SUMMARY OF THE 1994 ENVIRONMENTAL LEGISLATION

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SUMMARY OF 1994 ENVIRONMENTAL LEGISLATION

AIR REGULATION

IDEM's Title V operating permit trust fund, which consists of the air permit fees, was clarified this year to be for the purpose of implementing the permit program required implemented under the Clean Air Act ("CAA") -- making clear it is not for a program that is in excess of the Federal Title V permit program. P.L. 16-1994 (SEA 417) § 2.

Legislation was passed to allow IDEM to develop an enforceable operating agreement program under the Clean Air Act Amendments ("CAAA") of 1990. The Air Pollution Control Board ("Air Board") has been given authority to adopt by rule categories of sources or facilities that may be restricted through specific requirements to emit less than the amount of air pollutants for which a Title V operating permit is required. For the categories the Air Board established, the Indiana Department of Environmental Management ("IDEM") is required to recommend rules to establish an enforceable operating agreement program. The program can apply to some or all of the categories established by the Air Board. Before the agreements can be enforceable they must be approved by the Environmental Protection Agency ("EPA"). P.L. 16-1994 (SEA 417) § 8.

Additional revisions have been made to IDEM's air laws to satisfy requirements of the CAAA of 1990. First, IDEM's Office of Air Management is to establish a small business stationary source technical assistance program under Section 507 of the CAA. The program must be in place by January 1, 1995. It must include:

- -- education, training and information on permit and compliance requirements of the federal CAA;
- -- standardized forms and procedures for completing permit applications; and
- -- an ombudsman for small business.

This program may be included as part of the Technical and Compliance Assistance Program that IDEM is required to establish as part of the Voluntary Compliance Programs mandated by the legislature for all regulated entities. (See discussion of these programs below). P.L. 16-1994 (SEA 417) § 8. Second, at least a majority of the members of the Air Board must demonstrate that they do not derive any significant part of their income from persons subject to permits or enforcement orders under the federal CAA and all members of the Air Board must fully disclose any

potential conflicts of interest relating to permits or enforcement orders. P.L. 82-1994 (HEA 1182) § 1. Third, the Commissioner of IDEM is prohibited from issuing a permit to a solid waste incinerator under the CAAA of 1990 if she is responsible in whole or in part for the design, construction or operation of that unit. P.L. 83-1994 (HEA 1182) § 2. And fourth, in establishing fees pursuant to the CAAA 1990 the law has been changed from requiring that the fee be based on the cost of services in issuing the permit to allowing IDEM to establish fees for categories of sources (based on relative quantities of emissions), provided that the fee cannot exceed specified statutory caps for designated categories of sources. P.L. 82-1994 (HEA 1182) § 3.

Once again an exception to the Air Board's rule prohibiting open burning has been made by the Legislature. This year's exception is wood products derived from the initial clearing of a public utility right-of-way so long as the open burning occurs in an unincorporated area. P.L. 82-1994 (HEA 1182) § 4.

Finally limits have been placed on the amount of civil penalty IDEM may assess for a violation that involves construction or operation without the required permit. See below under "Voluntary Compliance Programs" for a discussion of these penalty limitations.

AUTOMOBILE INSPECTION & MAINTENANCE PROGRAM

In the continuing struggle to avoid EPA sanctions for failure to have an adequate automobile I&M program in moderate and severe VOC nonattainment counties, the legislature has passed a law that requires IDEM annually to advise the budget committee whether the funds available from the state and through federal grants are adequate to implement the I&M program. If funds become inadequate IDEM is immediately to notify the Governor and the budget committee. P.L. 83-1994 (SEA 285) § 2.

In addition, until July 1, 1998, IDEM will be allowed to contract with <u>any</u> person for purposes of conducting the I&M inspections. When this program was first started the legislature required IDEM to use the Indiana Vocational Technical Institute. P.L. 83-1994 (SEA 285) § 1.

CERTIFIED PROFESSIONAL GEOLOGISTS

As a result of legislation passed last year moving the Indiana Geological Survey ("Survey") from the Department of Natural Resources ("DNR") to Indiana University, this year legislation has been passed to have the Survey certify professional geologists instead of the DNR. This change takes effect on July 1, 1994. From July 1, 1994 until July 1, 1996 or whenever the Survey promulgates its own rules, the Survey will enforce DNR's rules for certification. Those rules appear at 310 IAC 9-2. P.L. 126-1994 (SEA 344).

CONSTRUCTION IN THE FLOODWAY

The definition of a "utility line" for purposes of DNR's floodway regulatory program has been revised. No longer does a utility line include a pipe or pipeline used for transporting a slurry substance. P.L. 85-1994 (SEA 408) § 1.

COUNTY ECONOMIC DEVELOPMENT INCOME TAX

Tippecanoe County and Columbia City have been given the authority to impose a county economic development income tax for the purpose of funding hazardous substance removal or remedial actions. Under this authority Tippecanoe County has already taken steps to impose the tax for closure of the Tippecanoe County Landfill. That tax has already been challenged in court by citizens opposed to the tax. P.L. 44-1994 (HEA 1398).

DEPARTMENT OF NATURAL RESOURCES CONTRACTING POWERS

DNR's obligation to bid a contract for construction or purchase of equipment, materials or supplies now applies only to contracts involving greater than $25,000. Previously it applied to any contract exceeding $5,000. P.L. 56-1994 (HEA 1382) § 1.

