Indiana Perspective
Environmental Law Newsletter

Summary of 2011 Environmental Legislation

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[1] Sue Shadley is a founding partner and has prepared a summary of all new Indiana environmental laws since 1994. Past legislative summaries are available to review on our website: www.psrb.com. In this legislative summary we try to make it easy to understand how and sometimes why the law has changed and to organize the new laws in a way that allow you to see and read just the topics that interest you. Sue's complete bio can be viewed at http://www.psrb.com/attorneys/39.

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The 2011 session of the Indiana General Assembly was atypical for at least two reasons. First, the democrats staged a walkout in February that prevented the House of Representatives from obtaining quorum for nearly six weeks. Second, the same party controlled the governorship and both houses of the legislature. As a result, and despite the legislative bottleneck, a significant amount of environmental and energy related bills passed this session. This was mainly due to the increased cooperation between the House and Senate, and the tireless efforts of veteran Senator Beverly Gard (R-Greenfield), Chair of the Senate Energy and Environmental Affairs Committee.

Plews Shadley Racher & Braun LLP is pleased to provide the following summary of new laws relating to the environment, natural resources, energy, and agriculture that became effective this year. We have been preparing this type of legislative summary since 1994. Our summary is unique in that it is organized by subject matter rather than by bill number, which allows the reader to more easily identify which laws may impact you and your business. In our summary we strive to explain in detail the new law or how an existing law is changed by the various legislation. At the end of each summary is a citation to the House or Senate Enrolled Act and Sections where the language of this law can be found, along with its corresponding Public Law number and Indiana Code citations. While review of the actual language of any law is necessary to apply it to a specific situation, we hope that this summary will alert you to changes in Indiana law.

Legislative summaries from previous sessions are also available on our webpage at www.psrb.com. We would be pleased to answer any questions you may have regarding these new laws, the application of existing law, or prospective legislation for the 2012 session of the Indiana General Assembly. Any one of our 39 attorneys, whose practices cover a wide variety of related sub-fields, can assist you with any legal issues you may have. Please contact us if we can be of service to you.

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CLEAN AIR PROGRAM

In response to a number of court decisions, the Senate passed a resolution opposing what it considers the numerous new regulations proposed by the United State Environmental Protection Agency ("EPA"). Specifically the Senate made the following recommendations, which were transmitted to the Indiana Congressional Delegation:

(1) To Congress -- adopt legislation prohibiting the EPA from regulating greenhouse gas emissions, and if necessary, to remove funding for EPA's greenhouse gas regulatory activities;

(2) To Congress -- impose a moratorium on promulgation of any new air quality regulation by EPA except to directly address an imminent health or environmental emergency for a period of at least two years, and if necessary, by removing funding for EPA's air quality regulatory activities; and

(3) To the Executive Branch -- undertake a study identifying all regulatory activity that EPA intends to undertake in furtherance of its goal of "taking action on climate change and improving air quality" and specifying the cumulative effect of all these regulations on the economy, jobs, and American economic competitiveness. The Indiana Senate recommends a multi-agency study drawing on the expertise of EPA and other agencies and departments with expertise in and responsibility for the economy and the electric system and should provide an objective cost-benefit analysis of all EPA's current and planned regulations.

Indiana Senate Resolution 39.

CLEAN UP PROGRAMS

Statute of Limitations for Environmental Cost Recovery and Contribution Statutes

Prior to this past legislative session, Senator Gard announced her intention to clarify the statute of limitations trigger and length for Indiana's two alternative vehicles for cost recovery and contribution for environmental liabilities, the Environmental Legal Action statute ("ELA") and the Underground Storage Tank Ace ("USTA"). The change in law settles the heavily-litigated but unresolved issue of the applicable statute of limitations period and trigger. Neither the ELA nor the USTA previously contained a statute of limitations, which omission led to a string of inconsistent Indiana appellate decisions. On or after May 10, 2011, a person may bring an action to recover costs incurred for a removal action or a remedial action which was incurred not more than 10 years before the date the ELA action is commenced and all costs that are incurred on and after the date of commencing the action. A person may recover those costs even if they were incurred before this law establishing the statute of limitations took effect. A person may not use this law to revive or raise new claims in an ELA that was brought and had been finally adjudicated or settled before May 10, 2011. A person also may not amend a pending action to assert new claims under the new law.

SEA 346 SECTIONS 2 – 4, Public Law No. 159-2011, Ind. Code 13-30-9-2.5, Ind. Code 34-6-2-103, Ind. Code 34-11-2-11.5, effective May 10, 2011.

Environmental Restrictive Ordinances

The definition of an environmental restrictive ordinance—a tool used by a municipalities to assist with Brownfield cleanups—was amended this year, effective May 10, 2011, in an effort to provide more clarity. An environmental restrictive ordinance is now defined as any ordinance that is adopted by a municipal corporation that seeks to control the use of groundwater in a manner and to a degree that protects human health and the environment against unacceptable exposure to a release of hazardous substances or petroleum or both. In addition, IDEM or the person doing the cleanup must give written notice to a municipal corporation that IDEM is relying on an environmental restrictive ordinance as part of a RISC-based remediation proposal for a clean up being done under the hazardous waste program, the Underground Storage Tank program, the petroleum program or the mini-superfund program.
SEA 433 SECTION 2, 40 and 42, Public Law No. 159-2011, Ind. Code 13-11-2-71.2, Ind. Code 13-25-5-8.5 and Ind. Code 36-1-2-4.7, effective May 10, 2011.

Giving further clarification to municipalities, the legislature also amended the law that requires a municipal corporation to give notice to IDEM 60 days before amending or repealing an environmental restrictive ordinance and notice within 30 days after passage of the amendment or repeal. This notice must now only be given if the municipal corporation received notice from IDEM or the person doing the cleanup that the ordinance is being relied on as part of a RISC-based remediation proposal.
SEA 433, SECTIONS 43, 44, 45, 46 and 47, Public Law No. 159-2011, Ind. Code 36-1-6-11, Ind. Code 36-2-4-8, Ind. Code 36-3-4-14, Ind. Code 36-4-6-14 and Ind. Code 36-5-2-10, effective May 10, 2011.

Lender Liability

The legislature amended the the state's corollary to the federal Superfund law to impose the criteria of Section 101(20)(E) of CERCLA[3] to a lender in order for that lender to be determined to have not participated in the management of the hazardous substances at the facility, and thus not be liable for cleanup. If the lender forecloses but after foreclosure maintains business activities or winds up operations, undertakes a response action, or takes any other measures to preserve, protect, or prepare the property for sale or disposition, the lender does not become liable if the lender seeks to sell or otherwise divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.
SEA 433 SECTION 39, Public Law No. 159-2011, Ind. Code 13-25-4-8, Effective May 10, 2011.

[3] CERCLA 101(20)(E) requires the lender hold an indicia of ownership primarily to protect its security interest.

Limitation on Liability for Certain Surface Activities

In an effort to assist communities to redevelop small contaminated corner lots, a new law was passed this year dubbed the "pave and waive" law, which does not substantially change existing law. As introduced, the bill proposed to extend immunities for costs or damages, including remediation costs, associated with the contamination, to the Brownfields owner where the owner installed watertight pavement or a similar impervious surface so long as certain conditions were met. The bill was amended to its enacted form following the testimony of IDEM and other groups expressing concern with the breadth of the language. Under this law, a person who owns or otherwise legally possesses real property that is not more than one acre in size and who installs only pavement or another hard surface or landscaping and other plantings on the surface of the property, does not incur any additional liability under the environmental laws for costs or damages associated with the presence of a hazardous substance, a contaminant, petroleum or a petroleum product that is located beneath the surface of the real property. However, to qualify for this limitation of liability, the paving or landscaping activities may not: (1) impede the effectiveness or integrity of any institutional control already in place on the property, (2) violate a land use restriction established or relied upon for a response action that has been taken, (3) result in a release of a hazardous substance, a contaminant, petroleum or a petroleum product at the real property, or (4) exacerbate existing contamination at the real property. In addition, a citation to this statute was added to the civil law that lists all of the statutes outside Title 34 that confer immunity.
HEA 1200, Public Law No. 6-2011, Ind. Code 13-19-6 and Ind. Code 34-30-2-51.2, effective July 1, 2011.

NORTHWEST INDIANA ADVISORY BOARD

Effective July 1, 2011 the Northwest Indiana Advisory Board no longer exists. That Board had not met in more than 2 years and was finally legislatively abolished.
SEA 433 SECTIONS 1, 48 and 49, Public Law No. 159-2011, Ind. Code 13-11-2-17, Ind. Code 36-7-13.5-3 and Ind. Code 13-13-6, effective July 1, 2011.

PERMITTING

Air Permits for Ethanol Production

The General Assemby clarified the Indiana Air Pollution Control Law (Ind. Code § 13-17) to exempt from what is regulated as a chemical process plant, any ethanol production operation after July 2, 2007 that produces ethanol by natural fermentation and is classified as NAICS Code 325193 or 312140.
SEA 433 SECTION 21, Public Law No. 159-2011, Ind. Code 13-17-3-4, effective May 10, 2011.

Correction to Electronic Signature Laws

As of May 10, 2011, IDEM is now authorized to accept electronic submissions with valid electronic signatures. This change was required by the EPA for IDEM's law to be no less stringent than federal law. Indiana Code 13-14-13-4 and Ind. Code 13-14-13-6 have been amended to remove the allowance for electronic documents to substitute for paper document if the procedures are acceptable to the State Board of Accounts under Ind. Code 5-24. IDEM now may only accept an electronic signature if the procedures are consistent with 40 CFR 3.
SEA 433 SECTIONS 18 and 19, Public Law 159-2011, Ind. Code 13-14-13-4 and Ind. Code 13-14-13-6, effective May 10, 2011.

General Permits

Changes were made to IDEM's Water Pollution Control Board rulemaking statute to address concerns raised by the EPA regarding general permits. EPA took the position that Indiana must make changes to eliminate the "conflict of interest" that exists due to one of the Water Pollution Control Board members being a person who represents the interests of those who are regulated and the Water Pollution Control Board being responsible for adopting the rules establishing general permit requirements. EPA was also concerned that the general permits did not each undergo an antidegration review and that the general permits had a term in excess of 10 years. The legislature agreed this year to change the law to address these concerns of the EPA. The law now requires IDEM to complete an antidegradation review of all NPDES general permits. IDEM also has authority to modify an entity's general permit after the antidegration review. An antidegration review must only be done once.
SEA 200, SECTION 1, Public Law No. 81-2011, Ind. Code 13-18-3-2(p), effective July 1, 2011.

In addition, effective April 28, 2011, the Water Pollution Control Board is required to amend rules 327 IAC 5 and 327 IAC 15 to remove the general permits and to eliminate the requirement that the terms and conditions of a general permit be in a rule. As of April 28 2011, IDEM is given the statutory authority to issue NPDES general permits, which must be in accordance with 40 CFR 122.28, and thus be of a term of 10 years or less. The authority to establish a general coal mine permit has also been transferred from the Water Pollution Control Board to IDEM.
SEA 200, SECTIONS 2 and 3, Public Law No. 81-2011, Ind. Code 13-18-3-15(a) and (b), effective April 28, 2011 and Ind. Code 13-18-18-1, Ind. Code 13-18-18-2 and Ind. Code 13-18-18-3, effective July 1, 2011.

To ensure permit requirements apply during the period between when the Board's rule is amended but before IDEM issues the new general permit, the legislature has provided that even after rules 327 IAC 5 and 327 IAC 15 are amended, the terms and conditions of an NPDES general permit under those rules as they existed remain in effect and are binding on any person regulated under the NPDES general permit until the person

submits notice of intent to be covered by an NPDES general permit to be developed by IDEM.
SEA 200, SECTION 2, Public Law No. 81-2011, Ind. Code 13-18-3-15(c), effective April 28, 2011.

Entities desiring to be regulated by an NPDES general permit will have 90 days after IDEM makes the notice of intent form available to submit the general permit notice of intent.
SEA 200, SECTION 2, Public Law No. 81-2011, Ind. Code 13-18-3-15(d), effective April 28, 2011.

Timeframe for Acting on Solid Waste Processing Facility Permit Applications

To address IDEM's concerns about the timetable for review of some solid waste processing facility applications, the legislature established a permit schedule timeframe for solid waste processing facility permit applications other than transfer stations (which are included in the definition of a processing facility). Current law had set a timeframe of 180 days for a new solid waste processing or recycling facility. No timeframe was set for a major modification or minor modification, which meant the catch-all 60 day timeframe applied to all solid waste processing facility modifications. Effective July 1, 2011, IDEM must act on a new transfer station or a major modification to a transfer station permit application within 180 days, and a minor modification to a transfer station in 60 days. IDEM must act on all other solid waste processing facility permit applications, other than transfer stations, within the following time frames:

A new facility – 365 days
A major modification to a facility – 270 days
A minor modification to a facility – 90 days.

SEA 433 SECTION 29, Public Law 159-2011, Ind. Code 13-15-5-1, effective July 1, 2011.

REGIONAL WATER, SEWER AND SOLID WASTE DISTRICTS

Addition of Territory to Regional Sewage or Solid Waste District

A new section was added to the law for adding territory to a Regional Sewage, or Solid Waste, District. This new law establishes a procedure to allow addition of territories by entities outside of the District, since current law has a procedure only for those entities wholly within the District. Under this new law Sewage and Solid Waste Districts can now add other territories by having the District Board file with IDEM a motion adopted by the Distirct Board requesting the addition of the territory and a petition signed by a majority of freeholders within the proposed territory addition. IDEM will follow the same procedure for establishing a Didstrict except that IDEM will not appoint a hearing officer to conduct a hearing, instead the District Board is to provide notice of and conduct a hearing to allow persons or eligible entities affected by the addition of the territory to file written objections and be heard at the hearing. The District Board must submit to IDEM documentary evidence proving the District Board provided notice and a hearing.

HEA 1197 SECTION 3, Public Law No. 123-2011, Ind. Code 13-26-8-4, effective May 9, 2011.

