent to clean up contamination from land on which a defunct company, Brown & Bryant, Inc. (B & B), operated a

## IV. OTHER DEVELOPMENTS IN ENVIRONMENTAL LAW

## A. Courts Examine Use of Nuisance Claims for Environmental Contamination

Parties have increasingly sought to obtain funds to address environmental contamination by using nuisance claims. Indiana defines a nuisance as “[w]hatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property.”<sup>196</sup> An actionable nuisance is “an activity that generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed at least without compensation to those that are harmed.”<sup>197</sup> Nuisance law is divided into two categories: private nuisance and public nuisance.<sup>198</sup>

In *City of Gary v. Shafer*,<sup>199</sup> the court scrutinized the use of nuisance claims for environmental contamination brought by current property owners against former owners of the same property.<sup>200</sup> In particular, Gary sought damages from former property owners of property transferred to Gary as part of a settlement for tax liability under nuisance law.<sup>201</sup> Gary’s subsequent property investigations

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facility that stored and distributed toxic chemicals. *Id.* at 930-32. Some of the land on which the chemical operation was located was owned by the defendant railroads, and some of the chemicals used by the company were supplied and delivered by the Shell Oil Company (Shell). *Id.* Because the operator of the facility was a defunct company, it could not contribute to the cleanup costs, and the environmental agencies sought to hold the railroad and Shell jointly and severally liable for the costs of the cleanup. *Id.* The district court refused to hold the companies jointly and severally liable, but the Ninth Circuit reversed, stating that “there was no reasonable basis for apportioning” the damages attributable to the railroads’ activity, the oil company, and the defunct company. *Id.* at 930, 937-48.

196. IND. CODE § 32-30-6-6 (2008).

197. *City of Gary v. Smith & Wesson*, 801 N.E.2d 1222, 1231 (Ind. 2003).

198. *See Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992). Indiana courts have held that a private nuisance affects only a “single person or a determinate number of people.” *Id.* “The essence of a private nuisance is the use of property to the detriment of the use and enjoyment of another’s property.” *Id.* (citing *Cox v. Schlachter*, 262 N.E.2d 550, 553 (Ind. Ct. App. 1970)). On the other hand, a public nuisance is “caused by an unreasonable interference with a common right.” *Ind. Limestone Co. v. Staggs*, 672 N.E.2d 1377, 1384 (Ind. Ct. App. 1996). Generally, a public nuisance affects an entire community or neighborhood, while the effect of a private nuisance is peculiar to an individual or a limited number of individuals. *See Wendt v. Kerkhof*, 594 N.E.2d 795, 797 (Ind. Ct. App. 1992).

199. *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2007 U.S. Dist. LEXIS 75503 (N.D. Ind. Oct. 4, 2007).

200. *Id.* at \*7-24.

201. *Id.* at \*13. Indiana nuisance law is codified at Indiana Code section 32-30-6-7 (2008). The City of Gary also sued under Gary Environmental Ordinance section 95.204, however, these claims were dismissed as the ordinances were retroactive and were passed after the contamination



revealed contamination, and Gary filed suit claiming that the conduct of various former property owners injured “the City’s Property and interfered with the City’s use and enjoyment of the Property.”<sup>202</sup> In rejecting Gary’s nuisance claim, the court concluded that Gary’s nuisance claim was for private nuisance, and not public nuisance, as Gary had not alleged any interference with a “common right” of the public but only harm to property owned by Gary.<sup>203</sup> The court further noted that private nuisance actions are premised on the assumption that the parties to a nuisance do not have prior contractual relationships wherein their interests might have been resolved by agreement.<sup>204</sup> As such, because Gary was a “purchaser” of the property at issue it could not bring a private nuisance claim against a former owner for property.<sup>205</sup> The court further noted that a “purchaser,” was not limited to cash buyers, private entities, or individuals who obtain property through a conventional money transfer or purchase, but included any party who “obtains property from another for either money or other valuable consideration” or who has the ability to negotiate with a property’s owner/seller to account for any defects in the property.<sup>206</sup>

