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Indiana Perspective

Environmental Law Newsletter Special Legislative Edition

SUMMARY OF 2004 ENVIRONMENTAL LEGISLATION

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LAWS AFFECTING THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Extension of 2003 Legislation for Temporary Prohibition on Rules More Stringent than Federal Rule

Last year the Legislature passed a non-code section of law that prohibited through July 1, 2004, the Indiana Department of Environmental Management ("IDEM") and the Air, Water and Waste Boards from adopting a new rule or policy that would be more stringent than what is established in a related federal rule or policy. This prohibition applies only to rules and policies affecting the following industries:

- Blast furnaces & steel mills (SIC Code 3312)
- Gray & ductile iron foundries (SIC Code 3321)
- Malleable iron foundries (SIC Code 3322)
- Steel investment foundries (SIC Code 3324)
- Steel foundries (SIC Code 3325)
- Aluminum foundries (SIC Code 3365)
- Copper Foundries (SIC Code 3366)
- Nonferrous Foundries (SIC Code 3369)

That prohibition was extended this year until July 1, 2006, with one clarification. In response to concerns expressed by IDEM with the prohibition, the law was clarified to specifically provide that it is not intended to prevent the adoption by the Air Pollution Control Board of rules needed to attain or maintain the primary or secondary National Ambient Air Quality Standards.

HEA 1017, SECTION 8, effective March 16, 2004, PL 24-2004.

WATER LAWS

Storm Water Management

County Department of Storm Water Management

Due to the Legislature's override of Governor O'Bannon's veto last year, all counties now have the same authority that exists for municipalities and in Marion County to create a Department of Storm Water Management. Effective January 27, 2004, any county that receives notice from IDEM that it will be

subject to storm water regulation under the Water Pollution Control Board's rules at 327 IAC 15-13, may by ordinance passed by the County Commissioners create a Department of Storm Water Management. The Storm Water Department becomes a special taxing district, which includes all of the territory in the County except that located in a municipality within the County. The Board of such Department consists of the County Commissioners and the County Surveyor. The County Board of Storm Water Management has the power to hold hearings, make findings and determinations, install, maintain and operate a storm water collection and disposal system, make all necessary or desirable improvement of the grounds and premises under its control and issue and sell bonds for the acquisition, construction, alteration, addition or extension of the storm water collection and disposal system or for the refunding of any bonds.

The acquisition, construction, installation, operation and maintenance of facilities and land for storm water systems may be financed through 5 different mechanisms:

(1) proceeds of special taxing district bonds;
(2) the assumption of liability incurred to construct the storm water system being acquired;
(3) service rates;
(4) revenue bonds; or
(5) any other available funds.

If the Board intends to collect user fees, it must hold a public hearing and obtain the approval of the County Council and the County Commissioners. If the decision is made to establish user fees, the Board must assess and collect user fees from all property of the storm water district and the amount of user fees must be the minimum amount necessary for the operation and maintenance of the storm water system. User fee charges can either be collected through a periodic billing system or by a charge that appears on the semi-annual property tax statement of the property. In deciding on the user fees, the Board shall use one or more of the following factors:

- a flat charge for each lot, parcel of property, or building;
- the amount of impervious surface on the property;
- the number and size of storm water outlets on the property;
- the amount, strength, or character of storm water discharged;
- the existence of improvements on the property that address storm water quality and quantity issues;
- the degree to which storm water discharged from the property affects water quality in the storm water district; and
- any other factors the Board considers necessary.

The Board may adopt different schedules of fees or make classifications in schedules of fees based on (1) variation in the costs, including capital expenditure of furnishing services to various classes of users or to various locations; (2) variations in the number of users in various locations; and (3) whether the property is used primarily for residential, commercial or agricultural purposes.

HEA 1798, SECTIONS 2 through 5 and 7-18, Ind Code §§8-1.5-3-3, 8.1-1.5-1, 8-1.5-

5-1.5, 8-1.5-5-2, 8-1.5-5-3, 8-1.5-5-4, 8-1.5-5-4.5, 8-1.5-5-5, 8-1.5-5-7, 8-1.5-5-12, 8-1.5-5-15, 8-1.5-5-16, 8-1.5-5-16.5, 8-1.5-5-20, 8-1.5-5-21, 8-1.5-5-22, and 8-1.5-5-23, effective January 27, 2004, PL 282-2004.

Two additional changes were made to the law, which applies to both county and municipal storm water departments. First, if the Department uses private property for storm water collection and disposal and the private landowner gives consent, the Department shall be responsible for maintaining that private property. Second in efforts to regulate storm water, a person may not be required to screen a storm water outfall that is less than 24 inches in diameter.

HEA 1798, SECTIONS 19 and 20, Ind Code §§ 8-1.5-5-27 and 8-1.5-5-28, effective January 27, 2004, PL 282-2004.

County Drainage Board Storm Water Management Authority

If a County does not adopt an ordinance to create a Department of Storm Water Management, effective January 27, 2004, the Legislature has given the responsibility and authority for storm water management to the County Drainage Board. The Drainage Board may establish fees for services it provides to address issues of storm water quality and quantity. Specifically, the Drainage Board may charge fees for the costs of constructing, maintaining, operating and equipping storm water improvements. For purposes of this law, storm water improvements is defined to include storm sewers, drains, storm water retention or detention structures, dams, or any other improvements used for the collection, treatment and disposal of storm water. Fees will be assessed to each owner of a lot, parcel of real property or building that uses or is served by storm water improvements that address storm water quality and quantity. Unless the Drainage Board finds otherwise, the storm water improvements are considered to benefit every lot, parcel of real property, or building that uses or is served by the storm water improvements. The Drainage Board is to use the same factors as a Department of Storm Water Management would in setting user fees:

- A flat charge for each lot, parcel of property, or building;
- The amount of impervious surface on the property;
- The number and size of storm water outlets on the property;
- The amount, strength, or character of storm water discharged;
- The existence of improvements on the property that address storm water quality and quantity issues;
- The degree to which storm water discharged from the property affects water quality in the district; and
- Any other factors the Drainage Board considers necessary.

The Drainage Board may, like the County Board of Storm Water Management, adopt different schedules of fees or make classifications in schedules of fees based on (1) variation in the costs, including capital expenditure, of furnishing services to various classes of users or to various locations; (2) variations in the number of users in various locations; and (3) whether the property is used primarily for residential, commercial or agricultural purposes.

HEA 1798, SECTION 40, Ind. Code 36-9-27-114, effective January 27, 2004, PL 282-2003.

Third Class City Storm Water Management

Starting July 1, 2004, Third Class cities were given the right to place responsibility for control of their storm water facilities in a municipal works board, a board consisting of the members of the city's legislative body, a utility service board or a board of directors of waterworks. If that city had a Department of Storm Water Management, the ordinance turning control of the storm water facilities over to one of these boards must specify a procedure for the transition of the control from the Department of Storm Water Management to the Board.