DISTRESSED PROPERTY

A person that desires to obtain title to and eliminate a hazardous condition of property containing hazardous waste or another environmental hazard for which a county holds a certificate of sale but for which no deed has been issued because the county executive has determined the property contains hazardous waste or another environmental hazard for which the

cost of abatement will exceed the fair market value of the property may seek transfer of title to the property and receive a waiver of delinquent taxes, special assessments, interest, penalties and costs assessed against the property. The process is started by filing a petition with the county auditor. The petition must outline the plans for elimination of the hazardous condition and the intended use of the property after remediation. Once the petition is complete it will be forwarded to the assessor in the affected township, the property owner, all persons who have a substantial interest of public record in the property, the County Board of Review and the State Board of Tax Commissioners. The County Board of Review must conduct a public hearing and make a recommendation to the State Board of Tax Commissioners as to whether the petition should be granted. The State Board of Tax Commissioners makes the determination whether to grant the petition. If the petition is granted the petitioner will receive a tax deed to the property.
P.L. 39-1994 (HEA 1385).

GOVERNMENT USE OF ENGINEERS

Counties, cities, towns, townships, school corporations and all other political subdivisions of the State are now allowed to submit, without the certification of a professional engineer, plans and specifications for the construction and maintenance of facilities IDEM requires to be permitted. Further IDEM is allowed to use, accept and approve plans not prepared by a professional engineer when issuing a permit to those government entities. This exception is in stark contrast to the general provision of Indiana law that both requires government entities to use a professional engineer when constructing public works and requires all state officials charged with enforcing the law relating to the design, construction, alteration of buildings or structures to be prepared by or under the supervision of a professional engineer. This statutory exception also establishes a differential standard for government owned environmental facilities allowing a government facility's design, and construction to be prepared by less qualified personnel (who, as discussed below, will be reviewed and approved by engineers within IDEM who are also exempted from the requirement of having to pass the professional engineering qualifications) while the private sector must continue to use a PE to design all plans. P.L. 83-1994 (HEA 1182) § 30.

IDEM ENGINEERS

The law providing that a job position using the word "engineer"

must be filled by a professional engineer has been amended to except IDEM. IDEM may continue to use engineers who have not received their professional engineering license in all engineering positions. P.L. 16-1994 (SEA 417) § 9.

IDEM ENVIRONMENTAL RULE MAKING STUDY COMMITTEE

A 13-member environmental rule making study committee has been created to study IDEM's Air, Water, and Solid Waste Boards and make a recommendation on whether the three subject matter boards should be replaced with two independent boards -- one for rule making and one for adjudications. The committee will have 4 senators, 4 representatives and 5 individuals who represent IDEM, the business community, local government, environmental organizations and agriculture. The committee is to issue a report and make recommendations by December 31, 1994, when the committee will expire. P.L. 16-1994 (SEA 417) § 13.

IDEM ENVIRONMENTAL QUALITY SERVICE COUNCIL

In addition to the committee set up to determine the appropriate Board structure within IDEM, as part of the compromise on IDEM permit fees an Environmental Quality Service Council ("Council") was created. The Council will serve until December 31, 1995. Its function is to study the efficiency and quality of IDEM's programs. This study was required in exchange for the large amount of money provided to IDEM to function. The Environmental Quality Service Council ("Council") consists of 21 members. 4 are members of the Senate and 4 are members of the House of Representatives and one member is the Commissioner of IDEM. The remaining 12 members are 4 representing business and industry, 4 representing local government, 2 representing environmental organizations, 1 representing semipublic permittees, and 1 representing agriculture. The Council is to:

(1) develop systems to evaluate whether IDEM has
   -- improved timeliness of review and issuance of permits;
   -- improved the consistency of issuing permits to avoid over regulation;
   -- efficiently and effectively implemented federal and state laws;

-- provided effective technical assistance and
-- effectively implemented the voluntary compliance program.

(2) advise IDEM's commissioner on issues decided by the Council; and

(3) evaluate program requirements and resource requirements for IDEM.

The Council will submit a report to the Governor, General Assembly, Budget Committee and Administrative Rules Oversight Committee before November 1, 1995 discussing how the Council evaluated IDEM, what funding levels are required for IDEM, the status of IDEM's efforts to develop permit assistance programs and whether the Council is needed to continue to evaluate IDEM's performance.

During the time the Council functions, IDEM's commissioner must make a monthly report to the Council on:

(1) permitting programs;
(2) proposed rules and rules in the rule making process;
(3) the financial status of IDEM; and
(4) additional matters requested by the Council.

The first meeting was held on June 23, 1994. The Council will meet regularly at 1:00 p.m. on the third Tuesday of each month. Senator Beverly Gard, who serves as chair, has proposed that 5 public hearings be held around the state. At the first meeting of the Council only 3 members of the public spoke: the Hoosier Environmental Council, Indianapolis Power & Light and the Indiana Oil Marketers Association. The comments concerned IDEM's use of unpromulgated policy and the proper role of local government to regulate in areas that are under IDEM's jurisdiction. This is your chance to air any concerns you may have about IDEM. P.L. 16-1994 (SEA 417) § 8 and P.L. 82-1994 (HEA 1182) § 32.