*Shafer* may limit the ability of Indiana property owners to pursue private nuisance claims against former owners of the same property, but it does not address the viability of public nuisance claims based on an interference with a “common right” likely to exist when groundwater, multiple or adjacent properties, or parks are contaminated. Even though *Shafer* is not binding on Indiana state courts, its holding may reduce the willingness of risk adverse municipalities to enter into tax settlements that allow individuals or corporations to reduce their tax liability by transferring potentially contaminated property to the municipality.

### B. Court Jurisdiction to Review IDEM Actions for Confined Feeding Operations

In *Save the Valley, Inc. v. Ferguson*,<sup>207</sup> the Indiana Court of Appeals held that it lacked subject matter jurisdiction to consider a lawsuit seeking private (as opposed to “in the name of the State of Indiana” under Indiana Code section 13-30-1-1)<sup>208</sup> declaratory and injunctive relief for activity regulated by IDEM.<sup>209</sup> At issue was IDEM’s grant of a permit to the defendant to construct a hog farm as a “confined feeding operation” (CFO) as defined in Indiana Code section 13-11-

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at issue occurred. *Shafer*, 2007 U.S. Dist. LEXIS 75504, at \*2-3.

202. *Shafer*, 2007 U.S. Dist. LEXIS 75503, at \*9.

203. *Id.* at \*8-9, \*15-16.

204. *Id.* at \*11-16 (citing *Lilly Indus. v. Health-Chem Corp.*, 974 F. Supp. 702, 706 (S.D. Ind. 1997)).

205. *Id.*

206. *Id.* at \*13-17 (citing *Lilly*, 974 F. Supp. at 702).

207. 896 N.E.2d 1205 (Ind. Ct. App. 2008).

208. *Id.* at 1205 n.2 (citing IND. CODE § 13-30-1-1 (2008)).

209. *Id.* at 1207.

2-40.<sup>210</sup> Because CFOs require an IDEM permit before they can be constructed, and because IDEM is statutorily authorized to pursue injunctive relief, impose penalties, and to order corrective action, “it is clear that the Indiana General Assembly has charged IDEM with the responsibility of regulating potential harm from the operation of CFOs.”<sup>211</sup> In the absence of a claim for damages, Indiana courts therefore lack subject matter jurisdiction to consider plaintiffs’ claims that the CFO had not been constructed within the two years of its permitting as required by law and that, if constructed, the CFO would irreparably harm their property.<sup>212</sup>

### C. Decisions Pertaining to Clean Water Act Regulations

The Clean Water Act (CWA),<sup>213</sup> among other things, regulates the discharge of pollutants and other materials into navigable waters and sets quality standards for surface waters.<sup>214</sup> One CWA case decided last year was *City of Portage v. South Haven Sewer Works, Inc.*,<sup>215</sup> in which the Indiana Court of Appeals held that the Indiana Utility Regulatory Commission improperly permitted the owner-operator of a wastewater collection and treatment system to expand its Certificate of Territorial Authority (CTA).<sup>216</sup> The expansion was improper because the owner-operator did not obtain the EPA’s advance consent, in violation of the unambiguous requirements of a consent decree previously entered against it.<sup>217</sup> In so ruling, the court rejected the Commission and the owner-applicant’s claim that the advance-consent requirement infringed upon Indiana’s Tenth Amendment authority to determine the geographical boundaries of utilities within its borders.<sup>218</sup> Because the owner-operator had voluntarily agreed to the consent decree and, in any event, the ultimate decision about whether to expand the CTA rested with the Commission so long as the prerequisites had been met, there was no infringement upon Indiana’s regulatory authority.<sup>219</sup>

In the past year, the U.S. District Court for the Southern District of Indiana also issued an instructional opinion in *United States v. Hagerman*,<sup>220</sup> where the court applied the federal sentencing guidelines to an executive convicted of violating the CWA. Under the CWA, the discharge of pollutants into navigable waters requires a permit.<sup>221</sup> Permit holders are required to test their effluents to

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210. *Id.* at 1206 n.3.