HEA 1798, SECTIONS 1 and 6, Ind. Code §§8-1.5-3-3 and 8-1.5-5-4, effective July 1, 2004, PL 282-2003.

State-Regulated Wetlands

A second law to take effect this year resulting from an override of Governor O'Bannon's veto last year concerns wetlands. The Legislature both overrode the veto of last year's effort to create a state-regulated wetlands program and approved a second bill to make corrective changes to the law as it was developed last year. These two laws are found at Public Law 282-2003 and Public Law 52-2004 and appear as a new chapter at Ind. Code 13-18-22.

Wetlands Definitions

To explain this new program, it is important to understand the terms that are used.

"Wetlands" are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

HEA 1798, SECTION 33, Ind. Code 13-11-2-265.7, effective January 27, 2004, PL 282-2003.

"State Regulated Wetland" is an isolated wetland located in Indiana that is not an exempt isolated wetland.

HEA 1798, SECTION 28, Ind. Code 13-11-2-221.5, effective January 27, 2004, PL 282-2003.

"Isolated wetland" is a wetland that is not subject to regulation under Section 404(a) of the Clean Water Act.

HEA 1798, SECTION 25, Ind. Code 13-11-2-112.5, effective January 27, 2004, PL 282-2003.

"Exempt isolated wetland" is an isolated wetland that:

- is a voluntarily created wetland (unless the wetland is approved by IDEM for compensatory mitigation, is reclassified as a state regulated wetland, or the owner of the wetland declares by written recorded instrument that the wetland is to be considered a state regulated wetland;
- exists as an incidental feature in or on a residential lawn;
- exists as an incidental feature in or on a lawn or landscaped area of a commercial or governmental complex;
- exists as an incidental feature in or on agricultural land;
- exists as an incidental feature in or on a roadside ditch;
- exists as an incidental feature in or on an irrigation ditch;
- exists as an incidental feature in or on a manmade drainage control structure;

- is a fringe wetland associated with a private pond;
- is or is associated with a man-made body of surface water of any size created by excavating, diking or excavating and diking dry land to collect and retain water for or incidental to agricultural, commercial, industrial or for aesthetic purposes;
- is a Class I Wetland (discussed below) with an area of 1/2 acre or less (provided however that the total acreage of Class I wetlands on a tract (definition discussed below) that can be an exempt isolated wetland is limited to the larger of the acreage of the largest individual isolated wetland on the tract that qualifies for this exemption and 50% of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption but for this limitation);
- is a Class II wetland (discussed below) with an area of 1/4 acre or less (provided however that the total acreage of Class II wetlands on a tract that can be exempt isolated wetland is limited to the larger of the acreage of the largest individual isolated wetland land on the tract that qualifies for this exemption and 33-1/3% of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption but for this limitation);
- is located on land subject to regulation under the United States Department of Agriculture's wetland conservation rules (also known as Swampbuster) because of voluntary enrollment in a federal farm program and is used for agricultural or associated purposes;
- is constructed for reduction or control of pollution.

To qualify as an incidental feature, the isolated wetland must be one where the owner did not intend for the isolated wetland to be a wetland, it is not essential to the functioning or use of the property and it arises spontaneously as a result of damp soil conditions that are incidental to the use of the property. To qualify for the Class I and Class II size-limited exemptions, the landowner must first notify IDEM that it has selected that particular isolated wetland to be the exempt isolated wetland on that tract of land.

HEA 1277, SECTION 3, Ind. Code 13-11-2-74.5, effective March 16, 2004, PL 52-2004.

"Voluntarily created wetland" is an isolated wetland that was restored or created in the absence of a governmental order, directive, or regulatory requirement concerning the restoration or creation of the wetland and has not been applied for or used as compensatory mitigation or for another regulatory purpose that would have the effect of subjecting the wetland to regulation as waters by IDEM or another governmental entity.

HEA 1798, SECTION 30, Ind. Code 13-11-2-245.5, effective January 27, 2004, PL 282-2003.

"Tract" means any area of land that is under common ownership and is contained within a continuous border.

HEA 1798, SECTION 29, Ind. Code 130-11-2-233.5, effective January 27, 2004, PL 282-2003.

Classification of Wetlands

Wetlands, for purposes of the State Regulated Wetland program are placed into three different classes, with a Class III being the highest quality type of wetland. A Class I wetland is an isolated wetland described by one or both of the following:

(1) at least 50% of the wetland has been disturbed or affected by human activity or development by removal or replacement of the natural vegetation and or by modification of the natural hydrology;

(2) the wetland supports only minimal wildlife or aquatic habitat or hydrologic function because the wetland does not provide critical habitat for threatened or endangered species and the wetland is characterized by at least one of the following:
   (a) the wetland is typified by low species diversity
   (b) the wetland contains greater than 50% areal coverage of non-native invasive species of vegetation;
   (c) the wetland does not support significant wildlife or aquatic habitat;
   (d) the wetland does not possess significant hydrologic function.

HEA 1277, SECTION 1, Ind. Code 13-11-2-25.8, effective March 16, 2004, PL 52-2004.

A Class II wetland is an isolated wetland that is not a Class I or Class III wetland or that is an acid bog, acid seep, circumneutral bog, circumneutral seep, cypress swamp, dune and swale, fen, forested fen, forested swamp, marl beach, muck flat, panne, sand flat, sedge meadow, shrub swamp, sinkhole pond, sinkhole swamp, wet floodplain forest, wet prairie, or wet sand prairie that would meet the definition of Class I wetland if the wetland were not a rare or ecologically important type.

HEA 1277, SECTION 1, Ind. Code 13-11-2-25.8, effective March 16, 2004, PL 52-2004.

A Class III wetland is an isolated wetland that is located in a setting undisturbed or minimally disturbed by human activity or development and that supports more than minimal wildlife or aquatic habitat or hydrologic function, or that is one of the following rare and ecologically important types: acid bog, acid seep, circumneutral bog, circumneutral seep, cypress swamp, dune and swale, fen, forested fen, forested swamp, marl beach, muck flat, panne, sand flat, sedge meadow, shrub swamp, sinkhole pond, sinkhole swamp, wet floodplain forest, wet prairie, or wet sand prairie which has not been Classified as a Class II.

HEA 1277, SECTION 1, Ind. Code 13-11-2-25.8, effective March 16, 2004, PL 52-2004.

A wetland classification that is based on the level of disturbance of the wetland by human activity or development may be improved to a higher numeric class if an action is taken to restore the isolated wetland, in full or in part, to the conditions that existed on the isolated wetland before the disturbance occurred.

