SUMMARY OF THE 1995 ENVIRONMENTAL LEGISLATION

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SOLID WASTE ISSUES

Setbacks from a landfill

As a result of the proposed Subtitle D rules that IDEM was considering, which proposed setbacks that would have essentially prohibited the development of any new landfill capacity, the legislature compromised and agreed to prohibit IDEM from developing any new setbacks from those already in existence until after January 31, 1996. Legislation was considered to statutorily create setbacks that would apply to solid waste landfills. As a compromise this temporary prohibition will allow the solid waste industry to work with IDEM to see if acceptable set backs can be agreed to. If IDEM persists with totally unreasonable setbacks, the plan is to go back to the legislature to plead the cause for reasonable regulation. HEA 1083 § 9.

Yard Waste

As of June 1, 1995 the ban on landfills accepting yard waste has been lifted -- in part. Previously only landfills with approved methane recovery systems could accept yard waste. Starting June 1, all landfills may now dispose of grass, woody vegetative matter that is less than 3 feet in length and bagged, bundled or otherwise contained and other de minimis amounts of vegetative matter less than thee feet in length that are bagged bundled or otherwise contained and not set out separately for collection. Landfills may not take leaves or woody vegetative matter greater than 3 feet in length. SEA 65 §§ 1, 2 and 4; Ind. Code 13-7-29-1, 13-7-29-3 and 13-7-35-9.

Notwithstanding this partial yard waste ban, the County Commissioners in any county that has experienced an emergency that has caused widespread or severe damage or loss of property resulting from fire, flood, earthquake, wind, storm, drought, explosion or other types of man made or natural causes may by resolution or order allow land-clearing projects and landscaping maintenance waste resulting from that emergency to be landfilled for a period of not more than 90 days. SEA 65 §3, Ind. Code 13-7-29-5.

Special Waste

As a result of changes IDEM made in its procedures for special waste certifications, which had included assessing multiple fees for certification, limiting the amount of time of a certification and requiring certifications for very small generators, legislation was passed to address the problems IDEM had created. Specifically, a generator may not be required to have solid waste certified as a special waste for a single shipment of solid waste if the waste is generated by one generator from one process, the quantity generated by the process is less than 100 kilograms per month and the quantity of solid waste disposed of is less than 1000 kilograms per shipment. Further, generators may combine similar solid waste streams into a single solid waste stream and fulfill the special waste certification requirements and pay fees only for the single solid waste stream. Special waste certifications are by law made valid for 5 years, except for the following circumstances:

(1) If the certification analysis demonstrates that hazardous constituents are present in the solid waste stream of at least 85% of the applicable standard for identifying it as hazardous, the certification is good for 1 year.

(2) If the solid waste stream has not previously been certified and the certification analysis demonstrates that hazardous constituents are present in the solid waste steam of at least 75% and less than 85% of the applicable standards for identify it as hazardous, the certification is valid for 1 year.

(3) If the solid waste steam has not previously been certified and the certification analysis demonstrate that hazardous constituents are present at least 50% and less than 75% of the applicable standard for identifying it as hazardous, the certification is valid for 3 years.

(4) If the certification performed on a solid waste stream after an initial certification analysis has been performed and the subsequent certification analysis demonstrates that hazardous constituents are present in the solid waste stream of less than 85% of the applicable standard for a hazardous waste, the certification is valid for 5 years.

Whenever the composition of the constituents of a solid waste stream that has been certified as a special waste is significantly altered, the solid waste stream must be recertified as a special waste. SEA 418 § 20, Ind. Code 13-7-22-4.

Waste Tire Fees

Notwithstanding the general split of 35% to IDEM and 65% to the Department of Commerce, when IDEM recovers money from a person to cover the costs and damages IDEM incurs in a tire removal action, all of the money recovered goes to IDEM for tire removal and remediation projects. In addition, when gifts or donations are made to the tire fund, the donor may specify how the money is to be divided, including specifying that it all be used by IDEM or all by the Department of Commerce. SEC 418 § 21, Ind. Code 13-7-23-11.

Use of Shredded Tires

IDEM is statutorily allowed to authorize the use of shredded or ground up tires as daily cover for a solid waste landfill. And, when tires are used for that purpose they will not be subject to either the state solid waste fee or any district fee. SEA 418 § 22, Ind. Code 13-7-23.2-9.3.

SOLID WASTE DISTRICT ISSUES

Reporting of Expenditures of Funds

For persons concerned about how Solid Waste Districts are spending the money they collect, the legislature has required that each solid waste district provide a report to IDEM accounting for the expenditures of district funds for calendar year 1994. That report was due to IDEM on July 1, 1995. IDEM is required to provide copies of those reports to the Environmental Quality Services Council. The legislature has provided with this reporting obligation an opportunity to raise issues with the Environmental Quality Services Council about improper uses of Solid Waste District funds. HEA 1083 § 3, Ind. Code 13-9.5-2-15.2.

Brown County Solid Waste District Authorization to Spend Solid Waste District Funds for Homeowner Compensation

The Brown County Solid Waste District's efforts to site a new landfill and the public opposition that has resulted caused the legislature to allow the Brown County Solid Waste District to spend district funds until year 2002 or 6 years after issuance of a landfill permit, which ever is later, to compensate an owner of a permanent residence for the diminution of property value shown to result from the operation of a new landfill. The money is to be paid to the County. The County can provide a permanent home owner reasonable compensation, which the legislature has declared to be set as no more than 1% of the fair market value for 5 consecutive years. The property diminution damages must be shown to result solely from the operation of a new landfill before compensation will be provided. HEA 1083 § 7.

Strategy to Educate the Public on Yard Waste

As of July 1, 1995, each solid waste district plan must contain a strategy to promote and educate the public regarding the benefits of disposing of vegetative matter by composting, mulching or other environmentally sound practices -- which can not include landfilling. SEA 65 § 5, Ind. Code 13-9.5-4-6.

Meetings of Advisory Committee

In an effort to provide more sound technical guidance to Solid Waste Districts, starting July 1, 1995 the District Advisory Committee must meet jointly with the Board of Directors of a Solid Waste District at least 2 times each year. At those meetings the two groups are to discuss current and future issues. The Advisory Committee must then provide advice to the Board of Directors on the issues discussed at the next meeting of the Board of Directors. SEC 358 § 1, Ind. Code 13-9.5-2-10(d).

Solid Waste District Budget Comment by Advisory Committee

The Advisory Committee is also now required to meet after the Board of a District proposes its budget in order to develop written comments on the proposed budget. The Committee's comments must be provided to the Board at the public hearing held on the budget. SEA 236 §1, Ind. Code 13-9.5-2-10(e).

Special Meeting of a District Board of Directors

Currently each Solid Waste District Board is required to meet monthly. Notice of the schedule of those monthly meetings is to be given annually by publication in a newspaper of general circulation in each county in the district. As a result of legislative changes, if a District Board meets other than during its regular monthly meeting, starting July 1, 1995, the law requires that notice of those special meetings be given at least 48 hours (excluding Saturdays, Sundays and legal holidays) in advance of the meeting. The Board must post an agenda of the special meeting at its headquarters at least 48 hours in advance and give notice of the agenda to a general circulation newspaper in each county and to each news media who requested notice. The Board can discuss during a special meeting only those items included on its agenda. SEC 358 § 2, Ind. Code 13-9.5-4-2(g).