211. *Id.* at 1206.

212. *Id.* at 1206-07.

213. 33 U.S.C. §§ 1251-1387 (2006).

214. *Id.* §§ 1311, 1313, 1344.

215. 880 N.E.2d 706 (Ind. Ct. App. 2008).

216. *Id.* at 712.

217. *Id.*

218. *Id.*

219. *Id.*

220. 525 F. Supp. 2d 1058 (S.D. Ind. 2007), *aff’d*, 555 F.3d 553 (7th Cir. 2009).

221. 33 U.S.C. §§ 1311(a), 1342 (2006).

determine whether they comply with their permit conditions, and to report the results of those tests.<sup>222</sup> At issue in *Hagerman* was the proper total offense level for a corporate executive convicted on ten counts of knowingly submitting a false testing report, each of which was a felony.<sup>223</sup> Because the court found that the defendant's recordkeeping offenses were designed to conceal a substantive environmental offense, the Sentencing Guidelines called for the application of specific offense characteristics otherwise only applicable to substantive environmental crimes.<sup>224</sup> The court rejected the defendant's claim that only the base offense level could be considered as this conflicted with the plain Guidelines instructions and holding otherwise would reward defendants whose successful fraudulent recordkeeping prevented prosecution for substantive CWA offenses.<sup>225</sup> Further, it rejected the claim of an amicus curiae that the Sentencing Commission assigned unreasonably high punishments to CWA violations.<sup>226</sup> After determining the total offense level, and adding additional levels required for the offender-specific portion of the calculation, the court sentenced the defendant to sixty months, within the Sentencing Guidelines range.<sup>227</sup>

*D. Attorneys Fees, Costs, and Punitive Damages in  
the Environmental Context*

In *Greenfield Mills, Inc. v. Carter*,<sup>228</sup> the U.S. District Court for the Southern District of Indiana ruled that fee awards were available under the CWA where one party has succeeded on the merits of at least some of its claims.<sup>229</sup> *Greenfield Mills* is an opinion rendered in response to a plaintiff's motion for an interim award of attorneys' fees and costs after the Indiana Attorney General refused to approve a settlement with the plaintiff riparian owners and users of a downstream stretch of river who the court found had been adversely affected by dredging performed by the Indiana Department of Natural Resources.<sup>230</sup>

Although the *Greenfield Mills* opinion deals mainly with the technicalities of calculating attorney fee and cost awards, it is significant because it demonstrates that under the CWA, like other fee shifting statutes, interim fee awards may be made where one party has succeeded on the merits of at least some of its claims. The interim fee award under the CWA was particularly

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222. *Id.* § 1318; 40 C.F.R. § 122.41 (2008).

223. *Hagerman*, 525 F. Supp. 2d at 1059-62; *see also* 33 U.S.C. § 1319(c)(4) (2006).

224. *Hagerman*, 525 F. Supp. 2d at 1062 (citing U.S. SENTENCING GUIDELINES MANUAL § 2Q1.2(b)(5) (2009)).

225. *Id.* at 1062-63.

226. *Id.* at 1064-65.

227. *Id.* at 1065-66. In an opinion outside the period covered by this Survey, the Seventh Circuit affirmed the trial court's sentence and decision to admit into evidence copies of test results from the defendant's employees. *United States v. Hagerman*, 555 F.3d 553 (7th Cir. 2009).

228. 569 F. Supp. 2d 737 (N.D. Ind. 2008).

229. *Id.* at 743.