Legislative Goal for Wetlands Protection

The Legislature's goal for this State Regulated Wetland Program is to promote a net gain in high quality isolated

wetlands and to assure that compensatory mitigation will offset the loss of isolated wetlands allowed to be affected by the permitting program. For purposes of this law, compensatory wetlands includes restoration or creation of wetlands. Wetlands enlargement, enhancement, and preservation may be considered compensatory mitigation, but only on a case-by-case basis.

HEA 1798, SECTION 23 and 38, Ind. Code §§13-11-2-36.3 and 13-18-22-1(c), effective January 27, 2004, PL 282-2003.

Permits Required for Wetlands Activity

Unless one of the seven following exceptions apply, a person proposing to discharge dredged or fill material into a state regulated isolated wetland must obtain a permit to authorize this wetland activity. The seven exceptions are as follows:

(1) the discharge of dirt, sand, rock, stone, concrete, or other inert fill materials in a de minimis amount;
(2) such activity occurring at a surface coal mine for which the Department of Natural Resources ("DNR") has approved a plan to minimize, to the extent practical using best technology currently available, disturbances and adverse effects on fish and wildlife which will effectuate environmental values and enhance those values where practicable.
(3) normal farming, silviculture, and and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices;
(4) maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches and transportation structures;
(5) construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
(6) construction of temporary sedimentation basins on a construction site that does not include placement of fill material into the navigable water; and
(7) construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where the roads are constructed and maintained, in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, the reach of the navigable waters is not reduced, and any adverse effects on the aquatic environment will be otherwise minimized.

HEA 1798, SECTION 38, Ind. Code 13-18-22-1(b), effective January 27, 2004, PL 282-2003.

An individual permit is required to authorize a wetland activity (discharge of dredged or fill material into an isolated wetland) in a Class III wetland. An individual permit also is required to authorize discharge of dredged or fill material into a Class II wetland, unless

it will result in minimal impact, including the activities analogous to those allowed under the nationwide permit program as published in 67 Fed. Reg 2077-2089 (2002). If that exception applies, the Class II impact can be done pursuant to a general permit rule. Wetland activities in Class I wetlands are to be authorized by a general permit rule. The Water Board must adopt rules no later than February 1, 2005, to establish and implement the general permit rule and must adopt rules no later than June 1, 2005, to govern the issuance of individual permits. Before the rules are adopted, IDEM is to issue individual permits consistent with the general purposes of Ind Code 13-18-22 and for wetland activities in Class I wetlands issue permits that are simple, streamlined, and uniform that do not require development of site-specific provisions and are approved promptly upon submission of a notice of registration for a permit. The form to apply for the individual permit and to submit notice of registration was to be made available by IDEM to the public by June 1, 2004.

The rules for individual permits that the Water Board must adopt are to require that the applicant demonstrate, as a prerequisite to the issuance of the permit, that the wetland activity is without reasonable alternative and is reasonably necessary or appropriate to achieve a legitimate use of the property. If the applicant submits a resolution from the County Commissioners or the executive of a municipality or a permit or other approval from a local governmental entity having authority over the proposed use of the property on which the wetland is located that includes a specific finding that the wetland activity is as described, that constitutes conclusive evidence that the activity is without reasonable alternative and is reasonably necessary or appropriate to achieve a legitimate use of the property. For permits that impact a Class III wetland, the applicant must demonstrate that the wetland activity is without practical alternative and will be accompanied by taking steps that are practicable and appropriate to minimize the potential adverse impacts of the discharge on the aquatic ecosystem of the wetlands. In addition, the rules must require compensatory mitigation to offset the loss of wetlands allowed by the permits, subject to limited exceptions. The rules may provide for an exception to compensatory mitigation in specific limited circumstances. Finally, the rules may prescribe additional conditions that are reasonable and necessary to carry out the purposes identified by the Legislature for this law.

The rules for the general permit that the Water Board must adopt must require as a prerequisite to applicability of the general permit by rule that the person proposing the discharge submit to IDEM a notice of intent to be covered by the general permit rule which identifies the wetlands to be affected and provides a compensatory mitigation plan to reasonably offset the loss of wetlands allowed by the general permit. The general permit rule may specify an exception to compensatory mitigation in specific limited circumstances.

The rules IDEM must promulgate under this new legislation are specifically exempt from the requirement to provide Indiana Register notice of a first public comment period identifying the authority for the rule, and requesting submission of comments on specific language.

HEA 1277, SECTIONS 5-8, Ind. Code §§13-18-22-2, 13-18-22-3, 13-18-22-4, 13-18-22-5, PL-52-2004, effective March 16, 2004, and HEA 1798, SECTION 35, Ind. Code 13-14-9-3, effective January 27, 2004, PL 282-2003.

Compensatory Mitigation

The type and amount of compensatory mitigation required varies based on the Class of wetlands disturbed and whether the replacement wetlands are on-site or off-site.

If the disturbance is to a Class III wetland, compensatory mitigation must consist of Class III wetlands. If the replacement wetlands are on-site the replacement ratio is 2:1 for nonforested wetlands and 2.5:1 if forested. If the replacement wetlands are off-site, the replacement ratio is 2.5:1 for nonforested wetlands and 3:1 for forested wetlands.

If the disturbance is to a Class II wetland, compensatory mitigation must be either Class II or Class III wetlands. If the replacement wetlands are on-site the replacement ratio is 1.5:1 for nonforested wetlands and 2:1 if forested. If the replacement wetlands are off-site, the replacement ratio is 2.5:1 for nonforested wetlands and 3:1 for forested wetlands.

If the disturbance is to a Class I wetland, compensatory mitigation must consist of Class II or Class III wetlands. The replacement wetlands whether on-site or off-site, is at a 1:1 ratio.

Three additional conditions apply to compensatory mitigation. First, the compensatory mitigation ratio is lowered to 1:1 if the compensatory mitigation is completed before the initiation of the wetland activity. Second, the off-site location of compensatory mitigation must be within the same county or within the same eight-digit U.S. Geological Service hydrologic unit code. Finally, exempt isolated wetlands may be used to provide compensatory mitigation, provided the compensatory mitigation becomes a state regulated wetland for all future purposes.

HEA 1798, SECTION 38, Ind. Code 13-18-22-6, effective January 27, 2004. PL 282-2003.

Time Frame for IDEM Action on Permit Application

IDEM must make decisions to issue or deny an individual permit within 120 days of receipt of a completed application, with one stopping of the clock, if IDEM gives notice within 15 days of receipt that the application is incomplete. The clock stops until IDEM receives the requested information. If IDEM fails to make a decision in the time frame set, the permit is considered to have been issued by IDEM in accordance with the application. A general permit becomes effective on the 31st day after IDEM receives the notice of intent.

Prior to adoption of the general permit rule, a permit to undertake a wetland activity in a Class I wetland is considered to be issued on the 31st day after IDEM receives a notice of registration, or earlier if IDEM approves it before that 31st day. IDEM may deny a registration before the 31-day period expires.