Approval of County Fiscal Body for District to Tax or Issue Bonds

The powers of a Solid Waste District have once again been modified. This time, instead of expanding the District's power, the legislature has shown some concern for the unbridled fiscal impact of districts by beginning to add layers of oversight. Districts must obtain the approval of a majority of the members of each county fiscal body before it may issue bonds which would be repaid directly or indirectly with property taxes. In addition, before a District may include as part of its budget revenue to be derived from a property tax, it must obtain the approval of each county in the district from the county(s) fiscal body. The county fiscal body must pass a resolution before May 1st of each year approving the Solid Waste District's imposition of a property tax. (For property taxes due and payable in 1996, the fiscal body had until July 1, 1995 to approve the resolution). If all necessary resolutions are not passed by May 1, no property tax may be assessed in 1996 and the following year by the District. SEA 450, § § 7 & 8, Ind. Code 13-9.5-2-11(a)(13) and 13-9.5-2-11.1.

The legislature's concern that solid waste district powers may be getting out of control has also resulted in new provisions for oversight and approval of District actions. Before Districts can receive a distribution of property tax assessments or county option income tax assessments, a majority of the fiscal body(s) of each county in the District must pass a resolution to approve the distribution to the district, or no distribution will be made. SEA 450 § § 1-4, Ind. Code 6-3.5-1.1 and Ind. Code 6-3.5-6.

Contracts with County to Collect Fees & Taxes

Solid Waste Districts may now contract with the county in which they are located to have the county collect fees that the District has imposed. Before contracting with the county, the county auditor and treasurer must both consent to the terms of the contract and the Solid Waste District

Board and County Commissioner must both approve the contract at public meetings. The County may be reimbursed administrative expenses, but the expenses may not exceed the county's direct cost, which can include an allowance for computer reprogramming and costs to establish and maintain the collection program. The County is allowed to include a notice of the amount of fees and charges in a regular property tax notice to a taxpayer. SEA 450 § 9, Ind. Code 13-9.5-2-15.

Joint District Right to Divorce

Effective July 1, 1995 a county that has joined with other counties to form a joint solid waste district may withdraw from that joint district. Likewise, Joint Districts may now force the removal of a county from a joint district. The County Commissioners of a county wishing to withdraw must adopt a resolution, which must specify the reasons for the withdrawal. A copy of that resolution must be provided to the Joint District and to IDEM's commissioner. If the Joint District consists of only 2 counties, the notice is to be provided to the county commissioner of the other county. To expel a county, the county commissioners of each county that remain in the Joint District must pass a resolution for expulsion. That resolution must state the reasons for the expulsion, and it shall be given to the county commissioners of the county to be expelled and to IDEM's commissioner. The withdrawing county or the county commissioners for the counties expelling a county must prepare or pay for the preparation of an analysis of the action on the finances of the Joint District and on those of the county withdrawing or being removed. A copy of the financial impact analysis must be submitted to the county commissioners of each county involved and to IDEM within 90 days of the date of a resolution to withdraw or expel. The county withdrawing or being expelled remains responsible for all legal obligations entered into by the Joint District before the date of the action to separate. After the financial impact analysis has been completed and the remaining counties and county being removed have entered into a written agreement specifying the legal obligations as of the date of withdrawal, a public meeting must be held by each county's county commissioner and the Joint District board. Before the date of withdrawal or removal the affected county shall either designate itself as a new county solid waste district or join with one or more other counties to form a new Joint District. The new county plan or an amended Joint District plan must be adopted before the date of separation. If all procedures required for withdrawal or removal are not completed within 365 days, the action to withdraw or remove a county is considered void. SEC 450 § 10, Ind. Code 13-9.5-2.3 and Ind. Code 13-9.5-4-13.

Amendment of District Plans

The law has been amended to allow Districts to amend their plans at any time. The requirement to reconsider and, if appropriate, amend the plan every five years has been deleted. Districts must amend their plan if they opt to undertake one of the following programs, or if they decide to not implement one of the programs which was specified in their approved plan:

· a program that requires a permit or registration from IDEM;

· program involving a facility for processing recyclable materials;

· program for collecting recyclables;

· a major education program.

Amended plans must be provided to IDEM.
SEA 450 § 11, Ind. Code 13-0.5-4-11.

Lake County Solid Waste Management District Executive Committee

Effective July 1, 1995 the Lake County Solid Waste District Board will be allowed to appoint an executive committee to execute any powers of the Board which the Board grants to it by resolution. Previously, only Joint Solid Waste Districts were allowed to create and act through an Executive Committee. SEA 450, § 6, Ind. Code 13-9.5-2-7.

IDEM PERMITS

IDEM Notification of Legal Actions Filed Against It

As a result of the recent issuance of the Newton County Development Corporation ("NCDC") permit, which was issued only after NCDC sued IDEM to have the court rule that the need statute could not be applied retroactively and that NCDC had properly demonstrated zoning, IDEM must notify the County Commissioners of a county in which a solid waste landfill is or would be located if a legal action has been filed that names IDEM as a party and concerns an application that has been filed with IDEM to obtain an original permit or a permit renewal for a solid waste landfill. SEC 418 § 15, Ind. Code 13-7-10-8.

Interim Permits for Pollution Control or Pollution Prevention in Excess of Applicable Requirements

IDEM's boards are required to adopt rules before January 1, 1997 to implement an interim permit program for equipment, facilities or pollution control devices that achieve pollution control or pollution prevention in excess of applicable federal, state or local requirements. Interim permits are to be available for eligible proposals to construct, modify or operate any equipment, facility or pollution control devices. An application for an interim permit must be made to the Commissioner of IDEM. The Commissioner will have 60 days from receipt to issue

or deny the interim permit. Interim permits are not allowed if they would not be allowed under federal law or a federally authorized or delegated permit program. HEA 1389 § 3, Ind. Code 13-7-10.1-4.

IDEM Notification of Permit Applications

Starting July 1, 1995, when IDEM receives a permit application, IDEM must send notice of that permit filing to all County Commissioners, mayors and town presidents who will be affected by the permit application. IDEM may require the permit applicant to provide information necessary for IDEM to implement this law. SEC 418 § 2, Ind. Code 13-7-3-18.

Government Use of Professional Engineers in Permit Applications

Last year's law that exempted a county, city, town, township, school corporation, or other political subdivision from having to use a professional engineer for plans or specifications contained in a registration, license or permit application submitted to IDEM has been changed. Now, the exemption will not apply if a state or federal law or rule or regulation requires that a professional engineer's seal is required. However, those government entities may not be required to use a professional engineer when making application to IDEM for an air quality construction permit, even if IDEM's rule or law requires the use of a professional engineer. HEA 1386, Ind. Code 25-31-1-19.

IDEM ENFORCEMENT

Minor Violations and Right to Correct

A major victory for small and medium sized business was achieved this session concerning IDEM's enforcement program. The legislature passed a law that provides that businesses with fewer than 500 employees who have committed a minor violation must be given 90 days from receipt of a written summary of IDEM's inspection to correct that violation. If the violation is corrected or if substantial steps[1] to correct the violation are commenced within the 90 days (or 180 days, if IDEM grants an extension to the 90 day requirement) then IDEM may assess a penalty no larger than $500. This limitation applies only to violations that do not present an immediate or reasonably foreseeable danger to the public and can not include a violation of one of the following:

(1) a numerical limitation or a numerical standard contained in a law or rule that existed prior to

the discovery of the violation;

(2) a term or condition of a permit, order or other type determination made by IDEM which was issued before the discovery of the violation, unless the term or condition incorporates a limitation, standard, work practice or other requirement by reference without specifying the limitation, standard, work practice or other requirement; and

(3) a requirement to have a permit.