Authority to Pay Claims or Receive Payments by Electronic Fund Transfer

The law allowing any area to establish a Regional Water, Sewage, or Solid Waste District to provide a water supply for domestic, industrial, and public use to users inside and outside the District or to provide for the collection, treatment, and disposal of sewage inside and outside the District or to provide for the collection, treatment, and disposal of solid waste and refuse inside and outside the District was amended this year. Effective July 1, 2011, Regional District Boards may adopt an ordinance allowing the District to pay claims or receive payments by electronic fund transfer. The Boards must review and approve a claim paid electronically at its next regular or special meeting in accordance with preapproved payment procedures.
HEA 1098, Public Law No. 71-2011 SECTION 1, Ind. Code 13-26-5-9, effective July 1, 2011.

Membership and Duties of Regional Sewer District Authority

The law was also amended, effective April 26, 2011, to change who serves as a Regional Sewer District Authority and to change the Authority's duties. Under prior law the Authority for a District located in a single county was the county executive. With this change, the Authority must now consist of an odd number of members, and must have at least 3 members, none of whom may be a person who serves on the Board of Trustees of the District. The Authority is charged with hearing evidence and making determinations concerning rate increases. Under the new law, the Authority will now also be charged with determining if the Board of Trustees of the District followed the procedures required by law when it adopted an ordinance increasing sewer rates and charges.
HEA 1098 SECTION 2, Public Law No. 71-2011, Ind. Code 13-26-11-15, effective July 1, 2011.

Connection of Existing Septic Tank Soil Absorption Systems

The law allowing a property owner to be exempt from the requirement to connect to a Regional Sewer District's sewer system has been amended this year. Prior law required that the property owner's septic tank soil absorption system be installed less than 5 years before the District's sewer system connection date and provided for a 3-year exemption. Now, a person cannot be required to connect to the sewer until 10 years from the date the septic tank soil absorption system was installed. When the property owner who qualified for an exemption subsequently discontinues use of the septic tank soil absorption system and connects to the District's sewer system, the property owner is only required to pay the connection fee he would have paid if he had connected when the sewer system was first available to connect and any additional costs that the District considers necessary and can support by documentary evidence.
HEA 1197 SECTION 1, Public Law No. 123-2011, Ind. Code 13-26-5-2.5, effective May 9, 2011.

Easement Obtained by Condemnation May Not Exceed 50 Feet in Width

The law allowing a District Board to condemn land for use by a Regional Sewage District was amended this year to establish a maximum width of an easement. If a Regional Sewer District exercises eminent domain[4] to acquire an easement or right-of-way within or outside the District to accomplish the District's purposes, the easement or right of way may not exceed 50 feet in width.
HEA 1197 SECTION 2, Public Law No. 123-2011, Ind. Code 13-26-5-6, effective May 9, 2011.

Notice of Changed or Readjusted Rates

When a Regional Water, Sewer or Solid Waste District changes or readjusts the rate it is charging, the District Board must mail to each affected user, either separately or with the periodic billing statement, notice of the new rates and charges. When a Regional Sewer District increases rates it must also follow the existing provisions of law applicable to Sewer Districts to give notice within 7 days and to include with the notice the user's rights to petition the District with his or her objection to the changed rates.
HEA 1197 SECTON 4, Public Law No. 123-2011, Ind. Code 13-26-11-13, effective May 9, 2011.

RULEMAKING

Unenforceability of State Rule that is Based on an Invalidated Federal Rule

Effective April 28, 2011, clarification has been added to IDEM's rulemaking law to address how IDEM is to enforce a rule that was an adoption or incorporation by reference of a federal law or rule without substantive change, when the federal law or rule has been stayed, repealed, invalidated, vacated or otherwise nullified by a legislative, an administrative, or a judicial action. First, if the federal law or rule on which the state rule is based is repealed or otherwise nullified by congressional or administrative action, that part of IDEM's rule is void as of the effective date of the congressional or administrative action repealing or nullifying the federal law or rule. Second, if the federal law or rule is invalidated, vacated or otherwise nullified by a judicial decree, judicial order or judgment of a state or federal court whose decision has force and effect in Indiana, that part of the rule that corresponds to the invalidated vacated or nullified law or rule may not be enforced by IDEM or any other person during the time in which an appeal can be commenced or is pending; that part of the state rule becomes void as of the date the judicial action becomes final and unappealable. IDEM's enforcement is restored if the

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[4] Eminent Domain is an action to acquire private property with monetary compensation, but without the owner's consent. Typically the property is taken for government use devoted to public or civic use. The most common uses of property taken by eminent domain are for public utilities, highways, and railroads

judicial action is reversed or vacated or otherwise nullified on appeal. Third, if the federal law or rule on which the state rule is based is stayed by an administrative or judicial order pending a ruling on the validity of the federal law or rule, IDEM must suspend enforcement of that part of its adopted rule corresponding to the stayed federal law or rule, while that stay remains in effect.
SEA 159, Public Law No. 79-2011, Ind. Code 13-14-8-9(g), effective April 28, 2011.

Technical Correction to Rulemaking Law

The general provisions of IDEM's rulemaking statute related to the exception for the Water Pollution Control Board to adopt a rule to establish new water quality standards for a community served by a combined sewer that has a an approved long term control plan and approved use attainability analysis were amended this year. That section of the law already had provided that sections 1 through 13 of the rulemaking law did not apply. This year the applicability rule requiring at least 2 public comment periods of at least 30 days in length, was amended to recognize that is also excepted from that requirement in that Water Board rulemaking.
SEA 433 SECTION 14, Public Law No. 159-2011, Ind. Code 13-14-9-2, effective July 1, 2011.

Expedited Rulemaking Procedures

Current law allows IDEM (subject to the right of the Board to determine such rule requires additional comment) to skip the advanced notice of rulemaking and minimum two public comment periods of at least 30 days each if the proposed rule: (a) is an adoption or incorporation by reference of a federal law or rule that is or will be applicable in Indiana and contains no substantive amendments affecting its scope; (b) is a technical amendment with no substantive effect on an existing Indiana rule; or (c) is a substantive amendment to an existing Indiana rule, but the primary and intended purpose of the amendment is to clarify the existing rule. This right to skip the public comment period only applies if it is one of these types of rulemaking and the nature and scope of the proposed rule poses no reasonably anticipated benefit to the environment or the persons affected by affording public comment on the proposed rule. The Commissioner must prepare findings to support the expedited rulemaking, publish the draft rule language, and provide a minimum 30 day written comment period and give notice of a public hearing before the appropriate Board in the Indiana Register. After the Board's public hearing the Board may adopt the proposed rule, reject the proposed rule, determine additional public comment is necessary or that the rule will be considered at a subsequent meeting. This year 2 changes were made to the law. First, the law has been changed to allow the Board a fourth option of adopting the proposed rule "with amendments," so long as the proposed amendment meets the logical outgrowth requirement. Second, the law has been changed to provide that the exception to use the expedited rulemaking for a rule where the primary and intended purpose is to clarify an existing rule can no longer be used for a "substantive" amendment to the rule.
SEA 433 SECTION 15, Public Law No. 159-2011, Ind., Code 13-14-9-8, effective July 1, 2011.

The same right to adopt the proposed rule with a "logical outgrowth" amendment was added to the special rulemaking statute for the Water Pollution Control Board to establish new water quality standards for a community served by a combined sewer that has an approved long term control plan and approved use attainability analysis.
SEA 433 SECTION 16, Public Law No. 159-2011, Ind. Code 13-14-9-14, effective July 1, 2011.

SOLID WASTE PROGRAM

Law Setting Minimum Number of IDEM Landfill Inspectors Repealed

The law passed back in 1990 requiring IDEM to have 10 employees designated as landfill inspectors was repealed this year. The 1990 legislative session saw the passage of 10 different laws related to solid waste, most of which had as their underlying purpose to stop out-of-state-waste from coming into Indiana. With the changes that have occurred over the past 20 years, the legislature and IDEM recognized there was no longer a need to statutorily establish the number of IDEM employees who are landfill inspectors.
SEA 433 SECTION 30, Public Law No. 159-2011, Ind. Code 13-20-11-1, effective July 1, 2011.

Solid Waste Management Districts to Educate Public on Electronic Waste

In addition to the resolution adopted this year to have the Environmental Quality Service Council ("EQSC") study Solid Waste Management Districts, the legislature passed one law giving Districts a new duty. Specifically, starting July 1, 2011, all Solid Waste Management Districts are to conduct educational programs to inform the public about reuse and recycling of electronic waste, including the proper disposal of the same, as well as collection programs available to the public for disposal of electronic waste. This duty for Solid Waste Management Districts was added both to the electronic waste article of IDEM's laws, and to the Solid Waste Management District law itself.
SEA 433 SECTION 35 and 36, Public Law 159-2011, Ind. Code 13-20.5-7-10 and Ind. Code 13-21-3-12(28), effective July 1, 2011.

"Sanitary Landfill" Replaced with "Solid Waste Landfill"

The legislature has remedied the confusion that has existed in the law for more than 10 years by use of the term "sanitary" landfill. This confusion was caused when the solid waste rules were amended in 1996 to establish the federal Subtitle D program. At that time IDEM changed its rule to categorize lawful solid waste land disposal facilities as a municipal solid waste landfill, a construction/demolition site, a restricted waste site type I, II, III or IV or a nonmunicipal solid waste landfill. 329 IAC 10-9-1. All reference in the rules to sanitary landfill was removed. The legislature has now followed suit and the permit law consistently uses the terms "solid waste landfill" where "sanitary landfill" was previously used.
SEA 433 SECTIONS 32, 33, and 34, Public Law No. 159-2011, Ind. Code 13-20-21-3, Ind. Code 13-20-21-4, and Ind. Code 13-20-21-9, effective July 1, 2011.

UNDERGROUND STORAGE TANK PROGRAM

USTA Statute of Limitations

While amending the Environmental Legal Action Statute ("ELA") the legislature decided to create consistency with the Underground Storage Tank Act by imposing a statute of limitations for cost recovery and contribution actions..The change in law settles the heavily-litigated but unresolved issue of the applicable statute of limitations period and trigger. Neither the ELA nor the USTA previously contained a statute of limitations, which omission led to a string of inconsistent Indiana appellate decisions. This law took effect on May 10, 2011. On or after May 10, 2011, a person may bring an action to recover costs incurred for a corrective action that were incurred not more than 10 years before the date the USTA action is commenced and all costs that are incurred on and after the date of commencing the USTA action. A person may recover those costs even if they were incurred before this law establishing the statute of limitations took effect. A person may not use this law to revive or raise new claims in a USTA action that was brought and had been finally adjudicated or settled before May 10, 2011. A person also may not amend a pending action to assert new claims under the new law.
SEA 346 SECTIONS 1 and 3 – 4;, Public Law No. 154-2011, Ind. Code 13-23-13-7.5, Ind. Code 34-6-2-103, Ind. Code 34-11-2-11.5, effective May 10, 2011.

Excess Liability Trust Fund Deductible

The legislature changed the amount an owner of a tank must pay before being eligible to receive money from the Excess Liability Trust Fund ("ELTF"), increasing the deductible from $25,000 to $30,000 for tanks that were in compliance with the rules for technical and safety requirements before the date the tank was required to be in compliance but where the tank is not double-walled and the piping does not have secondary containment. A tank owner must now pay $35,000 for tanks that were not in compliance at the time the technical and safety rules were passed, but that were in compliance when the release occurred, $30,000 for a tank in compliance when required but that is not double walled and the piping does not have secondary containment, $25,000 for a tanks in compliance when required where the either the tank is not double walled but the piping has secondary containment or the tank is double walled and the piping does not have secondary containment, and $20,000 for tanks in compliance when required and the tank is double walled and the piping has secondary containment.
SEA 433 SECTION 37, Public Law 159-2011, Ind. Code 13-23-8-3, effective July 1, 2011.

Lender Liability Exclusion

The General Assembly amended the law to provide that a lender to a nonprofit corporation that acquired ownership or control of a UST to assist and support a political subdivision's revitalization and reuse of a Brownfield for noncommercial purposes, including conservation, preservation, and recreation, who holds evidence of ownership primarily to protect a security interest in a UST, will only be considered to have

participated in management of the tank if (1) while the borrower is in possession of the tank the lender exercises decision-making control over environmental compliance, or (2) exercises control at a level comparable to that of a manager of the tank such that the lender has responsibility for overall management encompassing day-to-day decision making for environmental compliance of all or substantially all of the operational functions of the tank.
SEC 433 SECTION 38, Public Law 159-2011, Ind. Code 13-23-13-14, effective May 10, 2011.

Internet Training Program and IDEM Use of ELTF Funds

Effective July 1, 2011, IDEM is authorized to use money in the Underground Storage Tank Excess Liability Trust Fund ("ELTF") to establish an on-line Internet web site operator training program. The training program must comply with the requirements of the federal Energy Policy Act of 2005.

Previously IDEM could use not more than 10% of the fund (in the immediately preceding state fiscal year) to pay expenses IDEM incurs to pay and administer claims against the ELTF and to provide a source of money to pay IDEM's expenses to inspect USTs. Now that IDEM may use the ELTF funds to establish an on-line training program, the cap on expenditures has been raised from 10% to 11%.
SEA 347, Public Law 105-2011, SECTIONS 1-2, Ind. Code 13-23-1-3 and Ind. Code 13-23-7-1, effective July 1, 2011 and May 9, 2011 respectively.

Owner of Underground Storage Tank Amended

To assist IDEM in finding a person responsible for underground storage tank ("UST") corrective action, the definition was amended to include not just the person who owns the UST but also the person who owns the real property in which the UST is buried, or both. After May 10, 2011, a landowner of property in which a UST is buried can now be held responsible as an "owner" of that UST if it was in use on November 8, 1984 or brought into use after November 8, 1984 for the storage, use or dispensing of regulated substances. For a UST that was in use before November 8, 1984, but not after, the "owner" for purposes of assigning corrective action responsibility, is only the person who owned the UST immediately before the discontinuation of the tank's use.
SEA 433, SECTION 4, Ind. Code 13-11-2-148, effective May 10, 2011.