If IDEM does deny a registration or an individual permit, it must support its denial by a written statement of reasons.

HEA 1277, SECTION 10, Ind. Code 13-18-22-8, effective March 16, 2004, PL 52-2004.

Outstanding State Protected Wetland

The owner of a Class III wetland may petition the Water Board to designate his or her wetland as an Outstanding State Protected Wetland. The Board is required to make that designation, if it is verified that the wetlands is a Class III wetland and verified that the person requesting the designation is the owner. The Board is to make the designation by rule and must have a rule that identifies all outstanding state-protected wetland by wetland type, legal description and other information the Board determines necessary. Once a wetland is designated an Outstanding State Protected Wetland, two obligations apply. First, the owner may not cause or allow any anthropogenic activities on the property that may adversely affect or degrade the wetland, except for activities with minimal short-term effects that are authorized by a rule the Water Board is to promulgate, or that has been approved by IDEM, in the absence of a rule. Two examples of minimal short term affect activities identified by the Legislature include (1) installing an observation pathway or (2) installing an underground pipeline. Second, the owner must provide for long-term assurance of the protections by either a recorded restrictive covenant or a grant of title to or a conservation easement in the property to the DNR or a nonprofit entity with demonstrated ability in the maintenance and protection of wetlands. After a wetland has been designated an Outstanding State Protected Wetland, the owner may petition the Water Board for recission of that designation. The recission will be granted only if the owner can demonstrate important social or economic needs warranting the recission.

HEA 1798, SECTION 38, Ind. Code 13-18-22-9, effective January 27, 2004, PL 282-2003.

IDEM Authority over Wetlands prior to January 1, 2004

As a result of the uncertainty over whether IDEM did or did not have authority to regulate wetlands before these laws took effect, which resulted from conflicting court rulings and the veto of HEA 1798, the legislature made clear that IDEM did not have authority over isolated wetlands and activities that occurred before January 1, 2004, unless a NPDES permit had been issued by IDEM under the Clean Water Act Authority, an agreed order, consent order or consent decree had been executed between the regulated party and IDEM or a judgment of a court enforcing or upholding an enforcement order or decree had become effective before January 1, 2004.

HEA 1277, SECTION 11, Ind. Code 13-18-22-10, effective March 16, 2004, PL 52-2004.

Finally, the definition of waters, for purposes of the water pollution control laws and environmental management laws was amended. Isolated wetlands are excluded from the definition but all waters included as waters of the United States as defined in Section 502(7) of the Clean Water Act, which are located in Indiana are now included. Section 502(7) of the Clean Water Act defines the term “navigable waters” to mean the waters of the United States, including the territorial seas. As a result, waters for purpose of the Indiana environmental management laws now include the following:

- accumulations of water, surface and underground, natural and artificial, public and private that are wholly or partially within, flow through or border upon Indiana;
- a part of the accumulation of water that are wholly or partially within, flow through, or border upon Indiana; and
- all navigable waters of the United States that are located in Indiana.

Waters do not include the following:

- an exempt isolated wetland;
- a private pond; or
- an off-stream pond, reservoir, wetland, or other facility built for reduction or control of pollution or cooling of water before discharge.

HEA 1277, SECTION 4, Ind. Code 13-11-2-265, effective March 16, 2004, PL 52-2004.

Time Frame Established For IDEM to Act on 401 Water Quality Certification Requests

Another result of the Legislature's override of the veto of HB 1798 is the establishment of a time frame for IDEM to act on a request for a Clean Water Act Section 401 Water Quality Certification. As of January 27, 2004, IDEM must act within 120 days after receipt of a complete application. If IDEM fails to act within the time frame, IDEM is considered to have waived the certification. Section 401 of the Clean Water Act provides that a state must certify discharges into navigable waters will comply with applicable water quality effluent limits, water quality standards, national performance standards and toxic pollutant effluent limits. If the state fails or refuses to act on a request for certification within a reasonable period of time afer receipt of such request, the certification requirement of 401 is waived with respect to such application. With this requirement for IDEM to act in 120 days, Indiana has established that the reasonable time for IDEM to act is 120 days and that the need for a 401 water quality certification will be considered to be waived when IDEM fails to act within that time frame.

HEA 1798, SECTION 39, Ind. Code 13-18-23, effective January 27, 2004, PL 282-2003.

WASTE

Underground Storage Tanks

As a result of several large penalties IDEM proposed when operators missed payment of annual fees for either a short period of time, or due to reasonable confusion, and in recognition that the $2,000-per-tank penalty for missing a $90 annual fee by only one day was a disproportionate penalty, the legislature decided this year to waive the $2,000 civil penalty per underground storage tank ("UST") required to be paid when a UST owner fails to pay the required annual fees under certain circumstances. If the owner of a UST had registered that UST before January 1, 2004, as of July 1, 2004, IDEM is prohibited from assessing any civil penalty for violation of the requirement to pay the annual fees that were due before January 1, 2004.

HEA 1017, SECTION 1, Ind. Code 13-23-12-7, effective January 1, 2004, PL 24-2004.

Concentrated Animal Feeding Operations

On March 16, 2004, three changes were made to the law regulating confined

feeding operations ("CFO"), all of which relate to the regulation of concentrated animal feeding operations ("CAFO"). These changes to the law were necessary as a result of litigation finding that Indiana's existing CFO program was not adequate to meet the federal requirements applicable to CAFOs. The first change made this year was to add a definition of CAFO to the law. The law already contains a definition of a CFO, which includes confined feeding of

(1) at least 300 cattle,
(2) at least 600 swine or sheep, and
(3) at least 30,000 fowl,

as well as other animal feeding operations electing to be subject to the law or animal feeding operations that violate the environmental laws or rules. CAFOs are a subset of CFOs, which Indiana had chosen to define as set forth at 40 CFR 122.23. A CAFO includes any Animal Feeding Operation defined as a Large CAFO or as a Medium CAFO or that is designated as a CAFO in accordance with 40 CFR 122.23(c). An animal feeding operation includes a lot or facility — but not aquatic animal production facilities — where animals have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. Large CAFOs are those that stable or confine as many as or more than the following:

(1) 700 mature dairy cows, whether milked or dry;
(2) 1,000 veal calves;
(3) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/ calf pairs;
(4) 2,500 swine each weighing 55 pounds or more;
(5) 10,000 swine each weighing less than 55 pounds;
(6) 500 horses;
(7) 10,000 sheep or lambs;
(8) 55,000 turkeys;
(9) 30,000 laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;
(10) 125,000 chickens (other than laying hens), if the animal feeding operation uses other than a liquid manure handling system;
(11) 82,000 laying hens, if the animal feeding operation uses other than a liquid manure handling system;
(12) 30,000 ducks, if the animal feeding operation uses other than a liquid manure handling system; or
(13) 5,000 ducks, if the animal feeding operation uses a liquid manure handling system.