IDEM may decrease the penalty below $500 based on:

(1) the good faith effort or cooperation of a business required to correct the violation before IDEM discovered the violation;

(2) the ability of a business required to correct the violation to pay the penalty;

(3) an agreement that the business will offset the payment of the penalty by a project that has clearly identifiable and quantifiable environmental benefits that is not otherwise required by law; or

(4) other mitigating factors within the discretion of IDEM.

This leniency also does not apply if:

(1) the business commits the same or a similar violation

(2) the violation constitutes a criminal offense;

(3) the violation is committed intentionally or knowingly.

IDEM must keep a record of violations qualifying under this provision and of the corrections made and penalties imposed. That report must be available for public inspection. HEA 1387 § 1, Ind. Code 13-7-5-3.3.

Waiver of Civil Penalties

In addition to the 90 day period to correct, IDEM is allowed to waive up to 100% of a civil penalty for a minor violation committed by a business with no more than 500 employees. To obtain the penalty waiver, the business must submit a written report of the violation to IDEM before IDEM's inspection that discloses the violation. This report must be submitted to IDEM and before the business receives any notice of warning or notice of a violation from IDEM. No

part of the penalty shall be waived for a violation that:

(1) endangers or causes damage to public health or the environment;

(2) is intentional, willful or criminal;

(3) is of a requirement for which IDEM has previously issued a notice or warning of violation; or

(4) is not corrected within 90 days of the date the business seeks a waiver of the penalty from IDEM.

The department may waive in its entirety the $500 penalty.

In order to determine if a business is eligible for the penalty waiver, the business may contact the technical and compliance assistance program. Information provided to that program regarding eligibility for the waiver will be held strictly confidential and will not shared by the office of technical and compliance assistance with other IDEM offices. HEA 1387 § 2 & 3, Ind. Code 13-7-13-5 and Ind. Code 13-7-13-6.

HAZARDOUS WASTE

Liability for Bodily Injury or Property Damage From Household Hazardous Waste or Conditionally Exempt Small Quantity Generator Waste

A change in the law now allows payments to be made from the political subdivision risk management fund for bodily injury or property damage arising out of the discharge, disposal, release, or escape of a household hazardous waste or conditionally exempt small quantity generator waste which was caused by an act or omission of a political subdivision from a collection, disposal or recycling project conducted by that political subdivision if that political subdivision is a member of the fund. SEA 370, Ind. Code 27-1-29.1-14 and 18.

Rejection of Hazardous Waste Shipments

The provisions added last year requiring IDEM to adopt rules to regulate the rejection of partial loads was repealed and replaced with specific statutory provisions for when and how rejections of shipments of hazardous waste may occur. These procedures will apply until July 1, 2005 or the date that regulations of the US EPA govern the manifesting of rejected loads. IDEM must adopt rules to take effect on the date these statutory provisions expire. A hazardous waste

facility owner or operator may reject all of a hazardous waste shipment for any reason if it does so before signing the manifest. After a manifest has been signed by the receiving TSD, the owner or operator may reject all or part of a hazardous waste shipment that (1) does not conform to the terms of the agreement under which the hazardous waste facility agreed to manage the waste; (2) does not conform to the requirements of its permit, (3) would require a deviation from the facility's standard operating procedures or (4) cannot with reasonable effort be removed from the vehicle or container in which the hazardous waste was transported. If the rejection occurs after the manifest has been signed all of the following apply:

· the facility shall not be considered a generator of the rejected waste and shall not be liable for any rejected part of the shipment under Indiana's mini superfund provisions.

· the owner or operator of the facility must contact the generator who shall direct the facility to either return the rejected shipment to the generator or transport it to an alternate facility which the generator will select.

· If the rejected load is returned to the generator, the facility must complete a new manifest form and comply with all of the standards applicable to generators except that: the word "generator" will be marked out and replaced with "rejecting facility"; "designed facility" will be marked out and replaced with "generator"; and, REJECTED LOAD will be printed in large block letters and the state manifest document number of the original manifest will be placed in Box 15 of the rejected load manifest.

· The generator retains all responsibility for transportation of the rejected waste.

· Upon receipt of the rejected shipment, the generator shall note discrepancies in Box 19 of the manifest, line out the words "facility owner or operator" in Box 20 and insert the words "receiving generator," sign box 20, give a copy of the manifest to the transporter and mail a copy of the manifest to the rejecting facility and to the department not more than 5 days after receipt of the shipment. The receiving generator and rejecting facility shall retain copies of the manifest from the rejected load for not less than 3 years after the date of receipt.

If the rejecting facility does not receive a copy of the manifest with the written signature of the generator in Box 20 within 35 days of the date of the rejection, the rejecting facility shall comply with the exception reporting requirements applicable to generators.

a generator may retain the rejected load up to 90 days following receipt of the rejected load before shipping to a permitted facility.

· If the rejected load is to be shipped to an alternate facility, the generator shall complete the manifest form identifying itself as the generator and specifying the alternate designated facility.

The manifest shall be forwarded to the rejecting facility to accompany the shipment to the alternate facility.

· If hazardous waste from more than 1 generator is mixed together by the transporter before delivery to the hazardous waste facility, the transporter shall assume all responsibility for proper disposition of the rejected waste, including the responsibility to designate an alternate hazardous waste facility and to assure delivery to that facility.

SEA 418 § 6, Ind. Code 13-7-8.5-14.

Economic Development within Two Miles of the Chemical Waste Management Hazardous Waste Landfill

Allen County will receive $99,000 from the Hazardous Substances Response Fund on or before October 1, 1995 to be used to encourage economic development within 2 miles of the boundaries of the Chemical Waste Management hazardous waste landfill. The county may use the money to:

(1) create a plan for economic development;

(2) recruit commercial and industrial facilities to the area;

(3) coordinate public, private and nonprofit organizational resources to attract business and temporary and permanent employment opportunities and private sector investment in the 2 mile area and increase economic growth in the area; and

After completing an economic development plan, Allen County can use the remaining money to:

(1) design and construct public improvements that are located inside or outside the development area and support commercial and industrial development; and

(2) purchase real estate or interests in real estate within the development area for the purpose of facilitating commercial and industrial development in the area.
HEA 1083 § 8.

HAZARDOUS WASTE FACILITY SITE APPROVAL AUTHORITY

Rulemaking Procedures

The Hazardous Waste Facility Site Approval Authority is required to follow the new rulemaking procedures created last year for IDEM's Air, Solid Waste, Water and Financial Assurance Boards. SEC 418, § 4, Ind. Code 13-7-7.1-1.

Abolition

The Hazardous Waste Facility Site Approval Authority will be abolished on July 1, 1996. It will continue to exist for the purpose of acting on applications filed after December 31, 1994 and before July 2, 1995. SEA 418 § 7, 26 and 27, Ind. Code 13-7-8.6-1.

Additional Approvals Required for Siting of a Hazardous Waste Facility After July 1, 1995

Effective July 1, 1995 any person who has not filed for a certificate of environmental compatibility and who proposes to construct a hazardous waste disposal facility, a commercial hazardous waste treatment or storage facility or a commercial low-level radioactive waste facility may not begin construction until the local plan commission with jurisdiction over the area in which the facility would be located has recommended the construction of the facility and the county commissioners have approved the construction. SEC 418 § 8, Ind. Code 13-7-8.6-2.3.

Vacancies in Executive Council Membership

Vacancies in the Siting Authority must be filled by the governor not more than 20 days after the vacancy arises, if an application is pending, and not more than 30 days from when the vacancy arises if no applications are pending. SEA 418 § 9, Ind. Code 13-7-8.6-3(c).