IDEM FUNDING

IDEM's Office of Solid & Hazardous Waste Management and Office of Water Management have been funded for fiscal years 1993-1994 and 1994-1995 as follows:

	1993-1994	1994-1995
Solid Waste Management		

Total Operating Expenses	$4,571,760	$4,571,760
Hazardous Waste Management		
Total Operating Expenses	$4,130,897	$4,130,897
Water Management		
Total Operating Expenses	$8,107,436	$8,838,525

P.L. 16-1994 (SEA 417) § 15

IDEM PERMIT APPLICATION TIME FRAMES FOR ACTION

After 3 years of trying to find a way to make IDEM accountable for acting on permit applications, the legislature has by statute set the time in which IDEM is to act on applications that are filed after July 1, 1995 and the permit fee that IDEM may assess. P.L. 16-1994 (SEA 417) §§ 4 and 8. In addition starting July 1, 1995, applicants who have filed a permit application before July 1, 1995 that has been pending for the amount of time set for IDEM to act on applications filed after that date can force action on their applications. P.L. 16-1994 (SEA 417) § 10. The new provisions are found at Ind. Code 13-7-10.1. The following time frames for IDEM to act are required by the Legislature:

Solid Waste permits

New landfill	365 days
New incinerator	365 days
Major modification to a landfill	365 days
Major modification to an incinerator	365 days
New processing or recycling facility	180 days
Minor modification to a landfill	90 days
Minor modification to an incinerator	90 days
Permit renewal that includes major modification	365 days
Permit renewal that includes a minor modification	90 days
Certification of special waste	60 days
Any other type permit where the permit fee is greater than $100	60 days

Hazardous Waste Permits

New landfill	365 days

New incinerator	365 days
New treatment or storage facility	365 days
Initial Part B permit for a facility with interim status	365 days
Class 3 modification to a landfill	365 days
Class 3 modification to a treatment or storage facility	270 days
Class 2 modification	120 days
Class 1 modification that requires approval	60 days
Permit renewal that includes a Class 3 modification	365 days
Permit renewal that includes a Class 2 modification	120 days
Permit renewal that includes a Class 1 modification	60 days
Any other type permit where the permit fee is greater than $100	60 days

Water permits

Major new NPDES permit	270 days
Minor new NPDES permit	180 days
Land application permit	180 days
Waste water facility or water facility construction permit	120 days
Any other type permit where the permit fee is greater than $100	60 days

Air permits

As set by rules of the Air Pollution Control Board

The time frame above for an IDEM decision may be extended under the following circumstances.

1. Where the time to act is 180 days or less, if IDEM determines that a public hearing will be held on the application, the time for a decision is automatically extended an additional 30 days.
2. If, after consulting with the Environmental Study

Commission, it is determined that because of new requirements it is infeasible for IDEM to act in the time frame specified the time will be as provided in a rule adopted establishing an alternate time frame.

3. If the permit fee is paid by check and there are insufficient funds to cover the check, the time frame is suspended until the permit fee is paid.
4. If the Commissioner and the applicant agree to an extension for IDEM to act, the time frame may be extended.
5. During the first two notices of deficiency when IDEM specifies parts of the application that are incomplete or inconsistent with law, the time frame is suspended until the requested information is submitted by the applicant.
6. The time frame is suspended if the applicant requests IDEM to suspend processing the application while IDEM and the applicant try to resolve an issue;
7. If IDEM is required to transmit a copy of the proposed permit to EPA for review and comment, the time frame is suspended for the amount of time EPA requires to act or the maximum time allowed by federal law for EPA action, whichever is less.

A permit application may be denied due to incompleteness only if IDEM provides the applicant notice of the incompleteness and identifies each part that is incomplete within 35 working days of receipt and the applicant fails to submit or make a good faith effort to submit the required information within 60 calendar days of receiving IDEM's request.

If IDEM fails to act in the set time period, the applicant must attempt to reach some agreement with IDEM. If an acceptable agreement is not reached in 30 days then the applicant has three options. First the applicant may have the permit fee refunded and IDEM still must act expeditiously to review the application. Second the applicant may have the permit fee refunded and submit a draft permit and any necessary technical supporting information to IDEM for review and action. IDEM must act on the draft permit within 25 working days or 55 working days if a public hearing must be held. Third, the applicant can require IDEM to use the permit fee that has been paid to hire a consultant to review the application and prepare a draft permit. If the consultant costs more than the permit fee the applicant is responsible for the additional cost. The consultant must be selected and authorized by IDEM to begin work within 15 working days of

notification by the applicant that it has selected this option. The consultant must submit the draft permit to IDEM within 35 working days. IDEM must act on the draft permit by approving, modifying and approving or denying it within 25 working days, or 55 working days if a public hearing must be held.

If IDEM knows in advance of the time for a decision that it will not be able to meet the time frame for a decision, the applicant and IDEM may agree to have the applicant provide a draft permit or have the applicant fund IDEM's use of a consultant to do the review, without waiting for the time period to lapse. P.L. 16-1994 (SEA 417) § 4.

Annually on July 1, IDEM must provide a report of its permit review actions to the Governor, the General Assembly, the Air, Water and Solid Waste Boards and the Environmental Study Committee. P.L. 16-1994 (SEA 417) § 4. In addition the Legislature has mandated that IDEM establish a permit tracking program and make a one-time demonstration by December 31, 1995 that it is making improvement in its permit review programs. IDEM is required to show that between January 1, 1994 and January 1, 1995 it has achieved a 25% reduction in the time it requires for processing water, solid waste and hazardous waste permit applications. It must also show that at least 25% of the backlogged solid waste, hazardous waste, water and air permit applications have been processed. P.L. 16-1994 (SEA 417) § 12.

The law specifically provides that the three options made available to applicants when IDEM fails to meet the mandatory time frame are not the exclusive remedy available but that a permit applicant may seek other remedies available at law or in equity.