Recognizing current economic conditions, excluded from the definition of owner of the UST or owner of a petroleum facility is a person that is a lender that did not participate in management of the tank before foreclosure (see Lender Liability Exclusion above). That exclusion applies even if the person forecloses on the tank and after foreclosure sells, re-leases, or liquidates the UST, maintains business activities, winds up operations, undertakes a response action under CERCLA or under the direction of an on-scene coordinator appointed under the National Contingency Plan or takes any other measure to preserve, protect or prepare the UST prior to sale or disposition so long as the person seeks to sell, release or otherwise divest the person of the UST at the earliest practicable

commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.
SEA 433, SECTONS 4 and 5, Ind. Code 13-11-2-148 and Ind. Code 13-11-2-151, effective May 10, 2011.

WATER PROGRAM

Certified Operator Law Amended

The General Assembly amended the Certified Operator Program for water treatment plants and waste distribution systems to provide IDEM additional bases for suspending or revoking operator certification. Previously, the certification could be suspended or revoked if the operator practiced fraud or deception, failed to use reasonable care, judgment or application of the operator's knowledge or ability in performing his duties or the operator was found to be incompetent or unable to properly perform the operator's duties. After May 10, 2011, IDEM may suspend or revoke a certificate for the following additional reasons: (1) if the operator practiced fraud or deception in another state or jurisdiction, (2) the operator has previously had a certificate revoked in Indiana, (3) the operator has had a comparable certificate revoked in any other state, or (4) the operator has been convicted of a crime related to the Indiana or any other jurisdiction's certificate.
SEA 433 SECTION 23, Public Law No. 159-2011, Ind. Code 13-18-11-8, effective May 10, 2011.

IDEM Authorized to Seek Delegation of Underground Injection Control Program under Safe Drinking Water Act

The Genearl Assembly amended the law establishing IDEM as the agency for matters related to water pollution to give IDEM the legislative authority to develop a regulatory program to implement, and the authority to seek,federal delegation of the Underground Injection Control Program of the Safe Drinking Water Act. However, IDEM must also receive funding to seek this federal delegation.
SEA 433 SECTION 22, Public Law No. 159-2011, Ind. Code 13-18-2-1(a)(7), effective July 1, 2011.

IDEM Authorized to Seek Delegation of 404 Federal Water Pollution Control Act Permitting Program

The General Assembly also amended the law establishing IDEM as the agency for matters related to water pollution to give IDEM the legislative authority to enter into an agreement with the United States Army Corps of Engineers and the EPA to administer the permitting program under Section 404 of the Federal Water Pollution Control Act.
SEA 433 SECTION 22, Public Law No. 159-2011, Ind. Code 13-18-2-1(a)(8), effective July 1, 2011.

Finally, the General Assembly clarified that giving IDEM this authority is not intended to and does not affect the authority of the Department of Natural Resources to regulate

activities within the waterways of Indiana under the lakes and reservoirs law, flood control act and rivers, streams and waterways law.
SEA 433 SECTION 22, Public Law No. 159-2011, Ind. Code 13-18-2-1(b), effective July 1, 2011.

Land Application of Industrial Waste Products

Frustrated by IDEM's failure to approve Steel Dynamics' industrial waste product as a soil amendment or material to be land applied, legislation was introduced this session to address the problem. The version of the bill that eventually passed was diluted, but should help to alleviate the problem. First, a 180 day timeframe was established in which IDEM must act on a permit for marketing and distribution of a biosolid or industrial waste product. Second, a new section was added to the water law addressing use of industrial waste products in a land application operation or as ingredients in a soil amendment or soil substitute to be land applied. The industrial waste may not be a hazardous waste, must have a beneficial use or otherwise provide a benefit to the process of creating the soil amendment or soil substitute or to the final soil amendment, soil substitute or material to be land applied, such as bulking and the finished soil amendment, soil substitute or material to be land applied and must satisfy the applicable criteria in 327 IAC 6.1 for land application. IDEM is specifically authorized by this law to allow the use of industrial waste products in a land application operation or as ingredients in a soil amendment or soil substitute to be land applied on the same basis as other material under the rules concerning land application and marketing and distribution permitting. IDEM is prohibited from discriminating against the use of industrial waste products on the basis that the industrial products lack biological carbon and IDEM may not impose requirements beyond the applicable criteria in the land application rules, unless additional requirements are necessary for protection of human health and the environment. IDEM also cannot require that the finished soil amendment, soil substitute, or material to be land applied be of any particular economic value. Third, if there is a pollutant limit or concentration in the land application rules, IDEM may not require that the final product also meet other standards or criteria. If there is a pollutant present in the industrial waste that does not have a pollutant limit or concentration in the land application rules, IDEM is to consider the benefits of the finished soil amendment, soil substitute, or material to be land applied compared to the measurable risks to human health and the environment based on the anticipated use of the finished soil amendment, soil substitute or material to be land applied. Finally, included as a concession to IDEM, the new law allows IDEM the option of requiring the application for a permit for land application of industrial waste products to include characterization of individual industrial waste products at the point of waste generation before mixing the waste streams.
HEA 1112, Public Law No. 223-2011, Ind. Code 13-15-4-1 and Ind. Code 13-18-12-2.5, effective July 1, 2011.

Wastewater for Purposes of Sewage Disposal Replaced with the Term Septage

A new definition of “septage” was added to IDEM’s law and that term was substituted in the definition of sewage disposal system wastewater (now septage) holding tanks. Septage is defined to include the following from sewage disposal systems: human excreta, water, scum, sludge, sewage and incidental or accidental seepage and the retained contents of sewage holding tanks and portable sanitary units, grease, fats, and retained waste from grease traps or interceptors and human wastes carried in liquid from ordinary living processes. Also changed was the definition of “sewage disposal system” to now include septic tanks and septage holding tanks (formerly wastewater holding tanks), in seepage pits, cesspools, privies, composting toilets, interceptors or grease traps, portable sanitary units and other equipment, facilities or devices use to store, treat make inoffensive or dispose of human excrement or liquid carrying waste of a domestic nature.
SEA 433, SECTIONS 8 and 9, 24, 25, 26, 27, 28, 29, 31, and 49 Ind. Code 13-11-2-199.2 and Ind. Code 13-11-2-199.3, Ind. Code 13-18-12-1, Ind. Code 13-18-12-2, Ind. Code 13-18-12-3, Ind. Code 13-18-12-4, Ind. Code 13-18-2-5, Ind. Code 13-18-12-7, Ind. Code 13-20-17.5-5, Ind. Code 13-11-2-256, and Ind. Code 13-11-2-257, effective July 1, 2011.

LAWS AFFECTING THE ENVIRONMENTAL QUALITY SERVICE COUNCIL

MINT DISTILLATION STUDY

The death of a dog brought focused attention on mint distillation. The dog was scalded to death after falling in a ditch that contained hot water from a nearby mint distillation operation. The mint operator quickly agreed to obtain an NPDES permit for its water discharge, but IDEM became dissatisfied when an odor indicating VOC emissions was discovered. IDEM began an action to enforce air permit application requirements on the distiller. The legislature has directed the EQSC to study air emissions from mint distillation and directed IDEM to stop imposing air permit application requirements on mint distillation operations until the EQSC has completed an investigation and issued its report and recommendations (due by January 1, 2012) of the actual and potential air emissions created by the distillation of mint and whether distillation of mint should be considered a farming operation for purposes of permit requirements under the Air Rules. Mint distillation operations are an activity that is conducted for as short a period of time as 20 days a year. There are 15 to 17 mint operations in northwest Indiana. A "farming operation" is defined in the air rules as a business concerned with the planting, harvesting, and/or marketing of crops and the raising of animals. It does not include nurseries, tree farms, or sod production. The new source requirements to obtain a registration, a permit, modification approval, or a permit revision, including the requirement to submit a permit application, do not apply to sources that consist of only farm operations. A “farming operation” falls within the list of activities defined as an "insignificant activity.”
HEA 1451, Public Law No. 57-2011, noncode amendment, effective July 1, 2011.

STUDY OF UNDER- SELF-FUNDED IDEM PROGRAMS

The legislature has directed the EQSC to study each IDEM-administered program whose annual cost of administration exceeds the annual revenue generated by the program,to evaluate and recommend measures to reduce the cost or eliminate the excess cost.
SEA 433, Public Law No. 159-2011, Ind. Code 13-13-7-9, effective May 10, 2011.

ASSUMPTION OF GREAT LAKES TASK FORCE DUTIES

Effective July 1, 2011, a new duty has been assigned to the EQSC. The EQSC must now review and discuss various topics related to the Great Lakes and the Great Lakes watershed. Previously this was the duty of the Great Lakes Task Force. Specific topics for review and discussion include: (1) the availability of federal funds for projects related to water quality, supply and protection; (2) the extent of water consumption and use from the Great Lakes and its watershed; (3) levels of water pollution and the sources of pollution affecting the quality of the Great Lakes; (4) the impact of water quality and supply on recreational activities and natural habitats; (5) the impact of invasive species on the Great Lakes and its watershed ecosystem; (6) current laws and regulation that affect the Great Lakes; (7) current laws, regulations and infrastructure that affect shipping on the Great lakes; and (8) other matters relevant to the condition of the Great Lakes and the Great Lakes watershed. The EQSC is to include in its annual report an outline of its activities concerning the Great Lakes and recommendations to IDEM and recommendations for legislative action.
SEA157, Public Law No. 62-2011, Ind. Code 13-13-7-9, effective July 1, 2011.

STUDY OF SOLID WASTE MANAGEMENT DISTRICTS

Solid Waste Management Districts were created more than 20 years ago and their powers, duties, and functions have changed over time, as have the the needs of the citizens of Indiana related to solid waste management. Inconsistencies have also arisen in funding and services provided by the Solid Waste Management Districts, which has resulted in a large disparity in service to Indiana citizens. To address these issues, the Indiana Senate passed a resolution urging the EQSC to conduct a study of Indiana's Solid Waste Management Districts. Specifically, EQSC is urged to:

(1) Conduct a comprehensive study of the structure and functions of the Indiana Solid Waste Management Districts, including (a) the services currently provided, (b) funding, (c) current and future solid waste disposal capacity, and (d) the role that state and local government should have in providing solid waste services to the citizens of Indiana.

(2) Report its findings, and provide recommendations before January 1, 2012 to the General Assembly for amending existing laws related to the structure and functions of Solid Waste mManagement Districts.

Senate Resolution 33.

LAWS AFFECTING THE DEPARTMENT OF NATURAL RESOURCES

COAL BED METHANE

Regulation of Coal Bed Methane Wells

Effective July 1, 2011, the prohibition on the Department of Natural Resources ("DNR") to issue permits for extraction of coal bed methane from a well for oil and gas purposes was repealed. The new law requires the Natural Resources Commission ("NRC") to regulate coal bed methane through a permit program. In doing so, the NRC must: (1) establish alternative spacing, survey, unit, and bonding requirements for the methane wells; and (2) require that the permit application include detailed plans for: (a) stimulation, (b) horizontal drilling, and (c) plugging of wells drilled by horizontal drilling. To address growing public concern about coal bed methane, the legislature required that coal bed methane applications also include a disclosure of the types and amounts of all fluids and products to be used, and any information necessary to assess the potential impact of stimulation on commercially minable coal resources and underground sources of drinking water
SEA 71 SECTIONS 4 and 5, Public Law No. 140-2011, Ind. Code 14-37-3-14.5 and Ind. Code 14-37-4-1, effective July 1, 2011.

An owner or holder of coal bed methane mineral interest who wants to enter land for the purpose of surveying a drilling location must provide the surface owner a written notice of intent to enter the property at least 5 days before entry. Written notice may be delivered by certified mail to the last known address of each person liable for property taxes on the subject land or by personal delivery.
SEA 71 SECTION 26, Public Law No. 140-2011, Ind. Code 32-23-7-6.5, effective July 1, 2011.

Notice of Permit Applications Being Filed for Coal Bed Methane Well

Starting July 1, 2011, the Division of Oil and Gas must keep a list of parties with experience and interest in coal mining who have requested in writing to be given notice whenever a permit application has been filed with respect to coal bed methane.

Within 15 calendar days of any coal bed methane well permit application being filed, the Division of Oil and Gas must give notice to each coal company on that list that an application has been filed. The notice must include the location, type and depth of the proposed well and the coal seam that will be affected.
SEA 71, SECTION 6, Public Law No. 140-2011, Ind. Code 14-37-4-8(b), effective July 1, 2011.

If a permit application to test or produce coal bed methane proposes to drill into or through one or more coal seams, the application must either include written consent of the coal owner or coal lessee authorizing the drilling or certification by affidavit of the permit applicant that the activities do not and will not result in waste of commercially

minable coal resources or endanger the health and safety of miners. If the applicant provides the certification by affidavit, the applicant must also submit proof that written notice of the application has been received by the owner and, if applicable, the lessee of the coal.
SEA 71 SECTION 7, Public Law No. 140-2011, Ind. Code 14-37-4-8.5(d) and (e), effective July 1, 2011.

Protections of Coal Resource

If ownership of the coal resource is different from the ownership of coal bed methane, either written consent from the coal owner or coal lessee authorizing drilling must be provided or the DNR Director must make a finding that locating, spacing, drilling, equipping, operating or producing a well for coal bed methane purposes will not result in or have the potential to result in any waste of a commercially minable coal resource or endanger the health and safety of miners. Waste is defined as" unreasonably reducing or tending to unreasonably reduce the quantity of commercially minable coal resources that will ultimately be recovered from a mine." For the Director to make the finding, he or she must consider whether any of the following will result in waste or endanger health and safety of miners:

(1) hydrofracturing the coal seam;
(2) horizontal drilling in the coal seam;
(3) any other technology that disturbs the integrity of the coal seam or the strata surrounding the coal seam.

SEA 71, SECTION 7, Public Law No. 140-2011, Ind. Code 14-37-4-8.5(a), (b) and (c), effective July 1, 2011.

If there is a coal lease, the coal owner and the coal lessee who have provided written consent authorizing drilling must include in the written consent a statement acknowledging that recovery of coal bed methane might result in waste of the commercially minable coal resource.