230. *Id.* at 741-43.

justified in this case because plaintiffs had obtained substantial relief and caused a permanent change in policy and law, not only by persuading defendants to stipulate to a permanent injunction enjoining them from operating dams or other structures in a manner that violated the CWA, but also by affecting a change in national policy whereby the U.S. Army Corps of Engineers issued guidance to governmental agencies regarding releases of sediments by or through dams.<sup>231</sup> Thus, given the demonstrable damage suffered by the plaintiffs, the implications of the case, the time elapsed during the litigation, and the disparate resources of the parties, the court found an interim fee award pursuant to the Clean Water Act appropriate.<sup>232</sup> In fact, the court went so far as to state that the failure to grant the fee petition would be an abuse of discretion given the facts of this particular matter.<sup>233</sup>

In another decision stemming from a petition for attorney fees and costs, *Wickens v. Shell Oil Co.*,<sup>234</sup> the U.S. District Court for the Southern District of Indiana also awarded corrective action costs, attorneys' fees and court costs to the prevailing party under Indiana's USTA.<sup>235</sup> After protracted and highly contentious litigation, the parties successfully negotiated a settlement on the merits, but left for the court's resolution the amount of corrective action costs and attorneys' fees plaintiff could recover.<sup>236</sup>

Ultimately, the court determined that both investigative and remedial expenses were recoverable "corrective action costs" under the USTA.<sup>237</sup> The court awarded plaintiffs a judgment for his environmental consultant's invoices less amounts expended on "litigation support" activities and amounts incurred during a period when the court ordered no additional fees or costs be incurred without a showing of clear necessity, which had not been made.<sup>238</sup> The court likewise awarded attorneys' fees and court costs, engaging in a lengthy analysis of the submitted invoices and the parties' positions regarding the amounts requested.<sup>239</sup> The court concluded that although plaintiff could recover the amounts previously deducted from the consultant's invoices as recoverable litigation support disbursements, attorneys' fees for pursuit of non-USTA claims were not recoverable, nor were fees incurred after the time when Shell made it clear it was willing to assume full responsibility for the site efforts, as after that

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231. *Id.* at 743-44.

232. *Id.*

233. *Id.* at 744.

234. 569 F. Supp. 2d 770 (S.D. Ind. 2008), *modified by* 2009 WL 1582971 (S.D. Ind. June 3, 2009).

235. *Id.* at 793-95. The USTA is codified at Indiana Code sections 13-23-1-1 to -16-4 (2008).

236. *Greenfield Mills*, 569 F. Supp. 2d at 773-84. The court's analysis was complicated by several factors, including the fact that plaintiff's environmental consultant undertook testing of a neighboring property without any directive requiring it to do so, the generally contentious nature of the litigation, and the combative stances taken by counsel. *See id.*

237. *Id.* at 783-84.

238. *Id.* at 784-88.

239. *Id.* at 788-95.

point plaintiff's counsel only benefited from prolonging the litigation.<sup>240</sup> Finally, the court denied any award of prejudgment interest because a good faith dispute existed as to the reasonable amount of attorneys' fees and costs.<sup>241</sup>

In an issue of first impression, the U.S. Supreme Court held in *Exxon Shipping Co. v. Baker*,<sup>242</sup> that the CWA's water pollution penalties did not preempt punitive damages in maritime spill cases, but that punitive damages in maritime law should be subject to a one-to-one ratio, thus capping punitive damages at an amount equal to compensatory damages.<sup>243</sup> However, the Court was equally divided on the issue of whether maritime law allows corporate liability for punitive damages for the acts of managerial agents.<sup>244</sup> As a result, the Court left the court of appeals decision undisturbed on that issue.<sup>245</sup>

### *E. Developments in Indiana Environmental Insurance Law*

During the survey period, the Indiana Supreme Court granted transfer in two cases that raise a number of important insurance coverage issues (such as policy assignment and notice requirements) that often come up when policyholders make claims in environmental cases involving soil and/or groundwater contamination.

