Plews Shadley Racher & Braun

Indiana Perspective

Environmental Law Newsletter Special Legislative Edition

Summary of 1998 Environmental Legislation

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AIR

Air Pollution Control Board Permit Effective Dates

The Air Pollution Control Board was granted authority this year to allow all permits and permit modifications to become effective immediately upon issuance. Previously, only permits for which a 30-day comment period had been provided or a public hearing held were allowed to take effect upon issuance. In deciding which permits should take effect upon issuance, the Air Pollution Control Board is to consider 1) the environmental significance; 2) federal requirements for federally delegated or approved programs; and, 3) need for opportunity for public participation on the permit or permit modification. Ind. Code § 13-7-3-4 (HEA 1263 § 18), effective July 1, 1998.

DEPARTMENT OF NATURAL RESOURCES

Dam Inspection

An exception to the Department of Natural Resources' obligation to make an engineering inspection of all dams, levies, dikes, flood walls and appurtenant works was created this year. This requirement does not now apply to a dam, dike, flood wall or levy that is regulated under the Federal Mine Safety and Health Act of 1977, unless the dam, dike, flood wall or levy is proposed to be retained as a permanent structure after bond release. Under this statutory program, the Department is required to make an engineering inspection at least one time every two years, or at more frequent intervals if the exigencies of the case require or upon the written request of an affected person or agency. The only exception to the Department's engineering inspection of dams is for dams that:

1) are built for the sole purpose of erosion control, watering livestock, recreation or providing a haven or refuge for fish and wildlife;

2) have a drainage area above the dam of not more than one square mile;

3) do not exceed 20 feet in height from the natural stream bed to spillway level; and

4) do not impound more than 100 acre feet of water or a levy, dike or flood wall that is under a single private ownership and provides protection only to land or other property under the single private ownership.

Ind. Code § 14-27-7-4 (HEA 1074 § 4), effective July 1, 1998.

Landowner Liability to Invited Guests for the Purpose of Hunting, Fishing, Trapping

The law added in 1995 which provided that landowners do not assume responsibility or incur liability for injury to persons or property by an act or failure to act of other persons using the premises when persons have gone on land for the purpose of hunting, fishing, swimming, trapping, camping, hiking, sightseeing, or any other purpose, and that those persons do not have an assurance that the premises are safe for that purpose, was revised slightly in 1998. A separate law was created to treat differently persons who go upon premises to hunt, fish, trap or prepare to hunt, fish or trap. The only change made was that the portion of the law that indicated the statute was not intended to affect Indiana case law on the liability of owners or possessors of premises with respect to invited guests was deleted, meaning that the legislature intends by this statutory change to alter existing case law for persons engaged in hunting, fishing, trapping or preparing to hunt, fish or trap by the creation of this statute. Ind. Code § 14-22-10-2.5 (HEA 1074 §§ 1 and 2), effective July 1, 1998.

SURFACE COAL MINING AND RECLAMATION

Incidental Boundary Revisions

In a move that substitutes the legislature's authority for that of the Department of Natural Resources, statutory provisions have been added to address what is an incidental boundary revision to a surface or underground coal mine. The statutory standards for an incidental boundary revision include:

1) the extension may not constitute a significant revision to the method of conducting mining or reclamation operations contemplated by the original permit;

2) the extension must be required for the orderly and continuous mining and reclamation operation;

3) the extension must adjoin the permit or shadow area acreage;

4) the extended area must be mined and reclaimed in conformity with the approved permit plans; and

5) the area of the extension may not exceed the lesser of 10% of the area originally covered by the permit or 20 acres.

The aggregate of all incidental boundary revisions of a permit may not exceed the area originally covered by the permit by more than 15%. The director of the Division of Reclamation may waive this particular limitation if he finds that all other provisions of the law on incidental boundary revisions are met and the interests of the public are not adversely affected. Further, the aggregate

of all incidental boundary revisions of a permit that involve coal removal may not exceed the area originally covered by the permit by more than 10%.

The legislature has also specified the contents of an application for an incidental boundary revision: The application must contain

1) a statement of the size of the original permit area and the additional area to be added;

2) a statement of the uses that were made of the land before mining and the uses that will be made after mining;

3) a demonstration that the statutory requirements are met;

4) a map showing the additional area to be added;

5) proof of the permittee's legal right to enter and conduct surface coal mining and reclamation operations on the additional area;

6) any necessary plans that are not contained in the permit already approved;

7) a statement indicating whether any areas unsuitable for mining are contained in the permit already approved.