If there is not a coal lease, the coal owner must include in the written consent a statement that the coal owner has not leased the coal for coal mining purposes and acknowledge that the recovery of coal bed methane may result in waste of the commercially minable resource.
SEA 71 SECTION 7, Public Law No. 140-2011, Ind. Code 14-37-4-8.5(f) and (g), effective July 1, 2011.

Preconditions to Issuance of Coal Bed Methane Permit

The Director of DNR may not issue a permit for a coal bed methane well until all of the following have been met:

(1) 30 days has passed since DNR gave notice to the list of coal companies requesting notice.

(2) The permit applicant has submitted proof that it has complied with the written notification required to be given to surface owners. Starting July 1, 2011, unless

the surface owner and owner or holder of oil, gas or coal bed methane mineral interest have otherwise agreed, at least 5 days before an owner or holder of oil, gas or coal bed methane mineral interest enters land to survey for a drilling location notice must be given by personal delivery or by certified mail to the last known address of each person liable for property taxes.
SEA 71 SECTION 26, Public Law No. 140-2011, Ind. Code 32-23-7-6.5, effective July 1, 2011.

(3) If the permit application seeks to drill into or through one or more coal seams to test or produce coal bed methane and the coal owner or coal lessee has not provided written consent for the drilling, the permit application must include an affidavit of the applicant certifying it has diligently inquired into public records and DNR records from coal owners and lessees on the thickness and depth of coal, and the activities will not result in waste of a commercially minable coal resource or endanger health and safety of miners. In addition the applicant must provide proof that written notice of the permit application has been provided to the coal owner and coal lessee.

(4) If the proposal is to drill on land within the permit boundaries of an active underground mine, or on land with an inactive underground mine or on land associated with an underground mine that is projected to be mined and on which there is commercially minable coal resources, the applicant must provide proof it has given notice of the intent to drill to the permittee of the mine, or with inactive underground mines to the person with the right to develop the coal resources.
SEA 71 SECTION 8, Public Law No. 140-2011, Ind. Code 14-37-7-3.5, effective July 1, 2011.

(5) The Division of Oil and Gas has taken into consideration comments received from the coal companies who have requested notice of coal bed methane well applications and the objections made by surface owners who allege waste or endangerment of miner safety.

(6) The applicant has submitted documentation demonstrating that the commercially minable coal seam outside the coal bed methane production area is protected for future underground mining.

(7) DNR has issued a finding that the requirements of the law and rules have been met.

A decision to approve or deny the permit must be made, unless waived by the applicant, no later than 15 days after the 30 day notice has been given to the list of interested coal companies. This provides DNR approximately 75 days in which to act.
SEA 71 SECTIONS 6-8, Public Law No. 40-2011, Ind. Code 14-37-4-8, Ind. Code 14-37-4-8.5 and Ind. Code 14-37-7-3.5, effective July 1, 2011.

Coal Owner and Lessee Right to Object to Issuance of Coal Bed Methane Permit

A person who owns the coal, leases the coal, or has an interest to develop a coal resource (who has not consented to the drilling) may object to issuance of the permit on the basis of waste of a commercially minable coal resource or endangerment of the health and safety of miners. The objection must be filed within 30 days after receipt of notice of the permit application. The Natural Resources Commission is to promulgate a rule that prescribes the procedures for objections. The Division of Oil & Gas may require an

owner or operator to make reasonable modifications to the specific location for the drilling of a well if the modification is necessary to protect commercially minable coal resources from waste and is necessary to protect the health and safety of miners.
SEA 71 SECTION 7 & 8, Public Law No. 140-2011, Ind. Code 14-37-4-8.5 and Ind. Code 14-37-7-3.5, effective July 1, 2011.

If the proposal is to drill a well on land within the permit boundaries of an active underground mine, on land with an inactive underground mine, or on land associated with an underground mine that is projected to be mined and there is commercially minable coal resources on the land, the person may object in writing within 15 days after receipt of notice of the application. The objection may be based on a determination that the well is likely to result in either significant waste of the volume of coal ultimately to be recovered from the underground mine or endanger the health and safety of miners, or both. An objector making such determination must promptly provided a copy of the determination to the owner or operator of the well and to the DNR Director and identify alternative well locations that would reduce or avoid waste of the coal and eliminate the likelihood of endangerment of the health and safety of miners. If the permittee of the underground mine or other person with the right to develop the coal and the owner or operator of the well are not able to agree on a suitable location for the well that will not result in endangerment, the parties may request an informal hearing before the Division of Oil and Gas. The director shall conduct the hearing within 30 days. At the informal hearing, DNR will consider whether the location is an active, inactive, abandoned or projected underground coal mine, whether the location is an unsealed or sealed area with the potential for introducing oxygen into the area from drilling, the proximity and size of coal pillars in an alternate location that might be drilled through, and the equipment, technology and operating or drilling experience history of the operator. If DNR does not identify a suitable location for the well that will not endanger the health and safety of miners and the location for the well is not likely to result in endangerment of health and safety of miners, the owner or operator cannot be required to modify the location and may proceed with the submittal.
SEA 71 SECTION 8, Public Law No. 140-2011, Ind. Code 14-37-7-3.5, effective July 1, 2011.

Coal bed Methane Ventilation

The legislature amended Ind. Code 14-37, the Oil & Gas Law, to specifically provide that its provisions do not apply to methane ventilation, which is governed under an approved federal Mine Safety and Health Administration coal mine ventilation plan.
SEA 71, SECTION 3, Public Law No. 140-2011, Ind. Code 14-37-1-5, effective July 1, 2011.

Property Rights for Coal Bed Methane

The law for conveyance of property for oil and gas estates in land was changed this year to specifically address property interests in coal bed methane. The law now states that oil

and gas does NOT include coal bed methane. Added to the law is a new section defining a coal bed methane estate in land. It is defined to include in the aggregate all rights in land that affect the coal bed methane including in the land, on the land, under the land or that may be taken from beneath the surface of the land. A coal bed methane estate in land includes the right to produce coal bed methane for commercial use or sale and the appurtenant right to use the surface overlying the coal bed methane for coal bed methane operations.
SEA 71 SECTIONS 19 and 22, Public Law No. 140-2011, Ind. Code 32-23-7-1 and Ind. Code 32-23-70.4, effective July 1, 2011.

Also added to the property law is a definition of coal bed methane "production area" and "operations" for coal bed methane. A "production area" is defined as the area of land determined by the operator in which multiple wells are drilled for a common production purpose. The law specifically provides that a coal bed methane production area does not have to be part of a unit or other area in which production is pooled.
SEA 71 SECTION 20, Public Law No. 140-2011, Ind. Code 32-23-7-0.5, effective July 1, 2011.

"Operations" for coal bed methane is defined as: (1) the exploration, surveying, or testing of land for coal bed methane; (2) other investigation of the potential of land for coal bed methane production; (3) the actual drilling or preparation for drilling of wells for coal bed methane; (4) the stimulation of coal bed methane production by hydrofracturing or otherwise; (5) the collection and transportation by pipeline of coal bed methane from the land or nearby land that is part of a coal bed methane production or attempted production of coal bed methane from the land; and (6) any other actions directed toward the eventual production or attempted production of coal bed methane from the land.
SEA 71 SECTION 23, Ind. Code 32-23-7-2.5, effective July 1, 2011.

Interests in coal bed methane may be created for life, for a term of years, or in fee simple. Title to the estate may be by sole ownership, tenancy in common, joint tenancy, tenancy by the entireties, or another manner recognized under Indiana law.
SEA 71 SECTION 27, Public Law No. 140-2011, Ind. Code 32-23-7-7, effective July 1, 2011.

CONSERVANCY DISTRICTS

Natural Resources Commission Expenditures Recoverable from Districts

The DNR Conservancy District law was amended this year to clarify which expenditures by the NRC are recoverable. DNR's enabling statute provides for the establishment of Conservancy Districts for all the following purposes: (1) flood prevention and control, (2) improving drainage, (3) providing for irrigation, (4) providing water supply, including treatment and distribution, for domestic, industrial, and public use, (5) providing for the collection, treatment, and disposal of sewage and other liquid wastes, (6) developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management, (7) preventing the loss of topsoil from injurious water

erosion, (8) storage of water for augmentation of stream flow, and (9) operation, maintenance, and improvement of a work of improvement for water based recreational purposes or other work of improvement that could have been built for any other purpose authorized by law. Conservancy Districts are to repay the NRC for expenditures for hearings and necessary investigations and surveys and studies of District Plans, not to exceed 30% of the amount the Conservancy District paid to independent private engineers for preparation of the plans. The law was amended this year to provide that the NRC expenses to be repaid only include expenses incurred by an assisting or a cooperating state agency for services that are provided by an entity that is not a state agency. Under prior law, this limitation did not exist.
SEA 532 SECTION 25, Public Law No. 165-2011, Ind. Code 14-33-2-20, effective July 1, 2011.

Payment of Predictable District Expenses

The Board of a Conservancy District is now authorized to adopt a resolution to allow money to be disbursed by the financial clerk of the District in advance of Board allowance for certain types of expenses. The financial clerk of a District may make claim payments in advance of Board allowance for the following types of expenses, if a Board resolution has been adopted: (1) payroll, (2) state or federal taxes, (3) license or permit fees, (4) utility payments or utility connection charges, (5) insurance premiums, (6) maintenance or service agreements, (7) leases or rental agreements, (8) bond or coupon payments, (9) property or services purchased or leased from the United States government, its agencies or its political subdivisions, (10) general grant programs where the contracting party posts sufficient security to cover the amount advanced, (11) grants of state funds authorized by law, (12) expenses of emergency circumstances, and (13) expenses included in the Board's resolution. Each payment must be supported by a fully itemized invoice or bill and certification by the financial clerk of the District. The Board shall review and allow the claim at its next regular or special meeting following the preapproved payment of expenses.
HEA 1348 SECTION 7, Public Law No. 129-2011, Ind. Code 14-33-5-20.5, effective July 1, 2011.

EMINENT DOMAIN FOR TRANSPORTATION OF CARBON DIOXIDE BY PIPELINE

This year the General Assembly concluded that the movement of carbon dioxide by pipeline for carbon management applications can assist efforts to reduce carbon dioxide emissions from manufacture of gas using coal and the generation of electricity. The legislature also found that a carbon dioxide pipeline in Indiana is a public use, serves the public interest, and is a benefit to the welfare of the people of Indiana. With that declaration of law, the legislature established a program allowing DNR to issue a certificate of authority to give the company constructing the pipeline facilities the ability to acquire possession by eminent domain of property for the construction, maintenance or operation of a carbon dioxide transmission pipeline.

For purposes of this law, carbon dioxide is defined as a fluid with more than 90% carbon dioxide molecules compressed to a supercritical state. A carbon dioxide transmission pipeline includes all appurtenant facilities, property rights, and easements that are used exclusively for the purpose of transporting carbon dioxide to a carbon management application, including sequestration, enhanced oil recovery, and deep saline injection within or outside of Indiana.

Under this new program, a company must apply to DNR for issuance of a carbon dioxide transmission pipeline Certificate of Authority. The application must include: (1) a fee of $1,000, (2) the signature of a responsible officer of the company, (3) a statement that verifies that the information submitted is true, accurate and complete to the best of the responsible officer's knowledge and belief, and (4) information necessary for DNR to find the following six things: (a) that the applicant has managerial and technical ability to construct, operate, and maintain a carbon dioxide transmission pipeline; (b) that the applicant has the requisite experience in constructing, operating and maintaining a carbon dioxide transmission pipeline; (c) that the applicant has entered into a contract to transport carbon dioxide by pipeline in Indiana with at least one carbon dioxide producer located in Indiana and one end user of carbon dioxide; (d) that the applicant has provided documentation showing the proposed length, diameter and location of the pipeline; (e) that the applicant will construct, operate and maintain the pipeline in accordance with applicable local, state, and federal law, including the federal and state safety regulations and rules governing construction, operation and maintenance of carbon dioxide to ensure safety of pipeline employees and the public; and (f) that the applicant has entered into an agreement with the IURC concerning mitigation of agricultural impacts from construction or has agreed to use the guidelines adopted by the Pipeline Safety Division of the IURC at Ind. Code 8-1-22.6-8.

DNR must review the application and either return it and request a corrected application or find it to be complete and accurate and give notice to the applicant of the date, time and location for a public information meeting that DNR will hold. The applicant must place a copy of the application in a public library in each county where the pipeline is proposed to be located and publish notice in each county of the date, time and location of the public meeting and where to view the application. DNR must hold the public information meeting in a county seat of one of the affected counties and allow the public to make comments and ask questions. DNR must notify the applicant in writing within 90 days that it has approved the application or disapproved the application. If the DNR fails to act in 90 days, the application is deemed approved. The Certificate of Authority issued by DNR must include all of the following:

(1) A grant of authority to construct and operate the pipeline;

(2) A grant of authority to use, occupy and construct pipeline facilities in any designated public right-of-way for construction and operation of the pipeline; and

(3) A grant of authority to take and acquire possession by eminent domain of any property or an interest in property for the construction, maintenance, or operation of the pipeline in the manner provided for the exercise of the power of eminent domain and in accordance with the special provisions of this new law.

The special eminent domain provisions of this law include: (1) paying 125% of the fair market value for agricultural land acquired; (2) paying 150% of the fair market value for residential property acquired; and (3) payment for any loss incurred in a trade or business that is attributed to the exercise of eminent domain.

Within 180 days of completing a carbon dioxide transmission pipeline for which a DNR certificate of authority was issued, the company must provide DNR maps and other documents to show the actual route in Indiana of the carbon dioxide transmission pipeline.

Fees collected by DNR are deposited in the Oil and Gas Environmental Fund which is used for:

(1) Supplementing the cost required to abandon a well that has had a permit revoked;
(2) Covering the costs of remedial plugging and repairing of wells, including the expenses of remedial action;
(3) Covering the cost to mitigate environmental damage or protect public safety against harm caused by regulated oil and gas wells; and
(4) Pipeline safety.

SEA 251 SECTION 18, Public Law No. 150-2011, Ind. Code 14-39; effective May 10, 2011.