IDEM PERMIT FEES

Following the controversy and litigation over IDEM's effort to establish permit fees by rule which exempted government and not-for-profit entities from any fee, the Legislature has set IDEM's permit fees by statute and for the time eliminated IDEM's ability to establish fees by rule. The new fees, which took effect on March 18, 1994 are found at Ind. Code 13-7-16.1. Here are the new fees:

Water Fees

Annual Operating Fees

	1994	1995 & after
Major Industrial/State/Federal and		

public water supply	$1,200 - $30,000[1]	$1,240 - $35,800
Major Municipal	$1,700 - $19,500	$1,800 - $23,500
Major Semi-public	$ 850 - $ 9,750	$ 900 - $11,750
Minor Industrial/State/Federal and public water supply	$ 600 - $29,400	$ 640 - $35,200
Minor Municipal	$ 600 - $18,400	$ 700 - $22,400
Minor Semi-public	$ 300 - $ 9,200	$ 350 - $11,200
Coal Mine	$ 500 - $ 3,500[2]	$ 500 - $ 3,500
Stone Quarry	$ 750 - $ 2,500[3]	$ 750 - $ 2,500
Stormwater for construction activity	$ 100 w/ NOI[4]	$ 100 w/ NOI
Stormwater for Industrial activity	$ 100/year	$ 100/year
Industrial pretreatment	$ 300	$ 350

Permit Application Fees

New NPDES	$50
NPDES Modification	$50
Renewal	$50
Variance	$50

Solid Waste

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[1]Where ranges are provided the actual fee depends on the average daily flow in MGD as set forth in the permit

[2] The fee depends on whether a general permit or individual permit is to be issued, and when the permit is an individual permit it depends on the number of outfalls.

[3]Depends on number of outfalls.

[4] Notice of Intent.

Annual Operating Fees

Landfill & Incinerator > 500 TPD and RWS Type I	$35,000
Landfill & Incinerator >250-499 TPD	$15,000
Landfill & Incinerator 100-250 TPD	$ 7,000
Landfill & Incinerator <100 TPD	$ 2,000
C&D Site	$ 1,500
RWS Type II	$25,000
RWS Type III	$10,000
Processing Facility	$ 2,000
Infectious Waste Incinerator > 7 TPD	$ 5,000
Waste Tire Storage	$ 500
Waste Tire Transportation	$ 25
Groundwater Compliance Sampling (per well)	$ 250

Permit Application Fee

New Landfill and RWS[5] Type I & II	$31,300
Major Modification to Landfill or RWS Type I & II	$31,300
Minor Modification to Landfill or RWS Type I & II	$ 2,500
Renewal of Landfill or RWS Type I & II	$15,350
New C&D[6] Site/RWS Type III	$20,000
Major Modification to C&D Site and RWS Type III	$20,000
Minor Modification to C&D Site or RWS Type III	$ 2,500
Renewal of C&D Site and RWS Type III	$ 7,150
New Processing Facility	$12,150
Major Modification to Processing Facility	$12,150
Minor Modification to Processing Facility	$ 2,500
Renewal of Processing Facility	$ 2,200
New Incinerator	$28,650
Major Modification to Incinerator	$28,650
Minor Modification to Incinerator	$ 2,500
Renewal of Incinerator	$ 5,900
New Waste Tire Storage Registration	$ 500
New Waste Tire Processing	$ 200
Waste Tire Processing Renewal	$ 200

[5] Restricted waste site.

[6] Construction and demolition.

New Waste Tire Transportation	$ 25
Special Waste Certification	$ 250

Waste Disposal Fee

Municipal Waste (per ton)	10¢	
Special Waste per ton	10¢	
Municipal Waste disposed of by Incineration (per ton)		5¢
C&D waste	5¢	
Restricted Waste disposed of at RWS	0¢	

Hazardous Waste

Annual Operating Fee

Land Disposal Facility	$37,500
Incinerator (per unit)	$10,000
Storage Facility	$17,200
Treatment Facility	$10,000
Generator	$ 1,565
Post Closure Activity	$ 1,500
Groundwater Compliance Sampling (per well)	$ 1,000

Permit Application Fee

New Land Disposal Facility	$40,600
Class 3 Modification to Land Disposal Facility	$34,000
Class 2 Modification to Land Disposal Facility	$ 2,250
New Incinerator unit	$21,700
Class 3 Modification to Incinerator	$21,700
Class 2 Modification to Incinerator	$ 2,250
New Storage Facility	$23,800
Class 3 Modification to Storage Facility	$17,200
Class 2 Modification to Storage Facility	$ 2,250
New Treatment Facility	$23,800
Class 3 Modification to Treatment Facility	$17,200
Class 2 Modification to Treatment Facility	$ 2,250
Manifest (per manifest)	$ 8

When an application is submitted it must be accompanied by the fee or it may be denied. Although this act did not take effect until March 18, 1994 annual operating fees were required to be paid for all of calendar year 1994. IDEM was to assess the 1994 annual operating fees by April 1 and the

fee was due 30 days after the date the fees were assessed. For each subsequent year, IDEM will assess the annual operating fees no later than January 15, with a due date of 30 days following assessment. Waste disposal fees are due semiannually with the first fees being due for only a part of the first semiannual period on August 1, 1994 and then for each semiannual period on February 1 and August 1 thereafter.