Medium CAFOs include any animal feeding operation with the type and number of animals that fall within any of the ranges listed below and either pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device, or pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation, as follows:

(1) 200 to 699 mature dairy cows, whether milked or dry;
(2) 300 to 999 veal calves;
(3) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
(4) 750 to 2,499 swine each weighing 55 pounds or more;
(5) 3,000 to 9,999 swine each weighing less than 55 pounds;
(6) 150 to 499 horses;
(7) 3,000 to 9,999 sheep or lambs;
(8) 16,500 to 54,999 turkeys;
(9) 9,000 to 29,999 laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;
(10) 37,500 to 124,999 chickens (other than laying hens), if the animal feeding operation uses other than a liquid manure handling system;
(11) 25,000 to 81,999 laying hens, if the animal feeding operation uses other than a liquid manure handling system;
(12) 10,000 to 29,999 ducks, if the animal feeding operation uses other than a liquid manure handling system; or 1,500 to 4,999 ducks, if the animal feeding operation uses a liquid manure handling system.

In determining the total number of animals, two or more animal feeding operations under common ownership are considered to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

In addition, an animal feeding operation may be designated as a CAFO upon IDEM determining that it is a significant contributor of pollutants to waters of the United States. In making this designation, IDEM shall consider the following factors:

(1) The size of the animal feeding operation and the amount of wastes reaching waters of the United States;
(2) The location of the animal feeding operation relative to waters of the United States;
(3) The means of conveyance of animal wastes and process waste waters into waters of the United States;
(4) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and
(5) Other relevant factors.

No animal feeding operation shall be designated under this authority as a CAFO unless IDEM has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no animal feeding operation with numbers of animals below those defined as a Medium CAFO may be designated as a CAFO unless pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device or pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

All CFOs are required to obtain prior approval from IDEM before starting operations. The second change made to the law this year is to clarify that for CAFOs that approval is satisfied by obtaining an NPDES permit. For facilities not falling within the definition of CAFO, but within the definition of CFO, the current rule for CFOs will continue to govern their approval, unless those operations elect to comply with the NPDES rule for CAFOs.

The third change made to the law established permit fees for CAFOs. CAFOs are required to pay the existing $50 fee required for an initial, renewal, modification, or a variance application and an additional $100 initial or renewal fee for CAFOs who file a notice of intent for a general NPDES CAFO permit or $250 for initial or renewal permit application fee for CAFOs who obtain individual NPDES permits. CAFOS are not required to pay any annual fees.
HEA 1017, SECTIONS 2-4, Ind. Code §§13-11-2-38.3, 13-18-10-1 and 13-18-20-11.5, effective March 16, 2004, PL 24-2004.

Methamphetamine Abuse Task Force

The Legislature created a Methamphetamine Abuse Task Force ("Task Force"), which has as one of its purposes the development and updating of a strategic action plan for how to effectively clean up hazardous materials related to methamphetamine. This 26-member Task Force took effect on July 1, 2004. The members include:

- The superintendent of the state police or his designee.
- The commissioner of the state department of health or his designee.
- The state superintendent of public instruction or her designee.
- The commissioner of the department of environmental management or her designee.
- The director of the state emergency management agency or his designee.
- The secretary of family and social services or his designee.
- A judge, appointed by the governor.
- A prosecuting attorney, appointed by the governor.
- A county public defender, appointed by the governor.
- A sheriff from a county with a population less than 30,000, appointed by the governor, or the sheriff's designee.
- A sheriff from a county with a population greater than 100,000, appointed by the governor, or the sheriff's designee.
- A chief of police from a first or second class city, appointed by the governor, or the chief's designee.
- A chief of police from a third class city, appointed by the governor, or the chief's designee.
- One mental health professional with expertise in the treatment of drug addiction, appointed by the governor.
- A physician with experience in treating individuals who have been injured by an explosion or a fire in a methamphetamine laboratory or harmed by contact with methamphetamine precursors, appointed by the governor.
- One primary or secondary school professional with experience in educating children concerning

the danger of methamphetamine abuse, appointed by the governor.
- One person representing a retail grocery, appointed by the governor.
- One person representing a retail pharmacy, appointed by the governor.
- One person representing a retail hardware store, appointed by the governor.
- One person representing convenience stores, appointed by the governor.
- One person representing retail propane gas dealers with experience in combating the sale of methamphetamine precursors, appointed by the governor.
  A representative of the farming industry with knowledge of the problem of theft of anhydrous ammonia for use in the manufacture of methamphetamine, appointed by the governor.
- An individual appointed by the speaker of the house of representatives.
- An individual appointed by the president pro tempore of the senate.
- A probation officer, appointed by the governor.
- A pharmaceutical manufacturer representative, appointed by the governor.

The superintendent of the state police department serves as the chairperson of the Task Force. The Task Force meets at the call of the chairperson. By October 31 of each year, the Task Force is to develop and update a long-term strategic action plan to combat illegal methamphetamine production and to protect Indiana citizens. The plan must recommend specific actions to be taken during the term of the plan, as well as specific actions to be taken in the longer term that are designed to accomplish the following:

(1) lessen the demand for methamphetamine
(2) decrease the supply of methamphetamine
(3) improve the enforcement of methamphetamine laws
(4) improve the ability of agencies to deal with social and health consequences of methamphetamine; and
(5) improve the ability of agencies to timely and effectively clean up hazardous materials relating to methamphetamine.

The Task Force is to hold hearings around Indiana to obtain information regarding the nature of the problems and local initiatives to combat methamphetamine. The Task Force is required to invite experts to testify regarding issues the Task Force is studying.

HEA 1136, Ind. Code 5-2-14, effective July 1, 2004, PL 39-2004.

AIR

Vehicle Emission Inspection Program

The legislature also made a number of changes to Indiana's Air Pollution Control law for the Vehicle Emission Inspection Program, when it overrode the Governor's veto of HB 1798. First, the legislature added a definition of "periodic vehicle inspection program." That term is defined to include a program requiring a motor vehicle registered in a

county to undergo a periodic test of emission characteristics and be repaired and retested if the motor vehicle fails the emission test. The term includes entering into and managing contracts for inspection stations. Second, the legislature provided that a person may not be charged any fee for having a motor vehicle tested as part of a periodic vehicle inspection program. Finally, the legislature removed the Air Pollution Control Board's authority to adopt a rule to require Clark and Floyd Counties to have a motor vehicle periodic vehicle inspection program until at least December 31, 2006. After December 31, 2006, the Legislature requires that the Budget Agency must approve of the need for a periodic vehicle inspection program for Clark and Floyd Counties before the Air Board can impose such a program. Only if the Budget Agency determines that the implementation of a periodic vehicle inspection program is necessary to avoid a loss of federal highway funding for the state or a political subdivision of the State is it to be found to be needed.