Selection of Local Members

Clarification has been provided as to who is responsible for appointing the four local members of the Siting Authority. Two residents of the unincorporated portion of the county in which the facility will be located will continue to be appointed by the County Commissioners. However, the Commissioners may appoint a county health officer even if that person does not reside in the unincorporated portion of the county. One member will now be appointed by the mayor or town president of the largest city or town in the township containing the proposed facility, or, if there is no city or town in the township, one resident from the township will be appointed by the township trustee and one member will be selected from the second largest city or town in the County. The latter will be appointed by the mayor or town president of that city or town. SEC 418 § 9, Ind. Code 13-7-8.6-3(g).

Exemptions for Facilities that have Local Zoning or Land Use Approval and For Recycling Facilities not Required to have RCRA Permit

The siting law has been revised to exempt from the Siting Authority law those facilities that have local zoning or land use approval for construction and operation of the facility. In addition, the

law was clarified to provide that a CEC is not required for a recycling facility that is exempt from the requirements of a part B permit under RCRA. SEA 418 § 10, Ind. Code 13-7-8.6-5.

Time-Frame for Appointment of Local Members

The law was clarified to state that the local members must be appointed within 45 calendar days from the date notice is received of the obligation to make the appointments. The law was also clarified to specify that failure to appoint local members within the 45 calendar day period prohibits the appointment from being made, but allows the Authority to be constituted on that 45th day and to be fully constituted for purposes of acting on the application. SEA 418 § 11, Ind. Code 13-7-8.6-7.

Timing for Public and Adjudicatory Hearings

The law has been clarified by requiring that the initial notice given of the application include notice that written comments from the public will be received by the authority any time before or during the public hearing. The law also clarifies that the Authority will hold both a public hearing and an adjudicatory hearing before making a decision on the request for a CEC. The law requires that the authority hold its public hearing not less than 45 calendar days before the adjudicatory hearing. SEC 418 §§ 12 and 13, Ind. Code 13-7-8.6-8 and 10.

Notification of Public Comments be Given to Applicant

The Authority is required to provide the applicant for a CEC with copies of all written comments the Authority receives within 5 days of receiving them. SEA 418 § 12, Ind. Code 13-7-8.6-8(c).

Conditions Attached to CEC

The law has also been clarified to specify that the conditions which the Authority may impose in a CEC must be reasonably related to mitigating or preventing the risks or adverse impacts that will be posed by the facility on the immediately surrounding community (as those risks and adverse impacts are identified in the statute). The conditions imposed may not conflict with other conditions contained in state or federal environment laws or permits issued or required for the facility. To the extent conditions in a CEC do conflict with conditions in environmental permits, those conditions will be without legal effect to the extent needed to avoid the conflict. SEC 418 § 14, Ind. Code 13-7-8.6-12.

IDEM BOARDS

IDEM Permit Appeal and Enforcement Adjudications

Starting July 1, 1995 IDEM's solid waste, air, water and financial assurance boards will no

longer review appeals to decisions made by IDEM's commissioner. An Office of Environmental Adjudication has been established to serve that function. The Governor will appoint the Office's director, who will employ Environmental Law Judges to conduct hearings and make rulings on appeals of decisions made by IDEM's commissioner on permits, enforcement actions or any other agency action that is allowed to be administratively reviewed. The Environmental Law Judge's decision will be the final agency action that is appealable to court. Previously, the Administrative Law Judges would conduct the hearing and make a recommendation, which had to be affirmed, modified or rejected by one of IDEM's boards. This system will make adjudications less costly (there will be only one not two proceedings before IDEM), will ensure that the person making the decision is an attorney with knowledge of environmental or administrative law (new ELJ's must have at least 5 years of experience and be an attorney) and is intended to make the system less political and less biased toward the agency's position (new ELJs and the director must be independent of IDEM). Wayne Penrod who was employed by IDEM as the Chief Administrative law judge became the director of the new office on July 1. As director he will be responsible for hiring new ELJs. If a vacancy occurs in the Director's position, the Governor will appoint the new Director, based on 3 recommendations made to him by a panel consisting of one person appointed by the chief justice of the supreme court of Indiana, one person appointed by the governor, one person appointed by the Speaker of the house of representatives and one person appointed by the president pro tempore of the senate. All adjudicatory matters pending before the air, solid waste, water and financial assurance boards on June 30, 1994 were transferred to the Office of Environmental Adjudication and will be decided as if originally initiated under these new procedures. SEA 156 § § 1-12, Ind. Code 4-21.5-1-3, 4-21.5-7-7, 13-1-1-4, 13-1-3-4, 13-1-12-8, 13-7-2-13, 13-7-2-14, 13-7-8.7-10.9, 13-7-10.1-12, 13-7-11-2.

Air, Water and Solid Waste Board Membership

The Air and Water Boards' memberships have both been increased from 9 to 11 and the legislature has specifically designated that the Boards are to be independent from IDEM. A representative of small business and a representative of the general public (who does not qualify to sit under any of the other Board positions (including someone who would represent environmental interests) have been added to each board. The requirement as to the current representative of business and industry has been modified to require a representative of "manufacturing." The former physician position has been expanded to include any health professional who holds a license to practice in Indiana. The Solid Waste Board's membership has been increased from 9 to 13 members. The same change was made to the two existing members and the same two additional members were added as was done for the Air and Water Boards. In addition, the Solid Waste Board will have one representative of the Solid Waste Management industry and one representative of the solid waste management districts. The Governor is to appoint the new members based on recommendations from representative constituencies. Only individuals who possess knowledge, experience or education that qualify

them to represent the entities they are being recommended to represent may be appointed. Chuck Himes of Himeco Waste-Away Services of Elkhart has been appointed as the representative of the Solid Waste Industry. SEA 500, § 1-5, Ind. Code 13-1-1-3, Ind. Code 13-1-3-2 and Ind. Code 13-1-12-6.

Prohibition on Adopting Final Rules Until all Members Appointed

As a result of industry's frustration with the Governor's failure to appoint the solid waste business and industry representative to the board for more than a year, the legislature agreed to prohibit the Air, Water and Waste Boards from adopting in final form any rule until all members have been appointed. If a vacancy occurs, the Governor has not more than 60 days to appoint the replacement. If the vacancy has not been filled in the 60 day period, the boards must suspend the exercise of their duties until the position is filled. Also, in response to industry frustration with board members who never attended meetings, the law has been revised to allow the Governor to remove members for failing to attend 2 or more meetings during a calendar year. SEA 500 § 1-6, Ind. Code 13-1-1-3, Ind. Code 13-1-3-2 and Ind. Code 13-1-12-6.

Independent Technical Secretary and Legal Advisor to Boards

In a major revamping and in an effort to ensure IDEM's boards act independently of IDEM, the Commissioner of IDEM will no longer serve as the Board's technical secretary. The Boards are to select from a list of three qualified persons an independent third party, who may not be a state employee, to serve as the Board's technical secretary. The Department will continue to handle correspondence, and obtain, assemble or prepare reports and data as directed by the board between meetings. The new, independent Technical Secretary however will review all materials prepared for the Board by IDEM and is authorized to make revisions, with the object of preserving the independence of the Boards from IDEM. The Technical Secretary will continue as a non-voting member of the Board. SEA 500 § 1, 4 & 6, Ind. Code 13-1-1-3, Ind. Code 13-1-3-3, and Ind. Code 13-1-12-7.