FISH & WILDLIFE REGULATION

Right to Hunt, Fish, and Harvest Game

Because of a concern with what the General Assembly saw as over regulation, a Joint Resolution was adopted by both Houses proposing an Amendment to Article 1 of the Constitution of the State of Indiana. The next General Assembly will consider for agreement adding the following to the Indiana Constitution:

> The People have a right to hunt, fish, harvest game, or engage in the agricultural or commercial production of meat, fish, poultry, or dairy products, which is a valued part of our heritage and shall be forever preserved for the public good, subject only to laws prescribed by the General Assembly and rules prescribed by virtue of the authority of the General Assembly. Hunting and fishing shall be the preferred means of managing and controlling wildlife. This Section shall not be construed to limit the application of any provision of law relating to trespass or property rights.

Senate Enrolled Joint Resolution No. 9

Definition of Motorboat

The DNR general definitions law was amended to add “motorboat” for purpose of the fishing laws. Motorboat is as defined at IC 14-22-9-1, specifically as “watercraft

propelled by an internal combustion, steam, or electrical inboard or outboard motor or engine or any mechanical means." The term does not include a personal watercraft.
SEA 532 SECTIONS 2 and 9, Public Law No. 165-2011, Ind. Code 14-8-2-169 and Ind. Code 14-22-8-11, effective July 1, 2011,

Definition of Roe

The DNR defined "roe" for purposes of the commercial fishing law. Roe is defined at Ind. Code 14-22-13-2.5(b) as "the eggs or gametes of shovelnose sturgeon, paddlefish or bowfin.'
SEA 532 SECTION 3, Public Law No. 165-2011, Ind. Code 14-8-2-245.2, effective July 1, 2011.

License to Harvest, Possess or Sell Roe

A new section was added to the DNR laws to require issuance of a license to harvest, possess and sell roe from shovelnose sturgeon, paddlefish, and bowfin. Under this new law, an individual may not harvest, possess, or sell roe without a license issued by DNR. DNR may issue a license only to an Indiana resident, who may then only sell the roe to a DNR-licensed dealer. The individual must leave the roe intact and inside the body of the fish until it is sold to a licensed roe dealer. DNR must promulgate a rule for issuance of licenses and must limit the number of licenses that are available. The minimum application fee for licenses is $1,000 for a roe harvester license, and $5,000 for a roe dealer's license. Licenses are valid for 1 year and expire on December 31 of each year. A knowing or intentional failure to comply with the license or the law or rules will result in suspension or revocation of the license. Once a license is revoked it may not be reinstated. Violation is also punishable as a Class A Misdemeanor
SEA 532 SECTIONS 13, 14 and 15, Public Law No. 165-2011, Ind. Code 14-22-13-2.5, Ind. Code 14-22-13-9 and Ind. Code 14-22-9-10, effective July 1, 2011.

Fishing Guides

The law was changed to rename an individual who takes another person sport fishing for hire a "fishing guide." The person was previously called a charter fishing boat operator. In addition, the penalty for a guide failing to keep accurate records or failing to report monthly has been changed from a Class C infraction to a Class C misdemeanor, adding the possibility of imprisonment for not more than 60 days to the penalty that may be imposed.
SEA 532 SECTIONS16, 17, 18, 19, 20 and 21, Public Law N. 165-2011, Ind. Code 14-22-15-1, Ind. Code 14-22-15-2, Ind. Code 14-22-15-3, Ind. Code 14-22-15-4, Ind. Code 14-22-15-6, and Ind. Code 14-22-15-7, effective July 1, 2011.

Falconry Licenses

The law for "falconry licenses"--a license allowing the taking of wild quarry in its natural state and habitat by means of a trained raptor--was amended this year to allow an

individual residing in another state to use the license of the person's home state, to take wildlife in Indiana, eliminating the need to obtain a permit from Indiana's DNR.
SEA 532 SECTIONS 22 and 23, Public Law No. 165-2011, Ind. Code 14-22-23-1 and Ind. Code 14-22-23-2, effective July 1, 2011.

Wabash River Invasive Species Pilot Program

DNR is required to establish and implement a pilot program to contain and reduce invasive animal species in the Wabash River. DNR may allow taking of a specific invasive animal species by firearm, crossbow or hands alone. DNR may require use of ammunition and may require a hunting or fishing license as part of this pilot program. DNR's rule prohibiting an individual from discharging a firearm or bow and arrows from a motor-driven conveyance while the conveyance is in motion does not apply to this pilot program. DNR is authorized to adopt emergency rules to implement this program.
SEA 532 SECTIONS 9 and 33, Public Law No. 165-2011, Ind. Code 4-22-9-11, and noncode amendment, effective July 1, 2011.

Shipment of Hides and Furs of Furbearing Animals Legally Taken During Open Season

The statutory provision allowing shipment outside of Indiana of legally taken hides and furs of furbearing animals for the 5 day period after the last day of the open season has been replaced. Under the new provision, DNR is to promulgate a rule establishing the length of time after close of the season in which furs and hides may be shipped.
SEA 532 SECTON 10, Public Law No. 165-2011, Ind. Code 14-22-10-3, effective July 1, 2011.

Fishing and Hunting Fees

The law was amended this year to make it possible for DNR to issue fishing, trapping, and hunting licenses either individually or in combination. Under prior law it was not clearly stated, but assumed, that the licenses had to be issued individually.
SEA 532 SECTION 11, Public Law No. 165-2011, Ind. Code 14-22-12-1, effective July 1, 2011.

Commercial Fishing Licenses for the Ohio River Waters of Indiana

DNR may now only issue a commercial fishing license for the Ohio River waters of Indiana to Indiana Residents. Under prior law, DNR could issue such licenses to residents of Indiana or Kentucky.
SEA 532 SECTION 12, Public Law No. 165-2011, Ind. Code 14-22-13-2, effective July 1, 2011.

LAKE AND RIVER ENHANCEMENT FUND

This year the legislature expanded the uses for one-half of the Lake and River Enhancement Fund to add new uses and to add Rivers as well as Lakes for the uses. Previously, DNR could only use one-half for costs incurred to control sediment and associated nutrient inflow into lakes and rivers and for taking actions that will forestall or reverse the impact of that inflow and enhance the continued use of Indiana's lakes and rivers. The other one-half was to be used to pay for lake projects to remove sediment or control exotic or invasive plants or animals. Effective July 1, 2011, the first half remains the same but the second half may now be used to pay for lake or river projects that include, but are not limited to, removing sediment, controlling exotic or invasive plants or animals and for removing logjams or obstructions.
HEA 1343, Public Law No. 207-2011, Ind. Code 6-6-11-12.5, effective July 1, 2011.

LAKE MANAGEMENT WORK GROUP REPORT DEADLINE EXTENSION

The 2010 law creating a Lake Management Work Group to monitor, review, coordinate and implement the Work Group's recommendations from a 1997 and a 2000 law and to update and coordinate the implementation of new and existing recommendations has been given one more year to issue its final report. That report had been due July 1, 2011, but is now due July 1, 2012.
HEA 1097, Public Law No. 181-2011, Ind. Code 2-5.5-3-5, effective June 30, 2011.

MOTOR BOAT REGULATION

Sanction for Refusal to Submit to Chemical Test

Before the law was changed this year, a person who refused to submit to a chemical test (analysis of blood, breath, urine or other bodily substance for intoxication by alcohol, controlled substances or drugs) was penalized by a court order that the person could not operate a motorboat for at least 1 year. Now, the automatic sanction for refusal to submit to a chemical test is dependent upon the law enforcement officer advising the person in advance of the sanction for refusal to submit to the test. In addition, when a person refuses to submit to a test after having been advised that the refusal will result in suspension of operating privileges, the arresting law enforcement officer will take the person's driver's license, thereby suspending both the right to operate a motorboat and a motor vehicle until the initial hearing is held. The law enforcement officer will provide a receipt for the driver's license, will submit a probable cause affidavit to the prosecuting attorney of the county in which the offense occurred, and will send a copy of the probable cause affidavit to the bureau of motor vehicles. The person will be arrested and taken before a judge in the county in which the arrest is made for an initial hearing in court. If the person arrested makes bail before the person's initial hearing, the initial hearing must occur at within 20 calendar days after the person's arrest. This same procedure will be followed for a person who submits to a chemical test when the results of the test indicate evidence of intoxication

SEA 532 SECTIONS 4 and 6, Public Law No. 165-2011, Ind. Code 14-15-3-11, and Ind. Code 14-15-8-15, effective July 1, 2011.

Chemical Tests When Motorboat Involved in Fatal Accident or Accident Involving Serious Bodily Injury

A new section was added to the Motorboat Regulation Law requiring a law enforcement officer to administer a portable breath test or chemical test to any person believed to have operated a motorboat that was involved in a fatal accident or an accident involving serious injury. When a portable breath test indicates the presence of alcohol or does not find alcohol, but the law enforcement officer believes the person to be under the influence of a controlled substance or another drug, or when a person refuses to submit to a portable breath test, the law enforcement officer must offer a chemical test to the person. A law enforcement officer may offer a person more than one portable breath test or chemical test, but all tests must be administered within three hours after the accident occurred.

SEA 532 SECTION 5, Public Law No. 165-2011, Ind. Code 14-15-3-12.5, effective July 1, 2011.

Motor Sports Regulation

A new chapter was added to DNR's laws for regulation of motorboats involved in motor sports. In addition to the existing motorboat laws, an individual may no longer:

(1) Operate a motorboat inboard or have the inboard engine of a motorboat run idle when an individual is holding onto the swim platform, swim deck, swim step, swim ladder or any part of the exterior of the transom of a motorboat while the boat (a) is underway at any speed, or (b) while a person is swimming, or floating on or in the wake directly behind a motorboat that is underway using the wake itself as the means of propulsion; or

(2) Operate a motorboat with riders on a towed device that exceeds the listed capacity of the towed device or the owner's manual.

Violation of any of these prohibitions is a Class C infraction, which is punishable by a fine of up to $500.

SEA 532 SECTION 7, Public Law No. 165-2011, Ind. Code 14-15-13, effective July 1, 2011.

OFF-ROAD VEHICLES

The law requiring an off-road vehicle to be registered before operating on public property was amended this year to create an exception for vehicles that are owned or leased and used for official business by the state, a municipal corporation or a volunteer fire department. The law was also amended to allow a person seeking registration to provide the certificate of tile in lieu of the bill of sale for the off-road vehicle. Finally DNR was given one additional use for the Off-Road Vehicle and Snowmobile Fund. Now, in addition to constructing and maintaining trails, DNR can use the money to pay

operational expenses of properties that are managed by DNR and on which off-road vehicle or snowmobile trails are located.
HEA 1082, Public Law No. 25-2011, Ind. Code 14-16-1-8, and Ind. Code 14-16-1-9; effective July 1, 2011

OIL & GAS REGULATION

Emergency Rules

DNR was given the authority starting July 1, 2011 to adopt emergency rules to carry out the provisions of the Oil and Gas laws and the Other Petroleum Regulation law. Emergency rules adopted under Ind. Code 4-22-2-37.1 must be adopted by the Natural Resources Commission, assigned a document control number by the publisher of the Indiana Register, and published in the Indiana Register to become effective. An emergency rule cannot last more than 90 days.
SEA 71, SECTION 2, Public Law No. 140-2011; Ind. Code 14-10-2-5, effective July 1, 2011.

Permit Issuance Authority

Effective July 1, 2011, the Oil and Gas law has been changed to give permit issuing authority to the DNR Director. Oil and gas permits were previousl issued by the Natural Resources Commission.
SEA 71, SECTION 6, Public Law No. 140-2011; Ind. Code 14-37-4-8(a), effective July 1, 2011.

Plugging Wells

Effective July 1, 2011, the DNR Director has the authority to approve methods or materials for plugging a well, other than just mud-laden fluid, cement or mechanical plugs used singly or in combination.
SEA 71 SECTION 11, Public Law No. 140-2011, Ind. Code 14-37-8-2(a), effective July 1, 2011.

Effective July 1, 2011, plugging of a dry hole immediately following the completion of drilling or redrilling operations requires 12 hours verbal or written notice to DNR. Previously, notice was required at least 48 hours before plugging. The law was also clarified to allow either verbal or written notice and the time from which notice is required was clarified as before “beginning” the plugging. The law also now requires that an oil and gas inspector be present during the plugging of the well, unless as part of the notice the driller informs the oil and gas inspector of the plan for plugging the well and the oil and gas inspector gives verbal or written approval of the plan, waiving inspection.
SEA 71, SECTION 12, Public Law No. 140-2011, Ind. Code 14-37-8-4, effective July 1, 2011.

Effective July 1, 2011, other wells to be plugged (unless an emergency or other urgent conditions exist) require written notice of intent to plug be given to DNR on a form provided by DNR at least 10 days before beginning the plugging of the well. The notice must include a plan for plugging the well that describes the specific methods that will be used and demonstrates compliance with the law. The plugging may not begin until DNR provides written approval. The owner or operator of the well must give an oil and gas inspector verbal or written notice at least 48 hours before the scheduled time to begin plugging operations on a well.
SEA 71, SECTION 13, Public Law No. 140-2011, Ind. Code 14-37-8-4.2, effective July 1, 2011.

Effective July 1, 2011, an exception to the requirement for prior notice to DNR and either written plan approval or the presence of the oil and gas inspector during plugging, has been added to the law for emergencies or other urgent conditions that require immediate plugging of the well. This exception does not apply to plugging a well that is a dry hole. An emergency condition exists if a well is found to be leaking or discharging oil, gas or other fluids in quantities that are capable of causing substantial harm to the environment or posing an immediate threat to public health or safety. An urgent condition exists if delay in the plugging of a well will result in a substantial increase in the cost to plug the well due to impending weather or other conditions that are beyond the control of the owner or operator of the well. In an emergency or urgent condition situation, an owner or operator may begin plugging a well upon verbal approval of the Director of the Division of Oil and Gas or his designated representative. The oil and gas inspector need not be present for the plugging, unless as part of the verbal approval, the Director imposed the condition that the inspector be present.
SEA 71 SECTION 14, Public Law No. 140-2011, Ind. Code 14-37-8-4.3, effective July 1, 2011.