The Director of the Division of Reclamation approves or denies incidental boundary revision applications. The Director is required by law to act on that application 30 days after it is submitted, unless he finds that more than 30 days are need to adequately review the application. The Director is required to approve the incidental boundary revision upon finding that reclamation of the area as required by the law can be accomplished and the application complies with all of these particular requirements.

Limitations on the Division of Reclamation's Enforcement Authority

The legislature has made clear that the Department of Natural Resources Division of Reclamation cannot (and is not authorized to) enforce conditions in other licenses or permits that a surface coal mine is required to obtain or maintain in force. Those other licenses are only to be enforced by the issuing agency. Ind. Code § 14-34-4-18 (HEA 1074 § 5), effective July 1, 1998.

Permit Revisions

This year the legislature also repealed the provision of the surface coal mining statute that gave the Natural Resources Commission the right to define nonsignificant revisions of a permit.

That portion of the SMCRA law was replaced by specific statutory provisions for permit revisions. Ind. Code § 14-34-5-8.6 (HEA 1074 § 13), effective July 1, 1998.

These new statutory provisions legislatively establish which types of permit changes constitute significant revisions and which are non-significant revisions. Also added to the law are changes to permits that can now be approved as a minor field revision. As an overall philosophy, the legislature has provided that a change in mining or reclamation operations from the approved mining and reclamation plans that would adversely affect the permittee's compliance with the law is always the type of permit revision that must be subject to review and approval. In addition, any extension of the area covered by a permit, except for incidental boundary revisions, must be processed by applying for a new permit. For other types of changes, the legislature has specified which changes constitute significant revisions, nonsignificant revisions, and minor field revisions. A permit revision is SIGNIFICANT if any of the following conditions exist:

1) The changes may result in an adverse impact beyond that previously considered affecting cultural resources that are listed on or eligible to be listed on the Natural Register of Historic Places or the Register of Indiana Historic Sites and Historic Structures;

2) Blasting will be used in a manner that is likely to cause adverse impacts beyond that previously considered to persons or property outside the permit area;

3) The changes may result in an adverse impact beyond that previously considered affecting a water supply to which the emergency regulation of groundwater rights applies;

4) The changes require the identification, disturbance or handling of toxic forming or acid forming materials differently than those previously considered and have the potential for causing an additional impact not previously considered;

5) The changes may result in adverse impact on fish, wildlife and related environmental values beyond that previously considered;

6) The addition of a coal processing facility or a permanent support facility is proposed and the addition of the facility will cause an impact not previously considered except that the addition of a temporary coal processing facility used exclusively for crushing and screening will not be considered a significant revision;

7) The changes will cause a new or an updated probable hydrologic consequences determination or accumulative hydrologic impact analysis to be required;

8) A post-mining land use will be changed to a residential use, a commercial or industrial use, a recreational land use, or a developed water resource.

A permit revision is NONSIGNIFICANT if it includes the following:

1) For surface mines, changes in direction of mining or location of mining equipment within the permit area;

2) The substitution of mining equipment designed for the same purpose, the use of which is not detrimental to the achievement of final reclamation or subsidence control;

3) For underground mines, any change in the direction or location of mining within the permit area or shadow area in response to unanticipated events;

4) A post-mining land use change other than a change to residential, commercial or industrial recreational land use or develop water resource;

5) Any change in the mining or reclamation plan that the director of the Division of Reclamation reasonably determines will not have a significant effect on the achievement of the final reclamation plans, on subsidence control plans and on the surrounding area and which does not involve significant delay in achieving final reclamation or significant changes in land use or is necessary as a result of unusual adverse weather conditions or other acts of God, strikes or other causes beyond the reasonable control of the permittee and the steps specified to maximize environmental protection are taken.

A MINOR FIELD REVISION includes the following:

1) soil stockpile location and configurations;

2) as-built pond certifications;

3) minor transportation facility changes;

4) the depth, shape or orientation of a pond;

5) an area for temporary drainage control or temporary water storage;

6) equipment changes;

7) explosive storage areas;

8) minor mine management or support facility locations (except for the disposal or storage of refuse);

9) adding United States Natural Resource Conservation Service conservation practices;

10) methods of erosion protection on diversions;

11) temporary cessation of mining;

12) minor diversion location changes.