Failure to pay annual operating fees when due can result in permit revocation. If the annual operating fees are not paid within 60 days after they are due in addition to civil penalties that IDEM may assess, a delinquency fee of 10% of the fee is due. Failure to pay 90 days after the assessment results in revocation. Prior to revocation IDEM must notify the permittee that the fee is delinquent and advise that the permit will be revoked 30 days after the notification unless the fee is paid. P.L. 16-1994 (SEA 417) § 7

IDEM's boards are prohibited from changing the permit fees set in Ind. Code 13-7-16.1 or from assessing additional fees for NPDES, Solid Waste or Hazardous Waste permit programs from those in existence on January 1, 1994. P.L. 16-1994 (SEA 417) § 5.

A separate fund for providing money for permitting and directly associated activities of the NPDES, solid waste and hazardous waste programs has been created. The auditor of the state must make a report on the fund every 4 months identifying the beginning and ending balance, disbursements and receipts. This report must be available to the public. P.L. 16-1994 (SEA 417) § 6.

IDEM ENFORCEMENT ORDERS

IDEM's provisions for commissioner orders and determinations has been amended to allow the Commissioner to issue an order that addresses multiple sites when arranging site investigation and establishing priority of sites for remediation. IDEM testified that this revision was needed to allow it to include multiple sites in the Voluntary Redemption Program created last year. P.L. 82-1994 (HEA 1182) § 5.

IDEM RULE MAKING

The legislation enacted last year for IDEM emergency rule making has been revised this year to allow emergency rules to be extended 2 times -- twice as long as that allowed by law for other state agency emergency rules. P.L. 16-1994 (SEA 417) § 1.

IDEM STATUTE OF LIMITATIONS FOR COMMENCING ENFORCEMENT ACTIONS

Effective July 1, 1994 IDEM must commence an enforcement action by issuance of a Notice of Violation no later than 3 years after the date that it discovers the violation. In the case of violations that are continuing, the 3 year limitation applies only to the last in a series of events that serves as the basis for the authority to conduct the enforcement action. Any enforcement action commenced after that time frame is void. P.L. 82-1994 (HEA 1182) § 8. Notwithstanding this general statute of limitations for IDEM to bring an enforcement action, IDEM is allowed until July 1, 1997 to bring any enforcement action for a violation that it became aware of before July 1, 1994. With this provision we can expect to see IDEM enforcement activities greatly increase in order to address any matter that IDEM has been aware of through inspections over the years which it did not believe justified enforcement action -- since it will forego the ability to take such an action if it does not commence an enforcement action by July 1, 1997. P.L. 82-1994 (HEA 1182) § 31.

IOSHA

IOSHA is now allowed to enforce federal OSHA standards without promulgating a rule to adopt the federal provisions as a state rule. The federal rule will be enforceable by IOSHA sixty days after the federal rule takes effect. IOSHA must publish a statement in the Indiana Register referencing the federal regulation in order to advise the public of Indiana's enforceable OSHA standards. IOSHA may still adopt by rule an alternate standard to that in the federal rules, if that standard is at least as effective in providing a safe and healthful employment environment and IOSHA follows the regular rule making procedures. P.L. 117-1994 (SEA 128) § 1.

OIL AND GAS REGULATION

Criminal penalties have been added to DNR's law to make it punishable to knowingly fail to plug and abandon an oil and gas well when the operator ceases to operate the well. Each day is punishable as a Class B misdemeanor. P.L. 88-1994 (HEA 1263).

In addition the oil and gas law on permit revocations has been amended to clarify that a permit revocation does not relieve the owner or operator of the well from responsibility for plugging and abandoning the well and that the Natural Resources Commissioner's election to plug and abandon the well does not relieve the owner or operator from liability for the costs of plugging and abandoning the well. The law makes clear that DNR has the authority to apply the bond or the security to the costs of plugging and abandoning the well or may instead pursue the owner or operator to recover those costs.

POLLUTION PREVENTION

The Pollution Prevention Board's duties have been revised to clarify that the Office of Pollution Prevention that is to provide technical assistance related to source reduction and recycling, eliminating the broader duties of providing technical assistance to government entities and businesses which will now be the responsibility of the Office of Voluntary Compliance and the Technical and Compliance Assistance Program created under SEA 417.

In addition the Pollution Prevention Board has been given the new duty of approving the Pollution Prevention and Safe Materials Institute biennial budget and presenting that budget proposal to the legislature. P.L. 82-1994 (HEA 1182) §§ 18-21.

RENEWABLE TRANSPORTATION FUELS TASK FORCE

Just in time for EPS's rule allowing ethanol to qualify toward lowering VOC emissions, Indiana's Renewable Transportation Fuels Task Force was to be created prior to June 1, 1994 for the purpose of reporting on the status, relative strengths and weaknesses and competitive position of the State of Indiana in relation to other states concerning the attraction and development of industry involved with the production of ethanol and other renewable transportation fuels. The Task Force must report to the Governor and General Assembly by December 1, 1994 on the following:

1. policy recommendations on legislation and administrative action needed to put Indiana in a strong position to develop industry involved with the production of ethanol and other renewable transportation fuels;
2. ways to promote use of ethanol and other renewable transportation fuels in consumer vehicles and public transportation systems; and
3. recommendations regarding implementing a state wide

oxygenated motor fuels program that uses renewable transportation fuels.

SOLID WASTE REGULATION

What constitutes a major modification of a solid waste facility has been defined by statute. A major modification is any change to a permitted solid waste facility that would either increase the facility's permitted capacity to process or dispose of solid waste by the lesser of more than 10% or 500,000 cubic yards or change the permitted footprint of a landfill by more than 1 acre. P.L. 16-1994 (SEA 417) § 4.