Not later than 30 days after completion of well plugging operations, the operator must submit a report of well plugging to DNR describing in detail the specific methods used to plug the well. The report must be on a form provided by DNR, include an affidavit that certifies the well was plugged in accordance the law, and be signed by both the person who performed the well plugging operations and the well owner or operator.
SEA 71 SECTION 15, Public Law No. 140-2011, Ind. Code 14-37-8-4.4, effective July 1, 2011.

Waste

Waste of oil or gas law is prohibited under the Oil and Gas law. A new section was added to the law, effective July 1, 2011, to allow the owner or operator of a coal mine to burn in flares the coal bed methane produced from a coal bed methane well if the burning is necessary to protect coal miners' safety or if there is no market for sale of the coal bed methane.
SEA 71 SECTION 17, Public Law No. 140-2011, Ind. Code 14-37-11-3, effective July 1, 2011.

Protection of Commercially Minable Coal Resource

Effective July 1, 2011, the existing law for protection of commercially minable coal resources when drilling oil wells has changed. First, the law will now define commercially minable coal resources as coal identified in an affidavit filed with the Division of Oil and Gas by the owner or lessee of the coal or another person with an interest to develop the coal. The affidavit must include a map prepared by a licensed engineer or registered geologist showing the location of the coal that is targeted for later commercial production, and the location of the coal seam or seams of interest and the approximate depth of the coal seam or seams. The affidavit must state that the coal can be mined using generally-accepted underground mining practices and is of sufficient quantity and quality to be commercially saleable. It is not necessary for a coal mining permit to have been filed with the Division of Surface Coal Mining and Reclamation in order for the affidavit to be filed. The Division of Oil and Gas must keep the affidavit and map (but not the name of the person filing the affidavit) confidential and use the affidavit and map solely for determining if a commercially minable coal resource is present in an area for which an oil and gas permit application has been filed. The Division of Oil and Gas must use the affidavit to determine if a well location is in an area underlain by coal when an application is filed or when an inquiry is made from a person interested in oil and gas explorations or drilling of a well for oil and gas purposes.
SEA 71 SECION 10, Public Law No. 140-2011, Ind. Code 14-37-7-8, effectie July 1, 2011.

Second, the protective measures for commercially minable coal resources now applies to drilling a vertical well or the vertical part of a horizontal well that is completed as a producing well. Prior law only applied to a well, generally, without this additional clarification.
SEA 71 SECTION 9, Public Law No. 140-2011, Ind. Code 14-37-7-4(a), effective July 1, 2011.

Third, the well driller is no longer required to document that the production string of casing has been properly centralized and cemented by a sonic cement bond-variable density log. Eliminating this required log also means that the prior requirement to notify DNR and the coal permittee 48 hours prior to commencing logging and the requirement to allow the coal permitteee to be present during the logging to examine the log has been eliminated. Now, the well driller must submit an affidavit to DNR and to the coal permittee no later than 30 days after completion of the well. The affidavit (on a form provided by DNR) must verify that the commercially minable coal resource was protected by placing cement behind the casing in the area between 50 feet below and 100 feet above the commercially minable coal seam and provide evidence that adequate cement was circulated behind the casing. The affidavit must also include a cross-section drawing of the well showing the location of each centralizer in the completed well.
SEA 71 SECTION 9, Public Law No. 140-2011, Ind. Code 14-37-7-4(a) and (b), effective July 1, 2011.

Fourth, running a cement bond-variable density log or other similar logging procedure to determine the adequacy of cement bonding will only be required if the Director of the Division of Oil and Gas believes, based on the information provided in the affidavit, that either adequate cement has not been circulated to protect the commercially minable coal resource or that centralizers were not placed at locations necessary to properly centralize the casing through the coal seam. The owner or operator of the well must provide the Division of Oil & Gas and the coal permittee a copy of the required logs no later than 30 days after the date of completion of any logging prodedure.
SEA 71 SECTION 9, Public Law No. 140-2011, Ind. Code 14-37-7-4(c) and (e), effective July 1, 2011.

Fifth, if the logging procedure indicates that adequate cement bonding has not occurred, the Division of Oil & Gas Director will order remedial action to achieve adequate bonding. Under prior law, the Natural Resources Commission ordered remedial action only after a bonding failure occurred. If significant water, gas or other fluid moves into the underground coal mine through the annular space outside the protective casing string of a well, the Division of Oil & Gas Director will render the coal seam protection inadequate, and order the owner or operator of the well to perform additional remedial action to ensure protection of the coal resource and the health and safety of miners.
SEA 71 SECTION 9, Public Law No. 140-20-11, Ind. Code 14-37-7-4(f), effective July 1, 2011.

Rules for Plugging Wells that Impact Commercially Minable Coal Resources

The Natural Resources Commission has been given the authority and is required to adopt rules to prescribe plugging methods for wells that impact commercially minable coal resources. The special plugging rules apply unless the coal owner or coal lessee gives permission to follow the normal plugging rules.
SEA 71 SECTION 11, Public Law No. 140-2011, Ind. Code 14-37-8-2(b) and (c), effective July 1, 2011.

Notice Required to Surface Owner for Right of Entry

An owner or holder of an oil or gas mineral interest who wants to enter land for the purpose of surveying a drilling location must provide the surface owner a written notice of intent to enter the property at least five days before entry. Written notice may be delivered by certified mail to the last known address of each person liable for property taxes or by personal delivery.
SEA 71 SECTION 26, Public Law No. 140-2011, Ind. Code 32-23-7-6.5, effective July 1, 2011.

INDIANA STATE MUSEUM AND HISTORIC SITES CORPORATION

Effective July 1, 2011, the law creating the Division of Museums and State Historic Sites within DNR is repealed and a new Indiana State Museum and Historic Sites Corporation is created. The corporation is not a state agency, but will serve an essential governmental

function. The corporation is a public body corporate and politic. The Corporation is subject to a biennial audit by the State Board of Accounts and the Corporation's Board of Trustees must obtain the Governor's approval before appointing a Chief Executive Office. Employees of the Corporation are not state employees. The Corporation's records are available under the Public Records law. The rules adopted by the Natural Resources Commission related to state museums and historic sites will be treated as rules applying to the Corporation. The Board of Trustees consists of 13 persons appointed by the Governor and 12 additional persons appointed by the Board. Permanent, non-voting members of the Board include the Chief Executive Officer of the Corporation, the Governor or his designee, the DNR Director or his designee, and one member of the House of Representatives and one member of the Senate, each appointed by the Chairman of the Legislative Council,. Each Board member must be a resident of Indiana. Not more than two members can be from the same county. No more than 13 of the 25 may be from the same political party. Two members must be recognized supporters of historic sites. Members' initial term is three years. A member may be reappointed but may serve no more than three 3-year consecutive terms. The Governor will appoint the Chair of the Board. The Board is to elect a vice chair, secretary and a treasurer. Thirteen members constitute a quorum. The Board is to adopt bylaws establishing procedures for the Board. Members who are not state employees are entitled to the minimum salary per diem of $35 per day, travel expenses and other expenses actually incurred in connection with the members' respective duties. A state employee who is not a member of the legislature is entitled to reimbursement for traveling expense and for other expenses actually incurred in connection with the member's duties. Each member of the general assembly is entitled to the same per diem, mileage and travel allowances paid to legislative members of interim study committees.

Title to property constituting the State Museum and acquired by the Board must be held in the name of the State of Indiana. For purposes of this law, "museums" include the State Museum located in the White River State Park and historic sites. The Board has the following powers and duties:

(1) Operate and administer the State Museums;
(2) Maintain accreditation of the State Museums;
(3) Collect, preserve, display, and interpret artifacts and materials reflecting the cultural and natural history of Indiana;
(4) Prepare and maintain a statewide inventory of the artifacts and materials in its collections; and
(5) Uphold the highest professional and ethical standards as adopted by the American Association of Museums.

The Board may also do the following:

(1) Any and all acts and things necessary, proper or convenient to carryout the law;
(2) Hold meetings subject the Open Door law;
(3) Adopt an official seal;
(4) Adopt bylaws;
(5) Make and execute contracts necessary to the exercise of the Board's powers;
(6) Acquire by grant, purchase, gift, devise, or lease or otherwise and hold, use, sell, lease, manage, operate, clear, improve, encumber, transfer, convey, exchange, or

dispose of real and personal property, facilities, money or stocks and any right of interest necessary of useful for carrying out the Board's duties;

(7) Purchase insurance to protect against loss;

(8) Enter into contracts or other arrangements with the Indiana Department of Administration for financing of the State Museums;

(9) Allocate space in museums;

(10 Fix and collect rents, admission charges, fees, tolls, and other user charges for the State Museums, restaurants, other facilities and programs, lectures, classes, tours, and trips;

(11) Maintain shops and restaurants on property the Board manages and employ or contract with persons to manage the shops and restaurants;

(12) Make or sell pictures, models, books, and other representation of the museum and its artifacts and exhibits, souvenirs, crafts, art, videotapes, digital video discs, and other merchandise;

(13) Pay royalties, license fees, or charges for exhibits, artifacts, artwork, or materials;

(14) Own copyrights, trademarks, and service marks and enforce the Board's rights with respect to ownership;

(15) Conduct market research concerning the State Museums; and

(16) Adopt rules pursuant to the State's rulemaking statute to carry out the purposes of the law.

The Board may, in conformance with rules that have established a procedure, accept or refuse to accept an offered gift of historic property. The Board may sell, lease or exchange historic property it administers. The Board may sell, donate, or exchange artifacts in the state Museums' collections to or with other public or nonprofit museums or historical societies.

The Board may donate or make short term loans of artifacts in the museums' collections to other public or nonprofit museums or historical societies.

The Board is exempt from state gross retail tax for transactions involving tangible personal property, public utility commodities, and public utility services. The Board is not required to pay any taxes or assessments on any property acquired or used or upon income from the property. A State Museum and Historic Sites Development Fund has been created. The following shall be deposited in the Fund: (1) proceeds from admission and user fees, (2) sales at museum shops, (3) facility rentals, (4) restaurant sales, (5) any other income generated by the State Museums, and (6) gifts of money or the proceeds from the sale of gifts donated to the State Museums. The Corporation may spend money in the fund for any purpose of the corporation that complies with the law, including purchasing real property and historical artifacts and specimens, construction of facilities, and betterments and improvements at historic sites. The Board may establish a nonprofit subsidiary corporation to be known as the Indiana State Museum Foundation that is exempt from federal income taxation in order to solicit and accept private funding, gifts, donations, bequests, devises and contributions.

A new section has been added to the law making it a Class B Misdemeanor to knowingly or intentionally alter, without a permit, historic property located on property owned or leased by the state. A Class B Misdemeanor is punishable by imprisonment of not more than 180 days and a fine of not more than $1,000.

The Chief Executive Office of the Corporation may enter into a memorandum of understanding with the Department of Transportation to maintain historical services, a memorandum of understanding with the Department of Corrections to provide assistance in maintaining historic sites, and a memorandum of understanding with DNR to provide assistance or services to repair or clean up a state historic site if a natural disaster or severe weather has occurred and to provide equipment for special events.

The State Museum's great hall has been named the "Governor Frank O'Bannon Great Hall." The Chief Executive Officer is to install and maintain appropriate public signage on and around the museum to display the name and highlight the life and career of Governor Frank O'Bannon.
SEA 537, Public Law No. 167-2011, Ind. Code 4-37, Ind. Code 14-8-2-77, Ind. Code 14-8-2-103, Ind. Code 14-8-2-107, Ind. Code 14-8-2-124, Ind. Code 14-8-2-125, Ind. Code 14-8-2-126, Ind. Code 14-8-2-202, Ind. Code 14-8-2-258, Ind. Code 14-9-4-1, Ind. Code 14-10-2-5, Ind. Code 14-10-3-1, Ind. Code 14-12-2-14, Ind. Code 14-20-4-3, Ind. Code 14-20-4-10, Ind. Code 14-20-6-3, Ind. Code 14-20-7-3, Ind. Code 14-20-8-3, Ind. Code 14-20-8-4, Ind. Code 14-20-9-1, Ind. Code 14-20-9-4, Ind. Code 14-20-9-5, Ind. Code 14-20-10-2, Ind. Code 14-20-12-3, Ind. Code 14-20-16-1, Ind. Code 14-20-16-2, Ind. Code 34-30-2-6.8, Ind. Code 35-43-1-6, Ind. Code 14-8-2-266 (repealed), Ind. Code 14-8-2-283 (repealed), Ind. Code 14-20-1 (repealed), effective July 1,2011

SOIL AND WATER CONSERVATION DISTRICTS

Legislative Policies

The law was amended this year to add a tenth conservation purpose to DNR's Soil and Water Conservation legislative policies. Current law makes it the policy of the General Assembly to provide for the proper management of soil and water resources, the control and prevention of soil erosion, the prevention of flood water and sediment damage, the prevention of water quality impairment, and the conservation, development, use, and disposal of water in the watersheds of Indiana to accomplish the following nine purposes:

(1) Conserve the natural resources, including wildlife,
(2) Control floods,
(3) Prevent impairment of dams and reservoirs,
(4) Assist in maintaining the navigability of rivers and harbors,
(5) Protect the water quality of lakes and streams,
(6) Protect the tax base,
(7) Protect public land,
(8) Protect and promote the health, safety, and general welfare of the people of

Indiana, and

(9) Protect a high quality water resource.

Added this year as number (10) is to protect and improve soil quality.

HEA 1348 SECTION 1, Public Law No. 129-2011, Ind. Code 14-32-1-2, effective July 1, 2011.

Selection of Supervisors for Soil and Water Conservation Districts

The governing body of a Soil and Water Donservation District consists of five supervisors, two of whom are appointed and three of whom are elected. The criteria for an elected supervisor were changed this year to no longer require that the individual occupy a tract of land that is more than 10 acres. Now the individual must only occupy a tract of land located in the District. Previously the law had allowed the 10-acre requirement to be waived if the District requested a waiver of that requirement and the waiver was approved by the Soil Conservation Board (an entity within the Indiana Department of Agriculture that makes soil and water conservation policy. The Soil Conservation Board consists of seven members appointed by the Governor, four who must be land occupiers with farming interests, and three who must be land occupiers with nonfarming interests.)