To obtain approval of a revision to a permit that constitutes a significant revision notice and hearing requirements for the issuance of a permit must be fulfilled. A nonsignificant revision must be reviewed and approved in writing by the director before it can be implemented, but the notice of hearing requirements do not apply. A minor field revision can be approved by a field inspector in an inspection report or on a form signed in the field. The minor field revision approval must be properly documented and filed separately from the inspection files in the Division of Reclamation's files. Ind. Code §§ 14-34-5-7; 14-34-5-8; 14-34-5-8.1; 14-34-5-8.2; 14-34-5-8.3; 14-34-5-8.4; 14-34-5-8.5 (HEA 1074 §§ 6 through 12), effective July 1, 1998.

IDEM BOARDS

Manufacturing Representative to Air and Water Pollution Control Boards

The membership of both the Air Pollution Control Board and Water Pollution Control Board was changed slightly this year. The member who is to represent ***manufacturing*** must now also be a person who is employed by a company that has applied for or received a Title V air permit (for the Air Pollution Control Board) or a person who is employed by a company that holds a major NPDES permit (for the Water Pollution Control Board.) Ind. Code §§ 13-17-2-2 and 13-18-1-2 (HEA 1263 §§ 17 and 19), effective July 1, 1998.

IDEM GENERAL PERMIT REQUIREMENTS

Time Limits for IDEM Permit Appeals

A change or what may more accurately termed a clarification was made to the law this year to ensure consistency with the Administrative Orders & Procedures Act. This change relates to the time frame in which petitions for review of IDEM permit actions must be filed. The date for filing a appeal now runs from the *date of service* instead of the *date when the notice is actually received. Service* is defined as when a person is personally served *or* when the document is placed in the U.S. Mail. However, when calculating a time frame from a document is mailed, three days are added to the time frame for seeking review. If the last day falls on a Saturday, Sunday, legal holiday, or another day the State is closed, then the time runs until the next business

day. It will be very important to retain the *envelope* containing the postmark date and to carefully check time limits as this law requires appeals to be filed within 18 days from a notice being placed in the U.S. Mail and that 18 days will apply whether or not a person actually has received that notice in the presumptive 3-day period allowed by law for U.S. mail service. Ind. Code § 13-15-6-7 (HEA 1263 §§ 13, 14, 15 and 16), effective July 1, 1998.

LENDER LIABILITY

Once again changes have been made attempting to provide financial lenders protection from environmental liabilities in connection with releases from UST sites, petroleum facilities and state mini-CERCLA sites. This protection is provided to lenders and a lender is defined broadly to include:

1) an insured depository institution as defined in Section 3 of the Federal Deposit Insurance Act;
2) an insured credit union as defined in Section 101 of the Federal Credit Union Act;
3) a bank or association chartered under the Farm Credit Act of 1971;
4) a leasing or trust company that is an affiliate of an insured depository institution;
5) a person (including a successor or assignee of the person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;
6) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or an entity that buys or sells loans or interests in loans in a bona fide manner;
7) a person that insures or guarantees against the default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit to a nonaffiliated person; and
8) a person that provides title insurance and that acquires a UST, a petroleum facility, vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claim settlement.

To provide this liability protection, the legislature has altered the definition of who is an "operator" for purposes of the UST law and the petroleum facility law. Specifically excluded from who is an operator are persons who do not "participate in the management" of a UST or a petroleum facility *and* who are not otherwise engaged in production, refining, marketing of petroleum or regulated substances *and* who hold evidence of ownership primarily to protect their security interest in the tank or petroleum facility. The legislature has made clear that notwithstanding any liability imposed by the environmental management laws, a lender is not liable in connection with the release or threatened release unless the lender has "participated in the management" of the facility. The legislature has defined to "participate in management" by providing for what it *does not* include and then by providing for the activities it *does* include.