HEA 1798, SECTIONS 26, 36, and 37, Ind. Code §§13-11-2-130.5, 13-17-5-6.7, 13-17-5-9, effective January 27, 2004, PL 282-2003.

LAWS AFFECTING THE ENVIRONMENTAL QUALITY SERVICE COUNCIL

Assigned Duties for 2004

The Environmental Quality Service Council is given the following responsibilities as a result of legislation this year.

By November 1, 2004, submit to the Governor and to the Executive Director of the Legislative Services Agency a final report on the following:

- IDEM's implementation of the requirements of the new State Wetlands Regulatory Program;
- IDEM's compliance with the 120-day time frame for action on Water Quality Certifications;
- IDEM's role with respect to Water Quality Certifications under Section 401 of the Clean Water Act and whether statutory direction is appropriate or necessary to define IDEM's role;
- Consideration of the options for a statutory definition of private pond, as that term is used in the definition of waters, and a recommended option and the rationale for that option; and
- Recommended principles and policies for ameliorating tension between the program for wetlands protection and for local drainage, based on the rationale and objectives of both programs.

Before November 1, 2006, submit to the Governor and to the Executive Director of the Legislative Services Agency a report on the following:

- Implementation of the wetlands permit program; and
- Recommended adjustments to the wetlands program considered advisable to improve the opera-

tion and effectiveness of the program consistent with the purpose of providing an efficient permitting process and enhancing the attainment of an overall goal of no net loss of state regulated wetlands.

HEA 1277, SECTION 13, effective March 16, 2004, PL 52-2004.

House Resolution

In addition, the House of Representatives passed a resolution urging the Legislative Council to assign to the Environmental Quality Service Council the topic of extending the age of vehicles in Clark and Floyd Counties that are exempt from auto-emission testing. The resolution suggested a study of extending the age from 4 to 6 years. If a committee is established to study this issue, the Resolution provides that the Committee's final report is to be prepared when directed to do so by the Environmental Quality Service Council.

HR 78-2004.

LAWS AFFECTING THE DEPARTMENT OF NATURAL RESOURCES

Diversions of Water from the Great Lakes

Existing law, which requires approval of each Governor of the Great Lakes States, before water can be diverted for a use in a state outside the Great Lakes Basin, became even more stringent on July 1, 2004. As of July 1, 2004, any diversion of water for a use even inside of Indiana can only be done if approved by each Governor of the Great Lakes States. The Natural Resources Commission is required to adopt rules necessary to implement this section. Those rules must be consistent with the Water Resources Development Act, 42 U.S.C. 1962d-20. That section of the Water Resources Development Act declares that the Great Lakes are an important natural resource to the eight Great Lakes States and two Canadian provinces in providing water supply for domestic and industrial use, clean energy through hydropower production, as an efficient transportation mode for moving products into and out of the Great Lakes region, and for recreational use. That law further provides that the Great Lakes need to be carefully managed and protected to meet current and future needs within the Great Lakes basin and Canadian provinces. Congress' declared purpose and policy for the prohibition on Great Lakes diversions is to protect the limited quantity of water available for use by the Great Lakes States and to prohibit any diversion of Great Lakes water by any State or private entity for use outside the Great Lakes Basin, unless each Governor of each of the Great Lakes States approves of that diversion. Congress prohibited Federal agencies from undertaking any studies that would involve the transfer of Great Lakes water for any purpose for use outside the Great Lakes Basin. That law further provides that it does not apply to any diversion

of water that already had been authorized before November 17, 1986. Nothing in 42 U.S.C. 1962d-20 provides any guidance on how the Governors are to evaluate proposals for use within the Great Lakes States. For that reason it will be important to follow the Natural Resource Commission's rulemaking to understand how it interprets this new, more stringent requirement to obtain approval for diversions for use in the State of Indiana.

HEA 1203, SECTION 2, Ind. Code 14-25-1-11, effective July 1, 2004, PL 71-2004.

DNR Penalties and Enforcement Procedures

The Department of Natural Resources penalties for a number of its laws became more stringent on July 1, 2004. Specifically

(1) Knowingly lowering of the water level of a 20-acre-or-larger lake by more than 12 inches below the high water make established by the dam has been increased from a Class C Infraction to a Class B infraction.

HEA 1203, SECTION 9, Ind. Code 14-26-6-3, effective July 1, 2004, PL 71-2004.

(2) Knowingly riding or driving upon or over a levee constructed under Ind. Code 14-27-2 (except for purposes of passing over the levee at a public or private crossing or upon a part of a public highway or for the purpose of inspecting or repairing the levee) has been increased from a Class C Infraction to a Class B Infraction.

HEA 1203, SECTION 10, Ind. Code 14-27-2-2, effective July 1, 2004, PL 71-2004.

(3) A knowing violation of the public fresh water lake law has been increased from a Class C Infraction to a Class B Infraction.

HEA 1203, SECTION 6, Ind. Code 14-26-2-21, effective July 1, 2004, PL 71-2004.

(4) Knowingly commencing construction of an abode or residence in violation of the floodway law requirement to first obtain a DNR permit has been increased from a Class C Infraction to a Class B Infraction.

HEA 1203, SECTIONS 17,18 and 20, Ind. Code §§14-28-1-24, 14-28-1-25 and 14-28-1-33, effective July 1, 2004, PL 71-2004.

(5) A knowing failure to obtain a permit for construction the floodway is increased from a Class C Infraction to a Class B Infraction.

HEA 1203, SECTION 20, Ind. Code 14-28-1-33, effective July 1, 2004, PL 71-2004.

(6) A knowing failure to post and maintain a copy of the permit issued for construction in the floodway at the site of the construction has been increased from a Class D Infraction to a Class B Infraction.

HEA 1203, SECTION 21, Ind. Code 14-28-1-34, effective July 1, 2004, PL 71-2004.

(7) A knowing violation of the law regulating construction of channels has been increased from a Class C Infraction to a Class B Infraction.

HEA 1203, SECTION 25, Ind. Code 14-29-4-9, effective July 1, 2004, PL 71-2004.

In addition, the DNR laws were corrected to ensure that each violation that may

be enforced as a criminal infraction requires the element of knowing. Specifically, all the following laws were revised to insert the requirement that the violation be a knowing violation before being subject to a penalty as an infraction:

(1) Ind. Code 14-26-5-17, related to lowering of 10-acre lakes.

HEA 1203, SECTION 8, Ind. Code 14-26-5-17, effective July 1, 2004, PL 71-2004.

(2) Ind. Code 14-27-7-7, related to a failure to effect maintenance, alteration, repair, reconstruction, change in construction or location, or removal within the time limit set in a Notice of Violation ("NOV") for dams, dikes and levees.