SOLID WASTE DISTRICTS

As a compromise to doing away with solid waste districts or severely limiting their powers, a Solid Waste Management District Study Commission has been created. It is to hold its first meeting prior to July 1, 1994. The members include 4 Senators and 4 Representatives. The Study Commission is assisted by a 16 member Advisory Committee consisting of 2 city or town officials who are members of a District Board, 2 county officials who are members of a District Board, 2 representatives of the solid waste industry, 2 representatives of private business, 2 representatives of the environmental community, 4 private citizens and 1 person from a single county District Board and 1 person from a joint District Board. The specific areas of the Study Commission's investigation include:

1. methods used by the districts to meet recycling goals and the results;
2. the comparative benefits and results of private sector versus public sector in meeting the goals of the district plan;
3. the current and potential revenue sources and budgets of the solid waste districts;
4. the impact of district funding on the economic development in the district;
5. IDEM's assistance to districts in meeting the recycling goals;
6. how relevant the district goals are as related to current environmental and economic needs of the state;
7. issues related to methane production facilities and transportation of yard waste to landfills;
8. any other related issues referred to the Commission by a legislative council or raised by one of the 8 legislative

members.

The Study Commission is to have a final report prepared by December 1, 1994. P.L. 34-1994 (SEA 239) § 7.

In other efforts to curb excesses by solid waste districts, starting in 1994 each solid waste district is required to meet by no later than September 15 to fix its budget, tax rate and tax levy for the following year. A public hearing on the budget must be held and may be held during the annual meeting. For joint districts the public hearing is valid if held in any one of the counties in the joint district. P.L. 34-1994 (SEA 239) § § 1 & 2. In addition to having to obtain approval of the State Board of Tax Commissioners for its budget, each solid waste district must send a copy of its proposed budget to the executive and fiscal bodies of each county and each municipality located in the district -- the entities who are competing with districts for funds for public services. P.L. 34-1994 (SEA 239) § 4.

During the 1994 session legislation was introduced to allow districts to have unlimited non-reverting capital funds. In the end, the legislature agreed to allow districts to have a non-reverting capital fund only for the purpose of equipping, expanding, modifying, or remodeling an existing solid waste management facility. The Legislature further limited this power by providing that the capital fund may not exceed 5% of the total annual budget and the balance in the fund cannot exceed 25% of the total annual budget. If the Board District determines that any portion of the capital fund is no longer needed to further the goals of the capital fund, that portion is to be transferred to the general fund and used to offset tipping fees, property taxes or both. P.L. 34-1994 (SEA 239) § 4. With these specific provisions it is becoming even clearer that districts are only to assess and collect fees needed to implement their plans. Districts that have fees unrelated to the plan and in excess of what is needed to implement the plan are at risk of lawsuits to require a reduction in fees as a violation of the limitations on the amount and uses on non-reverting capital funds.

The Gibson County Solid Waste District is allowed to fund its district plan by use of a property tax rate of 47¢/$100. That is higher than the 25¢/$100 allowed other solid waste districts. This authority expires December 31, 1997. The higher tax rate is only allowed if the district is in the process of constructing a landfill and that higher rate is needed to pay the higher expenses the district will suffer during the design and construction of the landfill. The exact rate is to be determined by the State Board of Tax Commissioners. P.L. 34-1994 (SEA 239) § 3.

Effective July 1, 1994 the state's uses for the solid waste tax have been expanded to include providing grants to implement a household hazardous waste source reduction or recycling program. P.L. 34-1994 (SEA 239) § 5.

Effective July 1, 1994 districts have 4 new powers giving them the ability to:

1 implement a conditionally exempt small quantity generator collection and disposal project;
2 apply for a household hazardous waste grant;
3 make loans or grants for composting programs and other programs that reuse a component of the waste stream as a material component of another product; and
4 conduct promotional or educational programs that include giving awards and incentives for furthering the district plan.

P.L. 34-1994 (SEA 239) § 3.

Starting July 1, 1994 failure to pay the solid waste district fee that is assessed against waste generators and each person owning real property, subjects the person to a delinquency fee of $25, instead of 10% as previously set by law. P.L. 34-1994 (SEA 239) § 6.

SURFACE COAL MINING AND RECLAMATION

Commencing July 1, 1994 an order of the Director of DNR to forfeit a surface coal mining performance bond will become a final order of the DNR unless an appeal is filed within 15 days after notice is served on the permittee and surety. Previously this order had to be affirmed by the Natural Resources Commission even when no appeal had been filed. P.L. 85-1994 (SEA 408) § 2

An underground coal mining operation conducted after June 30, 1994 will be required promptly to repair or compensate owners of residential property and other noncommercial property for material damages caused by underground coal mining operations and replace any drinking, domestic or other residential water supply that is affected by contamination, diminution or interruption resulting from the operator's underground coal mining activities. Mine operators may satisfy this obligation to repair or compensate by purchasing prior to beginning mining operations a noncancellable premium prepaid insurance policy. P.L. 85-1994 (SEA 408) § 4.

The surface coal mining permit revocation procedure will change on July 1, 1994. Instead of the show cause proceeding DNR will now start a permit suspension or revocation proceeding. DNR will have the burden of going forward with evidence to establish a prima facie case that the permit should be suspended or revoked. After the DNR makes that prima facie showing the ultimate burden of persuasion to show that the permit should not be revoked or suspended is on the permittee. The permittee must request review of the Director's permit suspension or revocation within 30 days of receiving notice. Failure to request review results in a final order of the Natural Resources Commission without any further proceedings. A permittee may not allege that the facts of a violation are incorrect if those facts are contained in a NOV or CO that has become a final order, even if that NOV or CO was not appealed. A decision on a challenged permit suspension or revocation must be made by the Natural Resources Commission within 60 days after conclusion of a hearing when the revocation has been appealed. P.L. 85-1994 (SEA 408) § 4.