To participate in management does *not* include:

1) merely having the capacity to influence or the unexercised right to control;
2) performing an act or failing to perform an act before the time at which a security interest is created;
3) holding a security interest or abandoning a security interest;
4) including in the terms of an extension of credit or in a contract or security agreement relating to the extension, a covenant, a warranty or another term or condition that relates to environmental compliance;
5) monitoring or enforcing the terms and conditions of the extension of credit or security interest;
6) monitoring or undertaking at least one inspection;
7) requiring a response action or other lawful means of addressing the release or threatened release prior to, during, or on the expiration of the term of the extension of credit;
8) providing financial advice or other advice or counseling in an effort to mitigate, prevent or cure default or decrease in the value;
9) restructuring, renegotiating or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;
10) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or
11) conducting a response action under Section 107 of CERCLA or under the direction of an on-scene coordinator appointed under the National Contingency Plan, unless the person conducting the response action assumes or manifests responsibility for the overall management encompassing day to day decision making with respect to environmental compliance, or over all or substantially all of the operational functions (as distinguished from financial or administrative functions other than the function of environmental compliance).

To "participate in management" *does* occur if while the borrower is still in possession of the UST or petroleum facility that is encumbered by the security interest, the lender:

1) exercises decision making control over the environmental compliance such that the person has undertaken responsibility for the hazardous substance or petroleum handling or disposal practices related to the UST or petroleum facility; or
2) exercises control at a level comparable to that of a manager of the UST or petroleum facility such that the person has assumed or manifested responsibility for the overall management of the UST or petroleum facility encompassing day to day decision making with respect to environmental compliance or over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the UST or petroleum facility.

In addition, the legislature has clarified that the liability of a fiduciary for the release or threatened release of hazardous substances or petroleum shall not exceed the assets held in the fiduciary capacity. However, that limitation does not apply to the extent that the fiduciary is liable under the environmental laws independent of the person's ownership or actions taken in a fiduciary

capacity. In addition, the limitations on the liability do not apply if negligence of a fiduciary causes or contributes to the release or threatened release.

The legislature has specified that a fiduciary is not liable in its personal capacity for any of the following:

1) undertaking or directing another person to undertake a response action under 42 U.S.C. 9607(d)(1) or under the direction of an on-site coordinator designated under the National Contingency Plan;
2) undertaking or directing another person to undertake other lawful means of addressing a hazardous substance;
3) terminating the fiduciary relationship;
4) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law or monitoring, modifying or enforcing the term or condition;
5) monitoring or undertaking at least one inspection;
6) providing financial advice or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;
7) restructuring, renegotiating or otherwise altering the terms and conditions of the fiduciary relationship;
8) administering, as a fiduciary, a UST that was contaminated before the fiduciary relationship began;
9) declining to take any of the actions referred to in subdivisions 2 through 8.

However, this protection for fiduciaries does not apply to a person if the person acts in a capacity other than a fiduciary capacity or beneficiary capacity and in that capacity directly or indirectly benefits from a trust or fiduciary relationship or is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation and incidental benefits permitted under other applicable law.

Also, the legislature has provided that this limitation of liability for fiduciaries does not preclude a claim against the assets of the estate or trust administered by the fiduciary or a non-employee, agent or independent contractor retained by a fiduciary. Further, this law does not affect the rights, immunities or other defenses that are available under the environmental laws or create any liability for a person or a private right of action against a fiduciary or any other person. Finally, just as with lenders, the liability of a fiduciary shall not exceed the assets held in the fiduciary capacity with the same exceptions identified above for lenders. Ind. Code §§ 13-11-2-48; 13-11-2-81; 13-11-2-81.5; 13-11-2-85.5; 13-11-2-119; 13-11-2-147.5; 13-11-2-148; 13-11-2-151; 13-11-2-151.2; 13-11-2-151.3; 13-11-2-151.4; 13-11-2-197.7; 13-23-13-14, 15; 13-24-1-10, 11; 13-25-4-8 (HEA 1263), effective March 12, 1998.

MISCELLANEOUS

Anti-Slapp Suits

A law intended to protect citizens against being sued where the purpose of the suit is to deter or dissuade the citizen from opposing controversial matters that are of interest to the general public was put into effect on March 13 of this year for Indiana citizens. This type of lawsuit is referred to as a "Strategic Lawsuit Against Public Participation" lawsuits, known as SLAPP suits. The law actually is entitled Defense in Civil Actions Against Persons Who Act in Furtherance of a Person's Right of Petition or Free Speech, and is found at Ind. Code § 34-4-45.