HEA 1348 SECTION 2, Public Law No. 129-2011, Ind. Code 14-32-4-1, effective July 1, 2011.

Election of Supervisors

An additional change was made to the law to eliminate the secret ballot for purposes of voting to elect a supervisor. During the first quarter of each calendar year, a Soil and Water Conservation District must hold an annual meeting of all land occupiers in the District. At the meeting, the supervisors make a report of the activities and financial affairs of the District since the last annual meeting and an election is held for the land occupiers present to elect one supervisor to a three year term beginning on the date of the meeting. Prior law provided for the election to be conducted by secret ballot. The requirement for a secret ballot has been eliminated effective July 1, 2011. If only one candidate is nominated, the election is to be done by a show of hands. If more than one candidate is nominated, a ballot will be distributed to each land occupier present at the meeting and the ballots will be collected and counted after each person present has had an opportunity to vote and the vote results will be reported to the Chairman.

HEA 1348 SECTIONS 3 and 4, Public Law No. 129-2011, Ind. Code 14-32-4-6 and Ind. Code 14-32-4-8, effective July 1, 2011.

Supervision of District Personnel

The District Supervisors were already authorized to employ necessary personnel and to determine the qualification and duties of the personnel. Added to the law this year was a requirement that District Supervisors provide supervision to the personnel hired.

HEA 1348 SECTION 5, Public Law No. 129-2011, Ind. Code 14-32-4-18, effective July 1, 2011.

Clean Water Indiana Fund

The Clean Water Indiana program is administered by the Division of Soil Conservation in the Department of Agriculture. The program provides financial assistance to Soil and Water Conservation Districts, to land occupiers, and to conservation groups so they may implement conservation practices to reduce nonpoint sources of water pollution through education, technical assistance, training, and cost sharing programs. A small change was made this year to how money in the fund may be spent. Previously, money could be used to qualify for federal matching funds for county soil survey computerization. The law was changed to allow the fund to be used to qualify for *any* federal matching funds.
HEA 1348 SECTION 6, Public Law No. 129-2011, Ind. Code 14-32-8-7, effective July 1, 2011.

SURFACE COAL MINING AND RECLAMATION

Abandoned Coal Mine Reclamation Fund

The Abandoned Mine law was amended this year to establish two separate funds for deposit of federal money received to restore abandoned mine lands: the Acid Mine Drainage Abatement and Treatment Fund and the Reclamation Set-Aside Fund. The Acid Mine Drainage Abatement and Treatment Fund will be used to abate the causes and to treat the effects of acid mine drainage. The Reclamation Set-Aside Fund will be used for restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices, including measures for conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources and agricultural productivity. The funds include money from the federal government, accrued interest and other investment earning and gifts, grants, donations or appropriations from any source. No more than 30% of the money received from the federal government on an annual basis may be spent on water supply restoration projects.

The mine fund law was also amended to clarify that expenditure priorities are to be for protecting public health and safety, not general welfare. Finally the law was amended to remove as a priority research and demonstration projects related to developing surface mining reclamation and water quality control program methods and techniques, protection, repair, replacement, construction or enhancement of public facilities, such as utilities, roads, recreation and conservation facilities adversely affected by coal mining, and development of publicly owned land for recreation, historic, conservation and reclamation open space benefits.
SEA 532, Public Law No. 165-2011, SECTIONS 1, 26, 27, 28, 29 and 30, Ind. Code 14-8-2-107, Ind. Code 14-34-19-1, Ind. Code 14-34-19-1.3, Ind. Code 14-34-19-1.5, and Ind. Code 14-34-19-3, and Ind. Code 14-34-19-4.

Provisions concerning liens that may be filed by DNR for the amount of increase in market value of privately owned land as a result of the restoration, reclamation,

abatement, control or prevention of adverse affects of past coal mining practices, was also revised. Under prior law, DNR could not file a lien on property of a person who owned it before May 2, 1977. That prohibition has been removed. Now a lien may not be filed only if the private landowner did not consent to, participate in or exercise control over the mining operation that necessitated the reclamation performed under this law.
SEA 532, Public Law No. 165-2011 SECTION 31, Ind. Code 14-34-19-12, effective July 1, 2011.

SUSTAINABLE NATURAL RESOURCES TASK FORCE

Effective May 9, 2011 a new ten-member Sustainable Natural Resources Task Force has been established to accomplish set duties prior to its expiration date of May 1, 2013.. The Task Force is to collect programmatic and funding information concerning current natural resource protection programs in Indiana and in other states, emphasizing bordering states. The Task Force is also to perform a needs assessment for the natural resource programs in Indiana, including identifying current programs and the costs associated with each. The Task Force is required to present a progress report to the legislative Natural Resources Study Committee at its first and last meetings of 2012. Beginning November 1, 2012, the Task Force must conduct any follow-up research and policy analysis directed by the Natural Resources Study Committee and prepare a final report setting forth the findings and recommendations of the Task Force, including a report card on the health of natural resources in Indiana. The final report must be completed by January 1, 2013 and be submitted to the Governor and the General Assembly.

The members of the Task Force include:

(1) Two members of the House of Representatives, not of the same political party, appointed by the Speaker of the House;
(2) Two members of the Senate, not of the same political party, appointed by the President Pro Tempore of the Senate;
(3) Three members appointed by the Speaker of the House, each of whom is recommended by one of the following three organizations: the Indiana Association of Soil and Water Conservation Districts, the Indiana Wildlife Federation, and the Indiana Land Protection Alliance;
(4) Three members appointed by the President Pro Tempore of the Senate, each of whom is recommended by one of the following three organizations: the Indiana Farm Bureau, the Indiana Forestry and Woodland Owners Association, and the Nature Conservancy.

A vacancy is to be filled within 30 days by the authority who appointed the person no longer serving. Task Force members serve without compensation, except the members of the General Assembly are entitled to receive the same per diem, mileage and travel allowance paid to legislative members of interim study committees. Six members constitute a quorum. The first meeting must have been held no later than May 30, 2011. The Task Force may seek technical assistance from DNR, the Department of Agriculture, and IDEM. The Task Force may also seek and accept assistance from public universities

willing to provide research, scientific expertise and policy analysis, if the Task Force deems it necessary.
SEA 375, Public Law No. 106-2011, Ind. Code 2-5-31, effective May 9, 2011.

LAWS AFFECTING AGRICULTURE

BIOMASS ANAEROBIC DIGESTION AND BIOMASS GASIFICATION FACILITIES

Starting July 1, 2011, before a person constructs a biomass anaerobic digestion facility or a biomass gasification facility or expands one of those types of facilities, the person must obtain prior approval from IDEM. Biomass is biological material that is available on a renewable recurring basis and is used as a source of renewable energy and includes agricultural crops, agricultural wastes and residues, wood and wood byproducts, animal wastes and byproducts, including manure, aquatic plants, algae and byproducts of processing agricultural crops. A biomass anaerobic digestion facility is a facility that incorporates equipment that promotes the decomposition of biomass to simple organics and biogas products in an oxygen free environment in a closed, sealed chamber. This includes a methane recovery system. A biomass gasification facility is a facility that incorporates equipment to carry out a thermochemcial process that with little or no oxygen converts biomas into a synthesis gas. Neither of these facilities are subject to regulation as a solid waste processing facility, unless IDEM determines that the facility has an input that is a combination of biomass and solid waste. An anaerobic digestion or gasification facility that has approval under the air program is not subject to this statute. A person who proposes to construct or expand a biomass anaerobic digestion facility or a biomass gasification facility at a confined feeding operation regulated under IC 13-18-10 must obtain approval under the rules regulating the confined feeding operation. The Solid Waste Management Board is authorized to promulgate rules to implement this law.
HEA 1187 SECTIONS 1, 2, 3 and 13; Public Law No. 189-2011, Ind. Code 13-11-2-16.6, Ind. Code 13-11-2-16.7, Ind. Code 13-11-2-16.8 and Ind. Code 13-20-10.5

DEFINITION OF SOLID WASTE

The definition of “solid waste” for purpose of all environmental management laws has been amended to exclude all manure or crop residues that are returned to the soil as fertilizers or soil conditions as part of a total farm operation, whether or not it occurs at the point of generation.
HEA 1187 SECTION 10, Public Law No. 189-2011, Ind. Code 13-11-2-205, effective July 1, 2011.

EXCEPTION TO LIABILITY FOR RUNOFF OF PROPERLY APPLIED FERTILIZER

The Water Pollution Control law was amended this year to provide that it is not a violation when fertilizer material runs offs during a storm event or during irrigation and enters waters of the state causing or contributing to a polluted condition of the waters, if the fertilizer material was applied to the land in compliance with rules of the State

Chemist. Before IDEM can issue a Notice of Violation, IDEM must ask the potential violator to provide documentation of compliance with the State Chemist's rule. The potential violator has 30 days to submit documentation after receiving IDEM's request. IDEM may not issue a Notice of Violation if IDEM determines the person did comply with the State Chemist's rules for fertilizer application. Before the rules adopted by the State Chemist take effect, a person may still demonstrate it qualifies for this exception to liability if the person maintains documentation that it complied with the conditions for land application of manure requirements under IC 13-18-10 or the National Resources Conservation Services land application standards. Notwithstanding this exception to liability, a person can still be held liable for killing wild animals under the Department of Natural Resources law for destruction of wild animals by pollutants, IC 14-22-10-6.
HEA 1187 SECTION 11; Public Law No. 189-2011, Ind. Code 13-18-4-5, effective July 1, 2011.

The State Chemist is required to adopt rules before July 1, 2012 concerning the staging, management and land application of fertilizer material.
HEA 1187 SECTION 14, Public Law No. 189-2011, Ind. Code 15-16-2-44, effective July 1, 2011.

LIMITED LIABILITY FOR AGRITOURISM ACTIVITIES

A new chapter was added to the limited liability law to provide limited liability for Agritourism activities. This new chapter provides that an agritourism provider is not liable for an injury to a participant or the death of a participant resulting from an inherent risk of agritourism activities. Agritourism activity is defined to include three types of activities: (1) activity at an agricultural, horticultural, or agribusiness operation where the general public is allowed or invited to participate in, view, or enjoy the activities for recreational, entertainment, or educational purposes, including farming, ranching, historic and cultural agricultural activities, self-pick farms or farmers' markets; (2) an activity involving an animal exhibition at an agricultural fair; and (3) natural resource based activities and attractions, including hunting, fishing, hiking, and trail riding. The agritourism provider includes the person who provides the opportunity and the person's employees and authorized agents who offer or conduct agritourism activities on behalf of the provider. This limitation on liability applies whether or not the participant pays to participate. "Inherent risks" of agritourism activities include surface and subsurface conditions and natural conditions of land, vegetation and waters, the behavior of wild or domestic animals, the ordinary dangers of structures or equipment when the structures or equipment are being used or stored by the provider in a manner and for a purpose for which a reasonable person should know that structures or equipment is intended, and the negligent acts of a participant that may contribute to injury including failing to follow instructions given by the agritourism provider, failing to exercise reasonable caution while engaging in the activity or failing to obey written warnings or posting on the premises.

This limitation on liability does not apply if the agritourism provider has actual knowledge or reasonably should have known of a dangerous condition or dangerous

propensity of a particular animal and the provider does not make the danger known to the participant and the danger proximately causes injury, damage or death to the participant. The limitation of liability also does not apply if the agritourism provider fails to properly train or improperly or inadequately trains employees who are actively involved in the agritourism activities and an act or omission of the employee proximately causes injury, damage or death to a participant. Finally the limitation on liability does not apply to an act or omission that constitutes willful or wanton disregard for the safety of the participant or to an intentional injury to a participant.

If the Agritourism Provider charges money to participate, the agritourism provider must post and maintain a sign at a clearly visible location at the main point of entrance on which is printed in black letters, each letter being at least one inch in height, the following warning: "WARNING Under Indiana law, an agritourism provider is not liable for an injury to, or the death of, a participant in agritourism activities at this location if the death or injury results form the inherent risk of agritourism activity. Inherent risks of agritourism activities include risks of injury inherent to land, equipment, and animals as well as the potential for you to act in a negligent manner that may contribute to your injury or death or for other participants to act in a manner that may cause you injury or cause your death. You are assuming the risk of participating in this agritourism activity." To have this limitation on liability the Agritourism Provider who charges for admission must also obtain a signed release from the participant indicating the participant has received written notice of the same warning as is required to be posted on the sign.
HEA 1133, Public Law No. 3-2011, Ind. Code 34-31-9, effective July 1, 2011.

SATELLITE MANURE STORAGE STRUCTURES

Under this new law, a person may not, after June 30, 2011, start construction of a satellite manure storage structure or expansion of satellite manure storage structure that increases manure containment capacity, without obtaining the prior approval of IDEM. IDEM's Water Pollution Control Board is given authority to adopt rules for the construction, operation and maintenance of a satellite manure storage structure. A satellite manure storage structure is defined as a building, a lagoon, a pad, a pit, a pond or a tank that is not located at a livestock or poultry production area and is designed for use in whole or part for the storage of at least one million gallons of manure or at least five thousand cubic yards of manure. A definition of manure has also been added to IDEM's law. Manure means: (1) liquid or solid animal excreta, (2) waste liquid generated at a livestock or poultry production area including excess drinking water, cleanup water, contaminated livestock truck or trailer washwater, milking parlor wastewater, milk house washwater, egg washwater and silage leachate, (3) any precipitation or surface water that has come into contact with liquid or solid animal excreta, used bedding, litter, or any other materials generated at a livestock or poultry production area, and (4) all other materials generated at a livestock or poultry production area commingled with the above materials.
HEA 1187, SECTIONS 7, 9 and 12; Public Law No. 189-2011, Ind. Code 13-11-2-79.5, Ind. Code 13-11-2-196.2 and Ind. Code 13-18-10.5, effective July 1, 2011.