HEA 1203, SECTION 12, Ind. Code 14-27-7-7, effective July 1, 2004, PL 71-2004.

(3) Ind. Code 14-27-7.5-13, related to failure to effect maintenance, alteration, repair, reconstruction, change in construction or location or removal within the time limit set in a NOV for a dam.

HEA 1203, SECTION 15, Ind. Code 14-27-7.5-13, effective July 1, 2004, PL 71-2004.

(4) Ind. Code 14-28-1-24, related to beginning construction of an abode or residence in a floodway, violating a condition or restriction of permit for construction in a floodway and failure to post and maintain the permit at a reconstruction site.

HEA 1203, SECTION 17, Ind. Code 14-28-1-24, effective July 1, 2004, PL 71-2004.

(5) Ind. Code 14-28-1-25 and Ind. Code 14-28-1-32, related to reconstructions of abodes or residences in a floodway.

HEA 1203, SECTIONS 18 and 19, Ind. Code //14-28-1-25 and 14-28-1-32, effective July 1, 2004, PL 71-2004.

(6) Ind. Code 14-28-1-33 and 14-28-1-34, related to commencing construction in the floodway in violation of the requirement to first obtain a DNR permit.

HEA 1203, SECTIONS 20 and 21, Ind. Code //14-28-1-33 and 14-28-1-34, effective July 1, 2004, PL 71-2004.

(7) Ind. Code 14-29-3-4, related to taking sand, gravel, stone or other mineral or substance from or under the bed of navigable waters without a permit.

HEA 1203, SECTION 24, Ind. Code 14-29-3-4, effective July 1, 2004, PL 71-2004.

(8) Ind. Code 14-29-4-9, related to violation of the law on construction of channels.

HEA 1203, SECTION 25, Ind. Code 14-29-4-9, effective July 1, 2004, PL 71-2004.

DNR's enforcement provisions for a number of its programs also were changed July 1, 2004, to make violations subject to the penalty provisions of Ind. Code 14-25.5-4. That law allows DNR to: (1) revoke a permit issued, (2) order mitigation of violations, (3) assess civil penalties of not more than $10,000 a day for violation, (4) obtain court restraining orders and (5) seek criminal enforcement as a Class B Infraction. All of the following DNR programs are now enforceable under this penalty law:

(1) Public Freshwater Lake Law, specifically DNR may use all of the above penalty provisions for violation of any provision of this law.

HEA 1203, SECTION 4, Ind. Code 14-26-2-19, effective July 1, 2004, PL 71-2004.

(2) Public Freshwater Lake Law, specifically DNR may used its administrative and court enforcement provisions to recover damages resulting from a violation of the public freshwater law.

HEA 1302, SECTION 5, Ind. Code 14-26-2-20, effective July 1, 2004, PL 71-2004.

(3) Public Freshwater Lake Law, specifically DNR may now fine $10,000 per day for a violation of law, which previously was limited to $1,000.

HEA 1203, SECTION 7, Ind. Code 14-26-2-22, effective July 1, 2004, PL 71-2004.

(4) Floodway Regulation, specifically DNR may now fine $10,000 per day for violations of the floodway construction law.

HEA 1203, SECTION 23, Ind. Code 14-28-1-36, effective July 1, 2004, PL 71-2004.

Finally, DNR's enforcement provisions for some of its programs changed July 1, 2004, allowing violations to be enforced pursuant to the provisions of Ind. Code 4-25.4-2. That law allows DNR's inspectors a right to enter at reasonable times to determine if a violation exists. If a violation is found, DNR may issue a NOV, which becomes effective unless the person receiving it requests administrative review within 30 days of receipt. Finally, a person who fails to mitigate a violation within the time set in the NOV becomes liable for the civil penalty and the permit revocation sanc-tions found at Ind. Code 14-25.5-4. All of the following DNR programs are also now enforceable under this process:

(1) Regulation of dikes and levees, specifically if DNR finds that a dike, floodwall, levee or appurtenance is not sufficiently strong, or being maintained in a good and sufficient state of repair or operating condition or is unsafe and dangerous to life or property.

HEA 1203, SECTION 11, Ind. Code 14-27-7-5, effective July 1, 2004, PL 71-2004.

(2) Regulation of Dams, specifically when DNR finds a dam is not sufficiently strong, not maintained in a good and sufficient state of repair or operating condition, not designed to remain safe during infrequent loading events or unsafe and dangerous to life and property.

HEA 1203, SECTION 14, Ind. Code 14-27-7.5-11, effective July 1, 2004, PL 71-2004.

(3) Floodway construction, specifically DNR may enjoin construction in a floodway by issuing a NOV, as described above.

HEA 1203, SECTION 22, Ind. Code 14-28-1-35, effective July 1, 2004, PL 71-2004.

Dams

The DNR's law regulating dams was amended this year to allow persons potentially affected by an unregulated dam a procedure to have an investigation made to determine if the dam should be subject to the DNR regulatory program for dams. As of July 1, 2004, a property owner, the property owner's representative or an individual who resides downstream from a structure over which DNR does not have jurisdiction can, if they believe the dam would cause a loss of life or danger to the person's home, industrial or commercial building, a public utility, a major

highway or a railroad if the structure were to fail, request that DNR declare the structure a high hazard structure. Upon DNR's receipt of such a request, DNR must

(1) investigate the structure and the area downstream,
(2) notify the owner of the structure that it is being investigated,
(3) review any written statements and technical documentation from any person, and
(4) consider the available information

in order to determine whether or not the structure is a high hazard structure. DNR must then issue a written determination to the requesting individual and the owner of the structure, either of which may request administrative review within 30 days of the notice. If DNR determines that a previously unregulated structure is a high hazard structure, it becomes subject to the requirements of the law for high hazard structures.

HEA 1203, SECTION 16, Ind. Code 14-27-7.5-16, effective July 1, 2004, PL 71-2004.

In addition, the owner of a dam must now notify DNR in writing of the sale or other transfer of ownership of a structure. The notice must provide DNR with the name and address of the new owner.

HEA 1203, SECTION 13, Ind. Code 14-27-7.5-7, PL-71-2004, effective July 1, 2004, PL 71-2004.

Surface Coal Mining and Reclamation Bonding

The Surface Coal Mining and Reclamation Act ("SCMARA") was amended this year to provide the Director of DNR the right to initiate an application for release of the bond posted to ensure reclamation. DNR is required to periodically inspect each mine for which bond had not yet been released. As rare as it is, there are some mined areas that have been reclaimed, but the permittee has not yet applied for bond release. DNR found it more resource effective to have this authority to initiate the bond release, than having to spend its resources performing inspections of fully reclaimed areas. If the DNR initiates the bond release, DNR is responsible for providing the notification and certification requirements otherwise imposed upon the permittee.