The interest to be protected by this new law is a person's right of petition or free speech under the U.S. and Indiana Constitutions in connection with a public issue or an issue of public interest. The law is stated to be non-retroactive; the issue of public interest must arise after the statute's effective date. Further, this defense cannot be used against an enforcement action brought by the attorney general, a prosecuting attorney or another attorney acting as a public prosecutor. The protection is provided to individuals and to individuals acting as a group in the form of a legal entity. If an individual or individuals acting as a legal entity are sued civilly, it is a defense under this law if the persons were acting in furtherance of their right of petition or free speech in connection with a public issue but only if the act or omission was (1) taken in good faith and (2) with a reasonable basis in law and in fact. The defense must be raised by filing a motion to dismiss. When a motion to dismiss is filed, all discovery proceedings are stayed (except those relevant to the motion to dismiss). A prevailing defendant is entitled to recover reasonable attorneys fees and costs. However, if the court finds that the motion to dismiss is frivolous or solely intended to cause unnecessary delay, then the plaintiff is entitled to recover reasonable attorneys fees and costs in answering the motion to dismiss.

When a motion to dismiss is filed under this law, the court is to establish a reasonable time period not to exceed 180 days for an expedited ruling on the motion. The motion to dismiss must state with specificity the public issue or issues of public interest that prompted the act in furtherance of a person's right of petition or free speech. The court must make its own determination based on the facts in the pleadings and affidavits filed and discovery conducted during the expedited proceeding whether the person was acting in furtherance of the person's right of petition or free speech under the Constitution of the United States or Constitution of the State of Indiana on a public issue or issue of public interest. Ind. Code § 34-4-45 until July 1, 1998; Ind. Code §34-7-7, effective July 1, 1998 (HEA 1021 §§ 6 and 7), effective March 13, 1998.

POLLUTION PREVENTION

Grant Authority for the Division of Pollution Prevention

The Division of Pollution Prevention's authority to award grants to support and sustain pollution prevention has been broadened this year. Now the Division of Pollution Prevention can award grants to local units of government. Previously, the Division could only award those grants to

non-profit agencies organizations, trade associations, business organizations, labor organizations, educational institutions and industry. Ind. Code § 13-27-2-10 (SEA 241 § 5), effective March 13, 1998.

SOLID WASTE

Membership of Lake County Solid Waste Management District

The membership of the Lake County Solid Waste Management District was tinkered with during this legislative session. As a result of a change to the law, the executives of the three largest cities in Lake County are allowed to appoint a member of the legislative body of that city to serve as the board member, rather than the executive having to serve him or herself. In addition, the executive of each second class or third class city who is a member of the Lake County Solid Waste Management District Board may instead appoint a member of the legislative body to serve on the board rather than the executive him or herself serving. Ind. Code § 13-21-3-5 (SEA 387 § 1) effective March 13, 1998.

Solid Waste Management Districts Powers

In what has become an annual effort since Solid Waste Management Districts were created in 1990, the legislature again this year made changes to the Solid Waste Management District's powers in a clear effort to restrict, redefine and limit the powers of the districts. The legislature has specified that Solid Waste Management Districts do *not* have the powers within their districts to: (1) franchise, (2) establish a territory or territories within the district in which a person may provide service, (3) establish the type of service that a person must provide for the collection or disposal of solid waste or recyclables within the district, or (4) establish the fees that a person must charge for the collection or disposal of solid waste or recyclables within the district. The only exception to this limitation applies to activities conducted as part of a household hazardous waste collection and disposal program or if the district is able to proceed under the law to provide the service with its own work force or by contract because the private sector is unable and unwilling to provide the waste management service. Ind. Code § 13-21-3-14 (SEA 387), effective March 13, 1998.

Solid Waste Management District Notification of Intent to Provide Waste Management Services

Solid Waste Management Districts proceeding under the law that allow a district to provide a solid waste management service that the private sector cannot and is not willing to provide must now give notice by first class mail to each person who has requested that they receive notice of meetings to consider the solid waste management district providing that waste management service. That notice must be provided at the same time notice is published in the newspaper. Ind. Code § 13-21-3-14.5 (SEA 387 § 3), effective March 13, 1998.