Independent Legal Counsel to Boards

As a result of the conflict that exists with IDEM's Office of Legal counsel serving as legal counsel to IDEM as well as to the Board, (and as a result of the frustration the public has had with the IDEM legal counsel limiting public participation and comment to the Board), the law was revised to allow the Boards to select from a list of three qualified persons recommended by the Governor an independent third party non-state employee to serve as the Board's legal counsel. The legal counsel is to advise the board on legal matters or proceedings arising from the exercise of the Board's duties. The legal counsel will review all materials prepared for the board by the department for legal accuracy and sufficiency and can require IDEM to make revisions. IDEM has been quick to point out to the Boards that although the law for Technical

Secretary requires the Boards to select an independent Technical Secretary, the law for the legal counsel is discretionary. Boards may elect to continue to use IDEM's legal counsel. When the Boards served in an adjudicatory role it was fairly clear that IDEM's legal counsel could not advise the Board. It is less clear that a legal conflict exists now that the Board functions only to promulgate rules. SEA 500 § 1 & 4, Ind. Code 13-1-1-3 and Ind. Code 13-1-3-3.

Review of Office of Air, Water and Waste Management Existing and Future Technical Policies

Before January 1, 1996 the Air, Water and Solid Waste Boards have been authorized to review the technical policies of the offices of air, water and waste management for the purpose of making recommendations regarding those policies. Those recommendations are to be made publicly during regular meetings of the Board. This evaluation of the offices' policies and the new independence given to the Boards presents a unique opportunity to approach the Boards to raise issues about inappropriate procedures being used by IDEM. SEA 500 § 1, 4 & 7, Ind. Code 13-1-1-3, Ind. Code 13-1-3-3 and Ind. Code 13-1-12-7.

Declaration of the Purpose of Rule

The section of the law that had exempted IDEM from having to declare the facts or arguments on which it bases its rulemaking and the purpose that it intends to accomplish by promulgating a rule has been repealed. This means that in any rulemaking begun after June 30, 1995 the agency has an obligation to declare the purpose of the rule and the arguments for how the rule accomplishes that purpose. HEA 1797 § 8, repeal of Ind. Code 4-22-2-30.

Department of Commerce Comments on Proposed Rule's Impact on Business

Effective July 1, 1995, IDEM's rulemaking is once again subject to the provision for all agencies which requires that before an agency may adopt a rule the agency must respond in writing to comments or alternative proposals made by the Department of Commerce related to changes necessary to reduce regulatory burdens on small business. This section of the law was also modified this year to give the Indiana Economic Development Council, instead of the Department of Commerce, the job of providing the comments and alternatives on rules and now those comments are to relate to reducing the regulatory burden for all businesses, not just small businesses. HEA 1797 § 1, Ind. Code 4-22-2-28.

Mandatory Time in Which Development of Rules to Implement a Statute Must be Commenced

In response to the concern of industry that agencies such as IDEM fail to promulgate rules required by the legislature, the legislature has changed the rulemaking procedures for all state agencies. An agency must now begin the rulemaking process not later than 60 days after the effective date of the statute that authorizes the rules. If an agency cannot comply with the 60 day time-frame it is required to immediately give written notice to the Administrative Rules Oversight Committee of the reason for the agency's noncompliance. If an agency provides the

required notice, then the failure to begin the rulemaking process within 60 days does not invalidate the rules. Although the statute does not directly say so, it will be possible to argue that an agency that fails to commence rulemaking within 60 days after the effective date cannot proceed with rulemaking and any rule adopted pursuant to procedures started after the 60 day time-frame is void. Any such challenge to an IDEM rule started after the 60 day time frame would have to be brought within 2 years after the rule takes effect, as a result of last years legislative change imposing a statute of limitations on procedural challenges to an IDEM rule. This 60 day time-frame for commencing rulemaking does not apply to amendments made to existing rules, rules required by statutes enacted before June 30, 1995, rules required by statutes enacted before June 30, 1994 that are recodified in the same or similar form after June 30, 1995, or to rules required by statute where the initiation of the rule is contingent on receiving a waiver under federal law. HEA 1797 § 2, Ind. Code 4-22-2-19.

Notice of Intent to Adopt a Rule

All state agencies, not just IDEM are now required to give notice in the *Indiana Register* of an intent to adopt a rule at least 30 days before its preliminary adoption. The agency must prepare a written summary of all comments received (and the agency's written response) and make that information available to the public. The notice of intent must include an overview of the intent and scope of the proposed rule and the statutory authority for the rule. This requirement applies to all rule-making procedures commenced after June 30, 1995. HEA 1797, § 3, Ind. Code 4-22-2-23.

Time-Frame for Taking a Rule to Final Promulgation

Previously, all agencies were required to have obtained the Governor's approval of a rule within 1 year of the date that the rule was first published in the *Indiana Register*. Effective July 1, 1995, the one year time limit will run from the date the agency publishes notice of intent in the *Indiana Register*. Previously, if the agency did not obtain the Governor's approval within 1 year, the rule could not be adopted without starting the entire rulemaking process over. The law has been changed to allow an agency on the 250th day to notify the chairperson of the Administrative Oversight Committee in writing why the rules cannot be completed and the expected date the rule will be approved by the governor. If that notice is given and the agency obtains the governor's approval by the date later specified, then the rule can become effective without having to restart the rulemaking process. HEA 1797 § 5, Ind. Code 4-22-2-25.

Fiscal Analysis and Oversight of Rules with $500,000 Impact

Agencies must now submit to the Legislative Services Agency any rule that has a $500,000 impact on regulated entities after it is preliminarily adopted. Before such a rule can be final adopted the Legislative Services Agency shall prepare a fiscal analysis concerning the effect that compliance with the proposed rule will have on the state and on entities regulated by the proposed rule. The fiscal analysis must estimate the economic impact of the proposed rule and

determine the extent to which the rule creates an unfunded mandate on a state agency or political subdivision. The agency proposing the rule must take into consideration the fiscal analysis as part of the consideration in promulgating a final rule. In addition, the Administrative Rules Oversight Committee must review each rule adopted that has a fiscal impact of more than $500,000, to determine whether it compiles with the intent of the legislature and the extent to which it creates an unfunded mandate on any state agency or political subdivision. HEA 1797 § 6 and 7, Ind. Code 4-22-2-28 and 4-22-2-46.

MISCELLANEOUS ISSUES

Resource Recovery Tax Deduction

Although last year it appeared that the deduction allowed from assessed value for resource recovery systems would be repealed, the legislature opted instead to phase out the deduction over the next 3 years, with no deduction being allowed after 1997. If a resource recovery system was certified by IDEM for the 1993 or a prior assessment year, and if a timely application for the deduction for the 1993 assessment year was made, the person was entitled to receive a 95% deduction in the assessed value of that system. If those previously certified systems continue to be used for resource recovery, the following deductions will be available:

1994 — 95%
1995 — 90%
1996 — 75%
1997 — 60%.

Any portion of any property comprising a resource recovery system that was assessed and first deducted for the 1994 assessment year may not receive a deduction for property taxes due in 1995 or after.

To be eligible for the deduction an application must be filed with the county auditor after February 28 and before May 16 of the current assessment year unless an extension has been granted. Application must be filed each year a deduction is sought. The application must include the certification from IDEM for the 1993 assessment year or prior year and an itemized list of all property on which a deduction is claimed. The list must include the date of purchase of the property and the cost to acquire the property.

This phase-out does not however apply to political subdivisions. Political subdivisions that received a certification for the 1993 assessment year may continue to receive a 95% deduction so long as the political subdivision remains liable for the payment of the property taxes on the

system. HEA 1598 § 15, Ind. Code 6-1.1-12-28.5.