The Indiana Supreme Court will first consider *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*, in which the Indiana Court of Appeals reversed the trial court's grant of summary judgment in favor of an insurer due to delayed notice of a claim to the insurer.<sup>246</sup> *Dreaded, Inc.* (*Dreaded*) sought reimbursement of defense costs for an environmental liability claim incurred prior to notifying its general liability insurer of the claim.<sup>247</sup> *Dreaded* received a suit letter from IDEM on November 17, 2000, and took steps to respond, including hiring legal counsel and an environmental consultant, but did not tender the claim to its liability insurer until March 24, 2004.<sup>248</sup> Both the trial court and the court of appeals found that *Dreaded's* delay in notifying its insurer was unreasonable and thus, that a presumption existed that the insurer was prejudiced by the delay.<sup>249</sup>

However, unlike the trial court, the court of appeals held that the evidence

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240. *See id.* at 790-95.

241. *Id.* at 795.

242. 128 S. Ct. 2605 (2008). *Baker* stems from the 1989 Exxon Valdez environmental disaster. *Id.* at 2608. A jury awarded the class plaintiffs \$507.5 million in compensatory damages and \$4.5 billion in punitive damages, reduced by the Ninth Circuit Court of Appeals to \$2.5 billion. *Id.* at 2608-11.

243. *Id.* at 2633.

244. *Id.* at 2616.

245. *Id.* at 2634.

246. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 878 N.E.2d 467, 474 (Ind. Ct. App. 2007) *trans. granted*, 891 N.E.2d 48 (Ind. 2008), *vacated*, 904 N.E.2d 1267 (Ind. 2009).

247. *Id.* at 469-70.

248. *Id.*

249. *Id.* at 469, 472-73.

designated by Dreaded was sufficient to raise a genuine issue of material fact as to prejudice to the insurer, precluding summary judgment.<sup>250</sup> Specifically, Dreaded set forth evidence demonstrating that once the insurer received notice, it continued to defend the claim just as Dreaded had and that the actions taken were appropriate and necessary to defend against the environmental liability claim.<sup>251</sup> As a result, the issue of whether the insurer was prejudice by the late notice was one for the trier of fact and summary judgment on that issue was not warranted.<sup>252</sup> The court of appeals thus affirmed the trial court's finding that the insured's delay was unreasonable, but reversed as to the issue of prejudice and remanded the case for further proceedings.

The Indiana Supreme Court also agreed to review the Indiana Court of Appeals' decision in *Travelers Casualty & Surety Co. v. United States Filter Corp.*,<sup>253</sup> a case that raises issues pertaining to the assignment of policies. *U.S. Filter* involved a situation where five companies sought insurance coverage for bodily injury claims involving the operation of industrial blast machines.<sup>254</sup> The Indiana Supreme Court issued an opinion after the survey period holding that the policies were not properly transferred.<sup>255</sup> A full analysis of this opinion, and the underlying facts, will be addressed in next year's article.

#### CONCLUSION

The cases in this survey period reflect the changing priorities of environmental law. In many ways the law was clarified, as with the *Pflanz* clarification of the statute of limitations period for the USTA. Yet, in others, and in particular with the CAA, court decisions have left many areas of environmental regulation up in the air. As such, the contours of environmental obligations are in many ways in flux, with the CAA regulations exemplifying the inherent difficulties in developing consistent and equitable standards necessary to move forward in protecting our environment.

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250. *Id.* at 473-74.

251. *Id.* at 474.

252. *Id.* at 473-74.

253. *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 870 N.E.2d 529 (Ind. Ct. App.), *trans. granted*, 878 N.E.2d 222 (Ind. 2007), *vacated*, 895 N.E.2d 1172 (Ind. 2008).

254. *Id.* at 533-39.

255. *Travelers Cas. & Sur. Co.*, 895 N.E.2d 1172, 1180-81 (Ind. 2008).