Waste Tire Regulation

Again for the eighth year in a row, the legislature has passed requirements to regulate waste tires. This year no less than 18 changes have been made that both broaden and narrow the regulation of waste tires. Effective July 1, 1998 (except where otherwise specified), this year's changes include:

1. Waste tire *processors* must obtain a certificate of registration from IDEM in order to operate. Processing subject to this requirement includes cutting, shredding or grinding. Before it was only storage sites which had to have the IDEM certificate of registration. The Solid Waste Management Board must adopt rules necessary to implement the waste tire processing registration program.

2. Storage of 2,000 or more waste tires in an entirely enclosed structure now is an activity that requires a certificate of registration from IDEM in order to operate. Before only outside storage sites and storage sites that were partially out-of-doors had to be registered with IDEM.

3. Transporters of waste tires must now provide to IDEM $10,000 of financial responsibility in the form of a surety bond, certificate of deposit or letter of credit. No financial responsibility was required of transporters previously. This requirement does not, however, take effect on July 1, 1998, but takes effect only once the Solid Waste Management Board has adopted rules to implement this statutory mandate.

4. Waste tire transporters and waste tire processors must annually report to IDEM the number of waste tires transported or processed.

5. Waste tire storage sites out-of-doors or in partially-enclosed structures where only 500 to 999 waste tires are stored are no longer required to register with IDEM. As a result of this year's changes, only storage sites of 1,000 or more waste tires are required to obtain an registration from IDEM.

6. A certificate of registration can now be denied by IDEM if an enforcement action is pending against the person who applies for the registration. An enforcement action is defined *very broadly* to include a notice of violation, a letter from IDEM identifying a violation, or a court proceeding initiated by IDEM, the Department of Fire and Building Services, or any state or federal government agency that regulates public health, safety or the environment.

7. The limitations on how a retailer of tires may dispose of waste tires has been broadened to cover all tire disposals -- and applies to tire retailers, auto salvagers and sellers of used tires.

8. The ability to obtain a certificate of registration for waste tire activities no longer depends on IDEM finding that it is not economically feasible to recycle or reuse the tires. Now, the certificate of registration will be issued if the application otherwise complies with the statutory and regulatory provisions of the waste tire laws and rules.

9. The owner of land upon which a waste tire storage or processing operation is to be located, if different than the applicant for the certificate of registration, must now sign the application for a certificate of registration.

10. A certificate of registration may be revoked or modified during the 5-year period it is in existence if: 1) the applicant failed to disclose all relevant facts or misrepresented facts in obtaining the registration; 2) the holder of the registration fails to correct, within a reasonable time *established by IDEM*, a violation of a condition of the registration or a rule adopted by the Solid Waste Management Board. Notice of revocation or modification must be given by IDEM to the registrant by certified mail. IDEM's proposed revocation or modification can be appealed to the Office of Environmental Adjudication. The registration remains in effect pending a decision from the appeal unless injunctive relief is obtained by IDEM.

11. All of the $.25 per new tire money collected will be available to IDEM to spend on waste reduction, recycling and removal and remediation programs. Unlike the current split between IDEM and the Department of Commerce (where 65% goes to the Department of Commerce for their loan program) all of this money is for IDEM's use.

12. IDEM's waste tire management fund now also receives all of the civil penalties collected for violations of the waste tire statute and rules and all of those monies are available to IDEM to perform waste tire removal and remediation projects. Unlike the other funds, the Department of Commerce will not receive its 65% share. That fund now also receives the $25 waste tire transporter fees.

13. A tire retailer, auto salvager or seller of used tires that is the source of more than 12 waste tires per year is required to maintain the waste tire manifest received from a waste tire transporter for at least one year and make to a copy of those manifests available to IDEM upon request.

14. The July 1, 2000 expiration date on IDEM's authority to seek a court order to compel removal or remedial actions related to waste tires and to recover costs and damages against a person who fails to undertake removal and remedial action has been deleted. That authority now has been extended indefinitely.

15. The limitation on IDEM's ability to recover costs and damages from a person who is responsible for improper disposal of tires or who has failed to properly undertake removal or remedial action has been broadened to no longer limit that authority to situations where the failure to act is in violation of a court order.

16. The Solid Waste Management Board must adopt rules necessary to implement these new requirements by July 1, 1999.

17. The financial responsibility requirements for waste tire storage sites storing tires completely indoors does not take effect until the Solid Waste Management Board has adopted its rules.

18. The requirement for waste tire transporters to demonstrate financial responsibility also does not take effect until the Solid Waste Management Board has adopted those rules.