Immunity for Damages resulting from Response Assistance for Discharge of Oil

A new section has been added to the law effective July 1, 1995 providing immunity from damages, or for the cost of removal, to a person who provides services, care, assistance or advice in responding to a discharge or threatened discharge of oil into or on the navigable waters of Indiana. The response assistance provided must be consistent with the National Contingency Plan or be at the direction of the commissioner of IDEM or a federal on-scene coordinator. This immunity is not allowed to a person who was grossly negligent or who engaged in willful or wanton misconduct, or for personal injury or wrongful death. Notwithstanding this section, the party responsible for the original discharge remains liable, in the absence of a defense, for any and all damages arising from the discharge, including damages arising from improperly rendered response assistance, including the removal costs or damages caused by a person providing response assistance who is immune from liability. HEA 1552, Ind. Code 13-7-12-4.

Economic Evaluation of State Mandates on Local Government

Effective July 1, 1995, $100,000 has been appropriated to Indiana University's Center for Urban Policy and the Environment to be spent over the next two years studying federal and state mandates on local government entities and the costs incurred by local governments in implementing each state mandate. An Indiana Advisory Commission on Intergovernmental Relations has been created, staffed by IU's Center for Urban Policy and the Environment, to make recommendations to the general assembly for its consideration. SEA 115, Ind. Code 4-23-24. This legislation is patterned after federal legislation, which businesses in competition with government need to monitor closely to ensure equitable treatment.

Prohibition on Sale of Certain Types of Batteries

Starting July 1, 1995 no person may sell, offer for sale or offer for promotional purposes (1) an alkaline-manganese battery that contains mercury; (2) a zinc-carbon battery that contains mercury; or, (3) a button cell, mercuric-oxide battery, where the mercury was intentionally introduced into the battery and the battery was manufactured after December 31, 1995. Exempt from this prohibition are alkaline-manganese button cell batteries if each button cell has no more than 25 milligrams of mercury.

A person may not sell, offer for sale or offer for promotional purposes a mercuric-oxide battery (other than button cell mercuric-oxide batteries) manufactured after December 31, 1995, unless the person:

· identifies a collection site that meets all government standards and at which a used mercuric-oxide battery may be recycled or properly disposed;

· informs each of its purchasers of mercuric-oxide batteries of the collection site;

· gives each of its purchasers of mercuric-oxide batteries a telephone number that the purchaser may call to get information about returning the mercuric-oxide battery for recycling or proper disposal.

Violation of these prohibitions is punishable as a Class C infraction. SEA 399, Ind. Code 13-1-16.

Private Right of Condemnation

The statute allowing private persons the right to condemn land when under order from IDEM to control, treat, dispose or cease discharges of industrial or sanitary waste into waters of Indiana has been repealed effective July 1, 1995. This 1957 statute which allowed the Water Pollution Control Board to determine when condemnation of private property was required to address water pollution, had been little used and little known before its highly publicized repeal. SEA 424, Ind. Code 13-1-5.

Professional Engineers, Architects and Land Surveyors Investigation of Incident Related to Area of Practice

An exemption has been added to Indiana's licensing laws that will allow professional engineers registered under Ind. Code 25-31, architects with a certificate of registration under Ind. Code 25-4, and land surveyors with a certificate of registration under Ind. Code 25-21.5 to engage in an investigation incident to their specialized practice, without the need to have the license or registration required for that professional. HEA 1651, Ind. Code 25-30-1-5.

Westinghouse PCB Incinerator

The annual piece of legislation directed at the proposed Westinghouse PCB incinerator will require, in light of the abolishment of the Siting Authority, that an incinerator that will burn PCBs may not be built unless it has received the recommendation of the local plan commission with jurisdiction over the area in which it is located and county commissioner approval. In addition, the study of alternative technologies required to be concluded before July 1, 1995 has been extended so that it must now be completed by July 1, 1996.

Administrative Orders and Procedures Study Committee

An Administrative Orders and Procedures Study Committee has been created to study whether a centralized pool of administrative law judges should be created to serve the needs of most or all of Indiana's state agencies. This committee will expire January 1, 1997. The Study Committee is also to (1) consider whether alternative dispute resolution would be effective to streamline and simplify administrative adjudication and how to best implement alternative dispute resolution and (2) determine whether a set of basic rules is needed to insure the interests of litigants are consistent with implementation of the AOPA by all state agencies. The Study Committee

consists of 12 members including 2 members of the house of representatives, 2 members of the senate, the Chief Justice of the Supreme Court, the Attorney General, 2 state agency chief legal counsels, 2 administrative law judges and 2 Indiana state bar members, one from the government practice section and one from the alternative dispute resolution section. SEA 156 § 12.

SPILL REPORTING

Water Board Spill Report Rule

In an effort to begin to simplify the multiplicity of conflicting requirements for spill reporting the legislature has passed a law that prohibits IDEM from requiring a person to communicate a spill report to it if the spill is entirely cleaned up from the facility at which the spill occurred, within 12 hours after the spill occurred or is reasonably estimated to have occurred and no portion of the spill migrates across the property boundaries of the facility at which the spill occurred. However, that person must still submit a brief summary to the department before the 15th of the following month during which the spill occurred, that describes each spill during the month not required to be reported and the measures that were undertaken to clean up each spill. This exception from the immediate spill reporting requirements does not apply if the spill contains a reportable quantity of a substance regulated under RCRA, CERCLA or EPCRK or if it is a spill that must be reported to the state under any other federal law. SEA 418 § 1, Ind. Code 13-1-3-22.

Spills from Substances Being Stored Incident to Being Transported

The Emergency Planning and Community Right to Know spill reporting requirements have also been altered to allow substances being stored incident to transport to be reported in the same manner that spills during transport are reported. Specifically, the notification of a release for those spills may be satisfied by dialing the local 911 emergency telephone number, or if none exists, the operator. This applies instead of notifying the community emergency coordinator for the local emergency planning committees, the state commission and the state emergency planning commissions of other states that may be affected. SEC 418 § 23, Ind. Code 13-7-37-14.

Emergency Planning and Community Right to Know

The Legislature has clarified that the Emergency Planning and Community Right to Know law does not apply to transportation, or storage incident to transportation, of any substance or chemical subject to that law, including the transportation and distribution of natural gas, except for the limited spill reporting obligation. SEC 418 § 24, Ind. Code 13-7-37-21.

COAL

A clean coal technology program has been created within the Indiana Development Finance Authority ("Authority"). The Authority is to manage the clean coal technology program with the advice of the department of commerce. The Authority is authorized and directed to issue revenue bonds, or to guarantee its revenue bonds, in an amount not to exceed forty million dollars to finance clean coal technology projects, including all costs related to the financing of those technologies. Before issuing a revenue bond to finance a clean coal technology project, or guaranteeing revenue bonds issued by another body, or entering into a lease in connection with a clean coal technology project: (1) the department of commerce must evaluate the technical merits and feasibility of the project and issue a favorable recommendation that the project proceed to budget committee review; (2) the Authority and budget agency must evaluate the financial merits and feasibility of the project and issue a favorable recommendation to proceed to budget committee review; (3) the budget committee must review the project and make a favorable recommendation to proceed to the state board of finance; and, (4) the board of finance must approve the undertaking of the clean coal technology project and plan of finance. SEA 236, Ind. Code 4-4-11-43.

WATER RESOURCES

DNR Mapping of Community Public Water Supplies

Before July 1, 1996, DNR is required to prepare the initial compilation and mapping of all community public water supplies in Indiana that serve at least 500 customers. Once compiled DNR must update the mapping every 5 years. The compilation must include the following information:

· the location of water sources for community public water supplies;

· the location of treatment facilities used to treat raw water before the water is distributed to community public water supply customers;

· the extent of water mains in territories served by community public water supplies;

· the population served by community public water supplies; and

· the total amount of water produced by community public water supplies for the most recent calendar year.