IDEM's Water Pollution Control Board is required to adopt rules to allow surface coal mine permittees the option to be regulated under a general NPDES permit in lieu of a more specific NPDES coal mine permit. IDEM's rule must be adopted prior to the EPA rule for individual permits for coal mines. P.L. 16-1994 (SEA 417) § 3.

VOLUNTARY COMPLIANCE PROGRAMS

As a result of complaints that IDEM was only interested in enforcing after a violation had occurred and would not provide any assistance to the regulated community which could prevent violations before they occurred, the legislature created three programs to foster voluntary compliance. These new programs take effect July 1, 1994. The programs will be the responsibility of a new Office of Voluntary Compliance created with the legislature's stated purpose assisting regulated entities in achieving regulatory compliance and promoting cooperation between IDEM and regulated entities. A special non-reverting fund, the Voluntary Compliance fund, has been created to fund the Office of Voluntary Compliance. The initial funding for the program is a transfer of $350,000 from the Environmental Management Special Fund. P.L. 82-1994 (HEA 1182) §§ 23 & 24.

The new programs include the following:

1. Technical and Compliance Assistance Program

Before January 1, 1995 IDEM is required to establish a technical and compliance assistance program to do the following:

-- provide a liaison and ombudsman to the regulated community to assist with specific regulatory or permit matters pending before IDEM;
-- provide assistance to new and existing businesses and municipalities to identify applicable environmental rules and permit requirements;
-- develop and distribute educational materials regarding environmental requirements, compliance methods, voluntary environmental audits and pollution control technologies;
-- provide public outreach and training sessions in cooperation with businesses and municipalities regarding existing and future state and federal environmental requirements;
-- develop a clearing house to respond to inquires from businesses and municipalities concerning applicable environmental rules and requirements; and
-- conduct other activities as required to improve regulatory compliance and to promote cooperation and assistance in meeting environmental requirements.

IDEM is required to annually report the number and type of inquiries made and the services provided by IDEM. All inquiries made to the program are to be held strictly confidential and cannot be shared with other offices within IDEM which might result in an enforcement action. IDEM is allowed to contract with entities to provide some or all of the services required under this program. P.L. 16-1994 (SEA 417) § 8 and P.L. 82-1994 (HEA 1182), §§ 25, 26 and 27

2. Voluntary Environmental Audit Program

The Indiana Chamber of Commerce ("Chamber") and the Indiana Manufacturers Association ("IMA") worked hard to have Indiana enact by statute provisions to ensure the confidentiality of environmental audits performed by a regulated entity in order to help it identify if it has any environmental problems and if so to plan action to correct the problems. The Chamber and IMA argued that entities were afraid to perform such audits for fear that they could be used against them in an IDEM enforcement action. The legislature agreed that the value of having entities voluntarily conduct such audits justified the statutory confidentiality protection. IDEM insisted that exceptions to confidential status be made. It is necessary to understand these

exceptions so that adverse ramifications will not result from conducting a voluntary compliance audit.

An "environmental audit report" is defined as a set of documents prepared as a result of an environmental audit and labeled "Environmental Audit Report; Privileged Document" that:

(1) includes field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs, and surveys collected or developed for the primary purpose of preparing an environmental audit; and

(2) includes, when completed, the following 3 components:

(a) an audit report prepared by the auditor that includes:

(i) the scope of the audit;

(ii) the information gained in the audit;

(iii) conclusions and recommendations; and

(iv) exhibits and appendices;

(b) Memoranda and documents analyzing a portion or all of the audit report and discussing implementation issues; and

(c) an implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.

IMPORTANT TIPS

-- Make sure the report is labeled "Environmental Audit Report; Privileged Document".

-- The investigation and resulting document must have been done for the "primary" purpose of preparing the environmental audit. It cannot be information that has as only a secondary or side benefit what is done when performing an environmental audit

-- When completed the report must have at least the 3 following elements: (1) A report prepared by the person who performed the audit that discusses the scope of the

audit, the information that was learned, the conclusions reached and recommendations that include exhibits and appendices; (2) an analysis of the audited features and discussion of issues involved in implementation; and (3) an implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.

-- To ensure confidentiality protection, it is essential that the company treat the document as a confidential document. If the document is provided to the public or distributed widely to others not in a position to need to know the information as part of their job responsibilities it may be possible to argue that the right to confidentiality has been waived.

-- If an audit discloses that a permit is required, application must be made for that permit within 90 days of becoming aware that one is required.

-- If all or part of an environmental audit report is going to be provided to IDEM, to ensure that the audit report remains confidential it must be labeled confidential and submitted in a separate sealed envelope marked confidential.

P.L. 16-1994 (SEA 417) § 8 P.L. 82-1994 (HEA 1182) § 28.

The environmental audit cannot be admitted as evidence in an administrative or civil legal action against the company who had the audit performed, including enforcement actions under IDEM's NOV and order procedure, except as follows:

(1) Where the privilege of confidentiality is being asserted for the purpose of committing a fraud;
(2) Where the materials are not entitled to confidentiality protection because they have not been prepared, labeled or treated by the company as a confidential record;
(3) Where the audit found a violation of a law, rule or permit condition and the company did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence after receiving the audit report and becoming aware of the violation.