Ind. Code §§ 13-11-2-67; 13-11-2-250.5; 13-11-2-251; 13-20-13; 13-20-14 (HEA 1338), effective July 1, 1998.

UNDERGROUND STORAGE TANKS

Annual Report on the Financial Conditions of the Underground Petroleum Storage Tank Trust Fund

IDEM was given a new duty that will benefit the regulated community by forcing disclosure of the financial status of the Excess Liability Fund to the Underground Storage Tank Financial Assurance Board ("FAB"). Effective July 1, 1998, at each FAB meeting held, IDEM must provide the FAB a written report on the financial condition and operation of the underground petroleum storage tank trust fund. Ind. Code § 13-23-11-7 (SEA 158 § 5), effective July 1, 1998.

Underground Storage Tank Closure Grants

A new grant program has been created for certain small owners of USTs who are undertaking closure and the permanent removal of tanks. To be eligible for a grant, the owner or operator must comply with the following:

1) submit an application for a grant on a form provided by the Indiana Development Finance Authority ("Authority");
2) have owned or operated not more than 12 USTs;
3) had an adjusted gross income of less than $50,000 per year for the 5 years immediately preceding the year the application for the grant is submitted or be a non-profit corporation;

4) have complied with the UST laws, the rules adopted to implement the UST laws and the federal law and federal UST rules;
5) have paid all registration fees required under Ind. Code § 13-23-12; and
6) verify that the grant will be used to close or remove the UST and will not be used to upgrade the UST and the owner or operator will not be involved in the distribution of motor fuels after the UST is closed or removed.

The Authority is required to consider applications in the order in which they are received. The Authority, IDEM and UST Financial Assurance Board have developed nonpromulgated guidelines for the award of grants. Ind. Code §§ 13-23-10-1; 13-23-10-3; 13-23-10-7 and 13-23-10-10 (SEA 158 §§ 1- 4), effective July 1, 1998.

WATER

Non-Profit Water Utilities Can become a government agency

Nonprofit water utilities may elect to become a political subdivision of the state as a public water authority. Any existing nonprofit water utility desiring to become a political subdivision of the state must: 1) adopt a resolution; 2) keep the same structure for its board of directors and governing rules as existed for the non-profit utility; and 3) file the resolution with the Secretary of State. Upon taking those steps, the Secretary of State is required to dissolve the corporate status of the nonprofit water utility. The newly created water authority retains all of the powers of the nonprofit water utility and remains obligated for all existing contracts and agreements and indebtednesses of the nonprofit utility undertaken or incurred when it was unassociated with the state. Ind. Code § 13-18-16-16 (SEA 241 § 3), effective March 13, 1998.

Waste Water Loan Program

Changes were made this year to try to make more money available to political subdivisions for compliance with national primary drinking water regulations or other health protection objectives of the federal Safe Drinking Water Act. To do this the Waste Water Revolving Loan Program ("Waste Water Loan Program") was revised to allow it to be used for planning, designing, constructing, renovation, improving or expanding drinking water systems. Originally the Waste Water Loan Program was established to provide money only for waste water collection and treatment systems. Now that money can now also be used to secure a leveraged loan program or other type of financial assistance program for the drinking water revolving loan fund ("Drinking Water Loan Program"). However, the Waste Water Loan Program fund can be used for that purpose only to the extent it is permissible under the Federal Clean Water Act and the Federal Safe Drinking Water Act. Ind. Code §§ 13-18-13-30 and 13-18-21-30 (SEA 241 §§ 2 and 4), effective March 13, 1998.

Water Pollution Control Board Permits for Construction of Sanitary Sewers or Public Water Mains

In an effort to lessen the burden on those who are regulated by the Water Pollution Control Board and the speed up the construction of sanitary sewers and public water mains, the legislature this year created an exemption from the water construction permit requirements. The legislature has required the Water Pollution Control Board to promulgate rules to exempt from IDEM permitting requirements the preparation of plans for the design or construction of a sanitary sewer or public water mains if:

1. The plans are prepared for a unit of government;
2. The plans are prepared by an Indiana registered professional engineer;
3. The requirements specified in the Water Pollution Control Board rules are met; and
4. Federal law does not require that the plans be submitted to a state agency for permission or review.

Ind. Code § 13-18-3-12 (SEA 241 § 1), effective March 13, 1998.