SEA 442, Ind. Code 14-25-7-13.

Water Resources Study Committee

A 12 member legislative Water Resources Study Committee has been created to study and make recommendations concerning all matters relating to the surface and groundwater resources of Indiana, including
· usage, quality and quantity of those water resources;

· issues concerning diffused surface water, the common enemy doctrine and runoff.

The Study Committee shall also oversee activities of a 11 lay member work group to produce a technical and administrative handbook for drainage projects. The handbook must contain:

· technical description of drainage project construction techniques;

· best management practices of drainage projects that are protective of the environment (taking into account onsite and offsite effects, cumulative effects and downstream impacts);

· explanations of agency permitting processes and procedures to be followed by permittees to assure compliance with the law;

· addresses and telephone numbers of agency employees who are responsible for permitting;

· descriptions of compensatory measures for unavoidable environmental damage;

· descriptions of projects that are exempt from state or federal regulation;

· a description of a process that allows clear and timely access by permit applicants to supervisors in the agency to review and discuss prospective permit conditions;

· any other information the work group considers necessary.

SEC 303.

REGULATED DRAINS

Relocation of Regulated Drain on One's Own Property

The County Drainage Board may issue an order authorizing the reconstruction of a regulated drain without a reconstruction report or a county surveyor’s schedule of damages or a hearing on the reconstruction report and schedule of damages if:

(1) the project is presented to the Drainage Board for approval;

(2) the project involves relocating the drain from one site on the property owned by the person to another site on that property;

(3 the specifications have been approved by the county surveyor;

(4) the project will be completed under the supervision of the county surveyor;

(5) the person relocating the drain will pay the entire cost of the project;

(6) the county surveyor has investigated whether any other owner of land in the watershed will be adversely affected by the project and has communicated the results of the investigation to the Board;

(7) the Board finds no owner in the watershed will be adversely affected by the project and

(8) the Board votes at a public meeting to approve the project.

HEA 1036 § 3, Ind. Code 36-9-27-52.5.

Time limit for DNR Decision

Permit applications filed by a county drainage board to reconstruct or maintain a regulated drain must be approved or refused by the DNR within 150 calendar days after the application is deemed complete. Failure by DNR to act within the 150 days results in automatic approval of the requested permit. SEC 368 § 2, Ind. Code 14-26-5-7.4.

Public Hearings on Denial

If DNR refuses to issue a permit to reconstruct or maintain a regulated drain, within 60 days of the date of the permit refusal, DNR must publish notice that it will hold a hearing on the request. Any interested person appearing at the hearing will have the right to be heard. SEA 368, §3, Inc. Code 14-26-5-7.6.

Onsite Field Review by DNR and IDEM to Propose Negotiable Permit Conditions

For any regulated drain project requiring IDEM or federal water permits the county surveyor or board planning the project must request an onsite field review of the project. Within 14 days of receipt of the request DNR must contact the county surveyor and IDEM to establish a date, time and location of the onsite field review. Within 30 days of the onsite field review, DNR shall provide the county surveyor with a written summary of the review including any conditions the DNR or IDEM would place on the permit. The county surveyor aggrieved by the permit conditions has the right to enter into further negotiations with DNR or IDEM to obtain a

mutually agreeable set of permit conditions. SEA 368 § 7, Ind. Code 36-9-27-53.5.

UNDERGROUND STORAGE TANKS

Evidence of Financial Responsibility

A provision has been added to the law to provide financial relief to smaller business petroleum marketers by allowing for proof of ability to pay up to two (2) times the small business petroleum marketer's applicable deductible (up to $70,000 (2 x $35,000)). A "small business petroleum marketer" is defined as a person engaged in the business of selling petroleum products at retail while owning twelve (12) or fewer USTs. In addition, IDEM's Commissioner is authorized to lessen the financial requirements for the small business petroleum marketer to show that he satisfies the financial responsibility requirements for the deductible amount not covered by the Excess Liability Fund. The Commissioner must obtain EPA approval for the changed requirements. It is hoped that IDEM will define its financial and reporting requirements for all marketers by requiring that a company only provide proof of an ability to pay up to three (3) times the applicable deductible (up to $105,000 (3 x $35,000)). IDEM will need to clarify the type of documentation it will accept as evidence of ability to pay (i.e., third-party documentation, bank letter of credit, externally audited annual financial report, bonds, etc.). HEA 1384 § 2, Ind. Code 13-7-20-14.5.

Limited UST Corrective Action

Consistent with IDEM's recent shift toward risk-based environmental assessments which, in certain instances, may allow for little or no remediation of petroleum releases, legislation has been passed that will allow the Commissioner to issue orders for UST releases that pose "little or no immediate threat to human health or to the environment," that require only a limited form of corrective action. IDEM is also authorized to implement streamlined administrative procedures. This legislation gives IDEM greater flexibility in accepting higher levels of petroleum contamination without requiring remediation, particularly at sites where no offsite contamination has occurred or is likely to occur. From the marketers perspective, IDEM's adherence to this bill should significantly reduce remediation and environmental consultants costs at qualified sites. The financial stability of the ELF fund also should be enhanced because fewer claims should be filed and, of the claims filed, they should be for lesser amounts. HEA 1384 § 3, Ind. Code 13-7-20-19.

Limit on Local Government Regulation of UST

the law has been changed to clarify that local governments do not have the authority to enact or enforce UST ordinances or rules conflicting with those administered by IDEM, the Fire

Prevention and Building Safety Commission, or the Solid Waste Management Board. After June 30, 1995, a unit of local government cannot enact or enforce ordinances that require (1) a permit, (2) a license, (3) an approval, (4) an inspection, or (5) the payment of a fee or tax for the installation, use, retrofitting, closure, or removal of USTs unless IDEM has given written approval of the ordinance or proposed ordinance.

Unless IDEM acts upon a local government's request to approve an ordinance or a proposed ordinance within 90 days, the request is deemed approved by IDEM. IDEM may delegate authority to local governments whereby the Commissioner authorizes the local government to perform activities designed to achieve compliance with IDEM's UST statute and rules.

This new legislative provision should combat the increasing number of instances where oil marketers are being subjected to overlapping and/or conflicting UST regulations and UST fees at the State and local level. To the extent a local government is interested in enforcing UST regulations, it can be delegated the authority to do so by IDEM.

Term of FAB Members

The law has been revised to clarify that the term of an appointed member of the UST Financial Assurance Board continues until the member's successor has been appointed and qualified. This change will address the prior FAB problem of not having enough members for a quorum to conduct business due to the Governor's failure to appoint a successor member. HEA 1384 § 5, Ind. Code 13-7-20-35.

UST Defined

The term "underground storage tank" has been defined to mean underground storage tanks in operation after December 31, 1973. This provision clarifies the date for applicability of the UST statute. HEA 1384 § 1, Ind. Code 13-7-20-10.8.

ELF Money Allowed to be Used to Refund Reasonable Attorney's Fees Incurred

In response to the Financial Assurance Board's recent change disallowing reimbursement for attorney's fees, the law has been amended to clarify that the excess liability fund, (to the extent money is available) is to be used to provide payment of part of the liability of owners and operators of Underground petroleum storage tanks to third parties and for reasonable attorney's fees incurred in defense of a third party liability claim. SEC 418 § 19 and HEA 1384 § 4, Ind. Code 13-7-20-33.