If the audit reveals a failure to obtain a permit, a person is deemed

to have made appropriate efforts to achieve compliance if the person filed an application for the permit not later than 90 days after the person became aware of the noncompliance.

An environmental audit prepared after July 1, 1994 cannot be admitted as evidence against a company who had the audit performed in a criminal proceeding except for the three reasons above and for a fourth reason:

-- the prosecutor has a compelling need for the information;
-- the information is not otherwise available; and
-- the prosecutor is unable to obtain substantially equivalent information by other means without incurring unreasonable cost and delay.

The confidentiality provided by this statutory provision is in addition to confidentiality available under the work product and attorney client privilege or other statutory or common law privileges.

3. Clean Air Act Permit Compliance Program

Under the Clean Air Act Amendments of 1990 facilities are required to provide a complete emissions inventory. To ensure that these emission inventories are correct and to eliminate the concern that companies would have if they disclose in the inventory a facility that should have been registered or permitted but was not, the legislature has capped the civil penalty that IDEM may assess for construction, reconstruction, modification or operation without an air permit or registration. The limit is $3,000 plus the amount of one year's annual operating fee for unpermitted facilities that are included in an application for a Title V permit and $2,000 plus the amount of one year's annual operating fee for unpermitted facilities that are included in an application for a Federally enforceable state operating permit (FESOP) or for a state required construction permit or registration. By limiting the penalty the legislature hopes to promote voluntary disclosure of information in the emissions inventory even where it will disclose a violation for failure to have obtained the required permit for the emissions to be disclosed. It is important to understand this cap does not prevent IDEM from assessing penalties for:

(1) a criminal violation that could be imposed for the permit violation;
(2) a violation of a health-based emission limit or violation of an ambient air quality standard;
(3) failure to have obtained a PSD permit or permit imposing New Source Review requirements;

(4) an individual facility at a source that has potential emissions of more than 100 tons per year of any regulated pollutant for which emission limits were in effect on January 1, 1994 and no permit had been obtained under 326 IAC 2-1-4;
(5) cases that are already settled or resolved;
(6) enforcement actions to enjoin or abate emissions resulting from the operation of the facility or source;
(7) enforcement actions for any type violation other than the failure to have obtained a permit violation. P.L. 16-1994 (SEA 417) § 8.

To qualify for the limit on the civil penalty the following must be met:

-- A complete application for an operating permit must be submitted to IDEM no later than March 16, 1996
-- The permit application must be for a Title V operating permit, a FESOP, an enforceable operating agreement that complies with 40 CFR 70.5(a)(2) or a construction permit or registration required under the air rules.
-- Each facility for which the penalty cap is sought must be clearly identified in the application;
-- The facility must have been constructed or modified before January 1, 1994;
-- The emitting source must not have resolved the violation in an administrative or civil action between January 1, 1989 and January 1, 1994;
-- The source must not be subject to a pending administrative or civil action for failure to obtain the permit.

P.L. 16-1994 (SEA 417) § 8 and P.L. 82-1994 (HEA 1182) § 29.

VOLUNTARY REMEDIATION PROGRAM

The Voluntary Remediation Program has been amended to allow any person to submit an application. Previously in order to become part of the program it was necessary to be a person who owned the property, operated a facility on the property, or is a prospective owner of the property. After a short experience with this program it became clear that there were circumstances where other persons would be interested in being part of the program. Just one example is a person who formerly owned the property who has retained the liability for environmental remediation after selling the property to another. The revision to the law now allows those people to participate in the program. P.L. 84-1994 (HEA 1126) § 3.

WASTE TIRES

The requirement to pay a 25¢ fee on each new and replacement tire has been amended to exclude replacement tires. Starting July 1, 1994 the fee will be assessed only for new tires -- that have never been mounted on a wheel of a vehicle -- excluding replacement tires to ensure that no fee is charged for retreaded tires. Effective July 1, 1994 all motor vehicles involved in transportation, manufacturing, agriculture, construction and mining must pay the 25¢ fee per tire except that lawn and garden tractor tires for tractors propelled by a motor of not more than 20 horsepower and semitrailer tires are specifically excluded. P.L. 82-1994 (HEA 1182) § 10.

The distribution of the 25¢ fee between IDEM and the Department of Commerce has been revised. Commerce will now receive 65% of the fees to be used for loans and grants to persons involved in creating markets for using waste tires. IDEM will now receive 35% for its waste tire removal program and will have sole responsibility for the waste tire education program. P.L. 82-1994 (HEA 1182) § 11.

In what appears to be a glimmer of optimism that an environmental program can solve a problem, the waste tire storage registration program, waste tire management fund and tire fees laws will expire on July 1, 2000 when the Legislature anticipates the waste tire problem will have been solved.

WATER MIXING ZONES

After much controversy the Governor signed a bill that requires IDEM to allow for a mixing zone on Lake Michigan. Notwithstanding this allowance, the surface water quality standards for bioaccumulative chemicals of concern will continue to be applied to the undiluted discharge, rather than at a point outside the mixing zone. This legislation directly impacts Amoco Oil Company's Whiting Refinery. Amoco had indicated that due to the excessive costs required for no environmental benefit, it might close and remove jobs from Indiana if this legislation was not passed. The mixing zone (which would be allowed under the federal Great Lakes Initiative) will only be granted by IDEM if Amoco or another permittee proposing to discharge to Lake Michigan can demonstrate to IDEM's satisfaction that the mixing zone will not cause harm to human health or aquatic life. P.L. 84-1994 (HEA 1126) §§ 1 & 2.