HEA 1203, SECTIONS 26 and 27, Ind. Code //14-34-6-7 and 14-34-6-10, effective July 1, 2004, PL 71-2004.

In addition, as a result of experience with the bond pool, which has been in existence now for more than 10 years, conditions and requirements applicable to that program were revised in three ways. First, operators who initially elect to par-ticipate in the bond pool are no longer irrevocably committed to use of the bond pool for its bonding obligations. Effective July 1, 2004, permittees may opt out of the bond pool by replacing all bond pool liability with bonds acceptable under SCMRA. When the bond pool was first created there was a reason to keep permittees in the fund to build up that fund up through fees that had to be paid. With time and participation the bond pool now has more persons wanting to participate than can be supported. By allowing persons who want out of the bond pool this option to get out, it will allow others who wish to use it the opportunity.

HEA 1203, SECTIONS 28, Ind. Code 14-34-8-4, effective July 1, 2004, PL 71-2004.

Second, the right to use the bond pool

may be terminated by the Director if the final bond release has not been obtained within 10 years after the date of the last required report of the affected area. If the Director requires the operator to withdraw from the bond pool fund, the operator must replace the bond pool liability with bonds acceptable under SCMARA. If an operator fails to comply with the Director's order to withdraw an area from the bond pool, the Director may then suspend the operator from the bond pool, which automatically results in a requirement to cease all surface coal mining operations.

HEA 1203, SECTION 29, Ind. Code 14-34-8-6, effective July 1, 2004, PL 71-2004.

Third, the surface coal mining bond pool committee membership qualification has been modified in ways that will make it easier to have members appointed, easier to find members to serve and in a way that will allow for the best qualified persons to serve. As of July 1, 2004, appointment of the members to the committee will now be made by the Director of DNR, not by the Governor. Delays result when the Governor is required to appoint committee members, simply because the Governor has so many boards to which he must appoint members. With the change allowing the Director of DNR to make the appointments, appointments should be able to be made quicker. The law no longer requires that the five-member committee have a three-to-two split between political parties. This effectively removes any need to inquire into the political affiliation of the members. The public representative is no longer required to be a certified public accountant. Instead that public representative member must have knowledge of reclamation performance guarantees, which experience has been shown to be what is most important for members. Finally, a member is no longer limited to two four-year terms. Members may be reappointed to as many four-year terms as the Director of DNR determines. In addition to these changes to the committee and the appointing authority, the Legislature also relaxed the reporting obligations of the Director of DNR to annually, instead of semi-annually. That written report from the Director is given to the Committee and to the Governor on the status of the bond pool.

HEA 1203, SECTION 30, Ind. Code 14-34-8-11, effective July 1, 2004, PL 71-2004.

CONSERVANCY DISTRICTS

Conservancy districts may be created for any of the following purposes:

(1) Flood prevention and control;
(2) Improving drainage;
(3) Providing for irrigation;
(4) Providing water supply, including treatment and distribution, for domestic, industrial, and public use;
(5) Providing for the collection, treatment, and disposal of sewage and other liquids wastes;
(6) Developing forests, wildlife areas, parks, and recreational facilities, if feasible in connection with beneficial water management;
(7) Preventing the loss of topsoil for injurious water erosion;
(8) Storage of water for augmentation of stream flow;
(9) Operation, maintenance, and improvement of any improvement built for any of the purposes authorized above.

The law for Conservancy Districts was amended effective July 1, 2004, in three ways. First, the special provision governing the expansion of a Conservancy District located in Hendricks County was repealed. Second, when a vacancy on the Board of a Conservancy District occurs, the law now allows the District Board to vote to appoint a member to serve until the next annual meeting. Previously, the County Commissioners were the ones who temporarily filled that vacancy. If a vote of the District Board to appoint the member results in a tie, a judge of the circuit court of the county in which the district was established shall designate a person to serve as a member until the next annual meeting. Finally, the law was changed to provide that after a vacancy occurs, a director shall be elected to complete the term at the next annual meeting after the vacancy occurred. At the annual meeting, all freeholders who are present are allowed to vote. Between October 24 and November 1, the District Board invites nominations to fill vacancies by publication in a newspaper of general circulation in each county in the district. Nominations for director must be submitted in writing before December 1 and be signed by at least five freeholders from the area for which a director is to be elected. Notice of the annual meeting of the district must be given by publication in a newspaper of general circulation in each county in the district at least 14 and not more than 31 days before the annual meeting. Each freeholder is entitled to one vote.

HEA 1087, Ind. Code //14-33-4-2, 14-33-5-12, effective July 1, 2004, PL 4-2004.

LAWS AFFECTING THE DEPARTMENT OF HEALTH

On-Site Sewage Systems and Nitrates and Nitrites

Legislation was passed this year to specifically exempt certain on-site sewage systems (more commonly referred to as a septic tank and finger system) from the nitrate and nitrite groundwater quality standards. This exemption took effect on March 16, 2004. In addition IDEM and the Department of Health are required by this Legislation to study the effect of nitrates and nitrites in drinking water and public health in order to determine the advisability of continuing this exemption.

For purposes of this exemption, an on-site sewage system is defined as all equipment and devices necessary for proper on-site conduction, collection, storage and treatment and adsorption into the soil of sewage from a residential or commercial facility. Onsite “residential” sewage discharge disposal system is a defined term, which includes service to one or two residences. “Commercial” facility is not defined in either Ind. Code 13-11 or Ind. Code 13-18-17. It is not clear whether industrial septic tanks or government-operated septic tanks are intended to be exempt

from the nitrite and nitrate groundwater quality standard, nor how the Department of Health will interpret the breadth of this exemption.

The legislature barred the Executive Board of the State Department of Health from adopting numerical criteria included in the groundwater quality standards to these onsite sewage system. The legislature also voided any rule that already had been promulgated to apply these nitrate and nitrite numerical criteria in the groundwater quality standards to these septic tank systems.

By January 1, 2009, a report is to be submitted by IDEM and the Department of Health to the Governor, to the Executive Director of the Legislative Services Agency and to the Environmental Quality Services Council. This report must include the following:

- A review of literature and recent research into the effects of nitrites and nitrates in drinking water on public health, the effect of on-site sewage systems on the level of nitrites and nitrates in groundwater, the movement of nitrites and nitrates in soils, and on-site sewage system technologies available to achieve compliance with the current IDEM groundwater standards for nitrites and nitrates;
- The impact if newly installed on-site sewage systems were required to comply with the nitrates and nitrites numerical criteria of the groundwater quality standards, including the number of residential and commercial facilities that would be affected and the associated cost.

HEA 1017, SECTIONS 5-7, Ind. Code //13-11-2-144.8 and 13-18-17-5, effective March 16, 2004, PL 24-2004.

INDEX

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