Membership on Fire Prevention and Building Safety Commission

The Fire Prevention and Building Safety Commission's membership has been increased to place a member who represents owners, operators, and installers of underground and aboveground motor fuel storage tanks and dispensing systems. HEA 1141, Ind. Code 22-12-2-2.

SARA TITLE III

Indiana Law Implementing Emergency Planning and Right to Know Consistent with SARA

A new chapter has been added to Title 13 setting out the provisions of SARA Title III for the emergency planning and right to know law. This new chapter appears at Ind. Code 13-7-37. It contains a comprehensive system for notification to state and local emergency plan commissions by facilities that have regulated substances in amounts that exceed planning thresholds. It specifies the duties those facilities have to local emergency plan committees. Also, release reporting requirements for releases of regulated substances from stationary and mobile sources are described. Finally, provision has been made for the preparation, review and update of local emergency plans. SEA 465 § 7, Ind. Code 13-7-37.

Expanded Uses for Emergency Planning and Right to Know Funds

Effective July 1, 1995 the legislature has broadened the purposes for which the emergency planning and right to know funds may be used. In addition to the current uses for preparing and updating an emergency plan and processing requests for information and training, the money may now be used for:

· equipping a hazardous materials response team for district-wide emergency response;

· purchasing communication equipment for a local emergency planning committee's use; and

· paying a stipend of up to $20 per person to local emergency planning committee members who attend regularly scheduled meetings.

SEA 645 § 1, Ind. Code 6-6-10-7.

Withholding of Local Emergency Planning Committee Funding

The emergency response commission may withhold a local emergency planning committee's funding for failure to provide annually to the commissioner any one of the following:

· The required annual report;
· proof of published legal notice required under SARA

· an updated version of the local emergency planning committee's emergency preparedness plan as required by SARA;

· a copy of the current bylaws of the local emergency planning committee as required by SARA;

· Evidence of an exercise of the response plan required under SARA;

· a roster of the current membership of the local emergency planning committee;

· minutes of the local emergency planning committee meetings, which must be conducted at least once ever three months.

SEA 645 § 3, Ind. Code 6-6-10-9.

CLEAN AIR ACT

Compliance Advisory Panel

A compliance advisory panel required to carry out the duties of Section 507 of the Federal Clean Air Act has been created as of July 1, 1995. The panel will consist of 7 members, including:

(1) two members appointed by the governor to represent the public. Those two persons cannot be owners or representatives of owners of small business stationary sources;

(2) Four members of the general assembly who are owners of or who have an interest in small business stationary sources

(3) one member appointed by IDEM's commissioner.

The Compliance Advisory Panel will receive administrative and technical support from IDEM's Office of Technical and Compliance Assistance Program.

Office of Technical and Compliance Assistance

The duties of the Office of Technical and Compliance Assistance program have been clarified. The office may establish limited on-site assistance for small business or small municipalities in order to provide compliance information. This program will be funded from the Environmental Management Special Fund. The Program can impose a limit on the number of inspections per year and restrict on-site assistance to only specific programs. HEA 1389 § 5, Ind. Code 13-10-2-2.

More Exceptions to the Ban on Opening Burning

Again this year, and for about the 5th year in a row, additional exemptions have been added to the ban on open burning. This year the legislature has permitted a person to open burn vegetation from a cemetery, and wood remnants resulting from the demolition of a predominantly wooden structure originally located on real property. When engaging in these open burning activities, no IDEM permit or other authorization from a local unit of government, or a volunteer fire company is required. HEA 1547, Ind. Code 13-1-1.2-1.

VOLUNTARY REMEDIATION PROGRAM

Confidentiality of Application

The application that is required to be submitted to IDEM for the Voluntary Remediation Program has been provided confidentiality status. However, information that IDEM provides for purposes of rejecting an application will be public information. HEA 1389 § 1, Ind. Code 13-7-8.9-7.

Lender Liability Protection under the Voluntary Program

The Solid Waste Management Board has been authorized to develop rules establishing limits on the liability of lenders who are associated with persons involved in the voluntary remediation program. HEA 1389 § 2, Ind. Code 13-7-8.9-23.

Rules

The legislature has made clear that the rules adopted by the Solid Waste Management Board under the voluntary remediation program can include interim as well as final remediation standards. HEA 1389 § 2, Ind. Code 13-7-8.9-23.

DEPARTMENT OF NATURAL RESOURCES

Recodification of Law

The Department of Natural Resources' laws have been recodified. All of the DNR laws can now be found in Title 14 of the Indiana Code. HEA 1047.

OSHA

Affirmative Defense for Employee Misconduct

Effective July 1, 1995 an employer may raise as an affirmative defence to an OSHA violation that the violation was caused by employee misconduct. If the employer successfully proves the violation was the result of employee misconduct, no fine or penalty may be assessed for that violation. SEA 83, Ind. Code 22-8-1.1-27.2.

Penalties for First Offense

When IOSHA conducts an onsite consultation for an employer, if the employer complies in good faith to abate a violation as recommended by IOSHA, no penalty may be assessed during the first inspection following the onsite consultation for the condition or practice that the bureau had specifically examined. SEA § 176, Ind. Code 22-8-1.1-51.

Prohibition Against Use of Safety Audits in IOSHA Action

A written safety audit that is prepared for an employer by a third party or by an employer's employee whose principal responsibility includes compliance with health and safety standards, (which is not required to have been prepared by federal or state law), will not be admissible for purposes of IOSHA actions. This rule applies , though, only if employer has made a good faith and substantial effort to correct every hazard noted in the safety audit that is the subject of enforcement under the federal OSHA act. Also, this prohibition does not apply to criminal violations. SEC 230, Ind. Code 22-3-1.1-24.7.

Limitation on IOSHA Right of Entry to Inspect

Effective July 1, 1995, IOSHA no longer has the authority to enter and inspect the premises of (1) an employer who does not maintain a labor camp and is engaged in a farming operation that employs 10 or fewer employees, or (2) an employer that employs ten or fewer employees and is included in a category having an occupational injury lost work-day case rate, (at the most precise SIC code for which the data are published), less than the most recently published national average rate. Employers in the second category may however be inspected:

· to provide technical assistance, educational and training services and for surveys and studies

· to conduct an inspection or investigation in response to an employee complaint, to issue a citation of violations found during the inspection and assess a penalty for violations that are not corrected within a reasonable abatement period or are willful violations;

· to take any action authorized with regard to imminent dangers;

· to take any action authorized with respect to health hazards;

· to take any action authorized with respect to a report of an employment accident that is fatal to one or more employees, or results in hospitalization of one or more employees, and to take any

action pursuant to any investigation;

· to take action with respect to complaints of discrimination against employees for exercising legal rights under the law.

SEA 369, Ind. Code 22-8-1.1-23.1.

Inspection Reports

Starting July 1, 1995, at the closing conference following completion of an inspection an IOSHA inspector must provide the employer or a representative of the employer a written statement that clearly and concisely states:

· the results of the inspection including any hazard noted

· the right of the employer to petition for review of a safety order, a penalty assessment, an amended safety order, and an amended penalty assessment;

· an explanation of the review procedure.

SEA 427, Ind. Code 22-8-2.2-24.5.
Voluntary Protection Program

The Department of Labor is required to implement the Voluntary Protection Program defined in Ind. Code 22-8-1.1-1 within 90 days and no later than 60 days after each new voluntary protection program has been made available by the United States Occupational Safety and Health Administration. A Voluntary Protection Program under OSHA is one that exempts employers from general scheduled inspection. HEA 1399, Ind. Code 22-8-1.1-1 and Ind. Code 22-8-1.1-17.7.

[1]Substantial steps include at least applying for a permit, securing financing or ordering equipment.