LAWS AFFECTING ENERGY

CLEAN ENERGY FINANCIAL INCENTIVES

The definition of a renewable energy resource included in the Clean Energy Financial Incentives law was modified this year to make reference to a new definition added in a new law for the Voluntary Clean Energy Portfolio Standard Program. "Renewable energy resources" is now defined the same as "clean energy," except that it includes only the first sixteen sources and excludes the last five sources of clean energy, but also includes two other sources, low temperature, oxygen starved gasification of municipal solid waste, and methane recovered from landfills for the production of electricity. Newly added this year to the definition of a renewable energy resource are: (1) geothermal energy, (2) industrial byproduct technologies that use fuel or energy that is a byproduct of an industrial process, (3) waste heat recovered from capturing and reusing the waste heat in industrial process for heating or for generating mechanical or electrical work, (4) a source, technology, or program approved as a clean energy resource, and (5) demand side management or energy efficiency initiatives that reduce electricity consumption or implement load management, demand response, or energy efficiency measures designed to shift customers' electric loads from periods of higher demand to periods of lower demand as a result of equipment installed or customers enrolled after January 1, 2010.
HEA 1128 SECTION 1, Public Law No. 224-2011, Ind. Code 8-1-8.8-10 and Ind. Code 8-1-37-4, effective July 1, 2011.

The Clean Energy law was amended this year to allow the Indiana Utility Regulatory Commission ("IURC") to encourage clean energy projects by providing financial incentives for nuclear energy production or generating facilities in the form of timely recovery of costs incurred in connection with the study, analysis, development, siting, design, licensing, permitting, and life cycle management. In addition, the IURC must allow eligible business to recover the costs associated with the purchase of energy produced by a nuclear energy production or generating facility.
SEA 251 SECTION 12, Public Law No. 150, 2011, Ind. Code 3-1-3.3-12, effective July 1, 2011.

ENERGY UTILITY RECOVERY OF FEDERALLY MANDATED COSTS

A new chapter, taking effect on May 10, 2011, was added to the general provisions for energy utilities and provides for recovery of costs associated with complying with federally mandated requirements. This is often known as a "tracker", which automatically allow these costs to be added to the utility rate. Under this law, "federally mandated requirements" is now defined by law to include: (1) the Clean Air Act, (2) the Water Pollution Control Act, (3) the Resource Conservation and Recovery Act, (4) the Toxic Substances Control Act, (5) standards or regulations concerning integrity, safety, or reliable operation of transmission or distribution pipeline facilities, (6) requirements related to a license issued by the US Nuclear Regulatory Commission to operate a nuclear

energy production or generating facility, and (7) any other law, order or regulation administered by the U.S. EPA or the U.S. Department of Energy.

"Federally mandated costs" is also now defined by law to include costs an energy utility incurs in connection with a compliance project including capital, operating, maintenance, depreciation, tax or financing costs, but not fines or penalties assessed for violation of laws, rules or consent decrees. And a compliance project is defined by law to include a project undertaken by an energy utility related to direct or indirect compliance with one or more federally mandated requirements.
SEA 251 SECTION 1, Public Law No. 150-2011, Ind. Code 8-8-8.4, effective May 10, 2011.

An energy utility must obtain from the IURC a certificate that states that public convenience and necessity will be served by a compliance project proposed by the energy utility in order to recover 80% of the cost in its rates. The other 20% must be deferred and recovered by the utility as part of the next general rate case filed by the utility with the IURC. As a result of the overruns at Edwardsport, the law also provides that actual costs that exceed the projected federally mandated costs of the approved compliance project by more than 25% will require specific justification by the energy utility and specific approval by the IURC before being authorized in the next general rate case filed.
SEA 251 SECTION 1, Public Law No. 150-2011, Ind. Code 8-8-8.4-6, effective May 10, 2011.

The new law sets out what the IURC is to consider in determining whether to issue a certificate of public convenience and necessary to allow recovery of these costs. The IURC must find that the proposed compliance project will allow the energy utility to comply directly or indirectly with one or more federally mandated requirements based on an examination of the following: (1) a description of the federally mandated requirement, including any consent decrees; (2) a description of the projected federally mandated costs associated with the proposed compliance project; (3) a description of how the proposed compliance project allows the energy utility to comply with the requirements; (4) alternative plans that demonstrate the proposed compliance project is reasonable and necessary; (5) information as to whether the proposed compliance project will extend the useful life of an existing facility and if so the value of the extension; and (6) any other factors the IURC considers relevant. An energy utility must file with the IURC an application setting forth that information supported with technical information in as much detail as the IURC requires. The IURC must hold a properly noticed public hearing on each application. The IURC may grant the certificate only if it has: (1) made a finding that the public convenience and necessity will be served by the compliance project, (2) approved the projected federally mandated costs associated with the project, and (3) made a finding on each of the factors it is required to have considered. If approved, 80% of the approved costs can be recovered through a periodic retail rate adjustment mechanism, allowing the timely recovery of approved costs.
SEA 251 SECTION 1, Public Law No. 150-2011, Ind. Code 8-1-8.4-6, effective May 10, 2011.

FORCASTING GROUP TO STUDY CLEAN ENERGY RESOURCES

The IURC's Forecasting Group must conduct an annual study on the use, availability, and economics of using renewable energy resources in Indiana to be included in the annual report to the Regulatory Flexibility Committee. The law was amended this year to direct the Group to study six specific clean energy resources and any additional resources the IURC considers appropriate. The six specific resources include energy from wind, solar energy, photovoltaic cells and panels, dedicated crops grown for energy production, organic waste biomass and hydropower.
SEA 251 SECTION 14, Public Law No. 150-2011, Ind. Code 8-1-8.8-14, effective July 1, 2011.

RENEWABLE ENERGY RESOURCES

The legislature added three types of renewable energy resources to the already existing list of nine. Effective July 1, 2011, added to existing renewable energy resources are: (1) low temperature, oxygen starved gasification of municipal solid waste, (2) methane recovered from landfills for production of electricity, and (3) coal bed methane derived from a naturally occurring biogenic process. The other nine types of renewable energy resources include: (1) energy from wind, (2) solar energy, (3) photovoltaic cells and panels, (4) dedicated crops grown for energy production, (5) organic waste biomass, (6) hydropower from existing dams, (7) fuel cells, (8) energy from waste to energy facilities and (9) energy storage systems.

Under the Utility Generation and Clean Coal Technical law, the IURC must encourage clean coal and energy projects by providing financial incentives. IC 8-1-8.1-11. One of the financial incentives the IURC is required to provide (if the IURC finds the projects are reasonable and necessary) is a financial incentive to develop alternative energy from renewable energy resources. The change to the law this year should aims to increase gasification of municipal waste, recovery of landfill methane gas and production of coal bed methane for energy. Under the existing law, the Forecasting Group must do an annual study of the use, availability and economics of using renewable energy resources. That study is part of the IURC annual report submitted to the Regulatory Flexibility Committee, which must include suggestions from the Forecasting Group to encourage the development and use of renewable energy resources and technologies appropriate for use in Indiana.
SEA 66 SECTION 1, Public Law No. 96-2011; Ind. Code 8-1-8.8-10, effective July 1, 2011.

SUPPORT FOR CANADIAN OIL

The Senate passed a resolution this session in support of a continued shift towards reliable and secure sources of Canadian oil. Specifically:

(1) The Indiana Senate supports continued and increased importation of Canadian oil sands.

(2) The Indiana Senate urges Congress to support continued and increased importation of Canadian oil sands.

(3) The Indiana Senate urges Congress to ask the United States Secretary of State to approve the TransCanada Keystone Coast Expansion pipeline project that has been awaiting a Presidential Permit since 2008 to reduce dependence on unstable governments, improve our national security, and strengthen ties with an important ally.

The Secretary of the Senate was directed to transmit a copy of this Resolution to the Indiana Congressional Delegation.
Senate Resolution 54.

SUPPORT FOR NULEAR FACILITIES

The Legislature amended the stated purposes and findings related to the Clean Coal Technology law. Current law contains findings related to growth and the economy creating a need for new energy production in Indiana, development of a robust and diverse portfolio of energy production or generating capacity being needed for Indiana to continue to attract new businesses and jobs, Indiana having considerable natural resources that are underutilized and could support new energy production at an affordable price, southern Indiana benefiting from new employment opportunities using the plentiful supply of coal from the Illinois Basin, technology being deployed allowing high sulfur coal to be burned or gasified and meet air limitations and it being in the public interest to encourage new in-state capacity for anticipated demand at a competitive price. Newly included is a finding that it is in the public interest for the state to encourage the study, analysis, development and life cycle management of nuclear energy production or generating facility as well as carbon dioxide capture, transportation and storage facilities. Likewise, the purpose of the law has been amended to include the study, analysis, development, and life cycle management of nuclear energy production or generating facility being encouraged at the same time as we encourage new coal fired and other fossil fuel based energy production or generating facilities.
SEA 251 SECTION 2, Public Law No. 150-2011, Ind. Code 8-1-8.1-1, effective July 1, 2011.

A new definition was added to the Clean Coal Technology law to define a nuclear energy production or generating facility. It is defined as “an energy production or generation facility that uses a nuclear reactor as its heat source to provide steam to a turbine generator to produce or generate and supply electricity to Indiana retail customers which existed on July 1, 2011 and is dedicated primarily to serving Indiana customers and is undergoing a comprehensive life cycle management project to enhance the safe and reliable operation of the facility.” The term includes the transmission lines and other associated equipment employed specifically to serve a nuclear energy production or generating facility. This means that Indiana’s legislature chose to provide a nuclear plant financial incentives only for life cycle management, not for building a new plant, as the bill originally started. This change in Indiana’s law occurred during the Japan nuclear crisis.

SEA 251 SECTION 7, Public Law No. 150-2011, Ind. Code 8-1-8.1-5, effective July 1, 2011.

The definition of "clean coal and energy projects" was changed to "clean energy projects" and includes projects to provide electric transmission facility to serve a nuclear energy production or generating facility and projects or potential projects that enhance the safe and reliable use of nuclear energy production of generation technologies to produce electricity and the purchase of energy by a nuclear energy production or generating facility. The law was also amended to provide that a clean energy project includes projects to provide advanced technologies to increase the efficiency of existing energy production or generating plants fueled primarily by coal or gases from coal from the Illinois Basin. Previously, the definition only included projects to provide advanced technologies that reduce regulated air emissions from existing plants fueled by coal or coal gases.
SEA 251 SECTION 3, Public Law No. 150-2011, Ind. Code 8-1-8.8-2, effective July 1, 2011.

The definition of an eligible business to apply for incentives for clean energy projects, has also been amended to add an energy utility or owner of a coal gasification facility that purchases fuels or energy produced by a nuclear energy production generating facility and a utility that undertakes a project to develop alternative energy sources, including coal gasification facilities.
SEA 251 SECTION 5, Public Law No. 150-2011, Ind. Code 8-1-8.1-6, effective July 1, 2011.

VOLUNTARY CLEAN ENERY PORTFOLIO STANDARD PROGRAM

The legislature has created a new program for Indiana electricity suppliers to participate in a voluntary clean energy portfolio standard program. All electricity suppliers, except those that are municipally owned, those that are a Rural Electric Membership Corporation ("REMC") or those that are a not-for-profit corporation with one member that is an REMC, may participate in the voluntary clean energy portfolio standard program. Clean energy has been defined as "electricity produced from a clean energy resource." The clean energy resources include the following 21 sources:

(1) Energy from wind;
(2) Solar energy;
(3) Photovoltaic cells and panels;
(4) Dedicated crops grown for energy production;
(5) Organic waste biomass that is available on a renewable basis from agriculture crops, agricultural waste and residues, wood and wood wastes from wood residues, forest thinnings or mill residue wood, animal wastes, animal byproducts, aquatic plants or algae;
(6) Hydropower;
(7) Fuel cells;
(8) Hydrogen;

(9) Energy from waste to energy facilities, including energy derived from advanced solid waste conversion technologies;
(10) Energy storage systems or technologies;
(11) Geothermal energy;
(12) Coal bed methane;
(13) Industrial byproduct technologies that use fuel or energy that is a byproduct of an industrial process;
(14) Waste heat recovery from capturing and reusing the waste heat in industrial processes for heating or for generating mechanical or electrical work;
(15) A source, technology, or program approved by the IURC and designated as a clean energy resource by a rule adopted by the IURC;
(16) Demand side management or energy efficiency initiatives that reduce electricity consumption or implement load management, demand response or energy efficiency measures designed to shift customers' electric loads from period of higher demand to periods of lower demand;
(17) A clean energy project
  (a) at a new energy production or generating facility that employs the use of clean coal technology and that produces energy, including substitute natural gas, primarily from coal, or gases derived from coal, from the geological formation known as the Illinois Basin,
  (b) to provide advanced technologies that reduce regulated air emissions from or increase the efficiency of existing energy production or generating plant that is fueled primarily by coal or gases from coal from the geological formation known as the Illinois Basin, such as flue gas desulfurization and selective catalytic reduction equipment,
  (c) to provide electric transmission facilities to serve a new energy production or generating facility or a nuclear energy production or generating facility,
  (d) that produces substitute natural gas from Indiana coal by construction and operation of a coal gasification facility.
  (e) that enhances the safe and reliable use of nuclear energy production or generating technologies to produce electricity,
(18) Nuclear energy;
(19) Electricity that is generated by a customer owned distributed generation facility that is interconnected to the electricity supplier's distribution system in accordance with IURC interconnection standards;
(20) Combined heart and power systems; and
(21) electricity that is generated from natural gas at a facility constructed in Indiana after July 1, 2011, which displaces electricity generation from an existing coal fired generation facility.

Not more than 30% of an electricity supplier's clean energy may come from sources identified in items 17 through 21 above.

The clean portfolio standards ("CPS") include three goals. CPS Goal Period I is for January 1, 2013 through December 31, 2018, with a goal of at least an average of 4% of the total electricity being obtained from clean energy. CPS Goal Period II is for January 1, 2019 through December 31, 2024, with a goal of at least an average of 7% of the total electricity being obtained from clean energy. CPS Goal Period III is for the calendar year ending December 31, 2025, with a goal of at least an average of 10% of the total electricity being obtained from clean energy.

If a participating electricity supplier is approved and meets the CPS goal the IURC will authorize an incentive and allow the recovery of costs by a periodic rate adjustment mechanism. The incentive consists of authorizing a shareholder increased overall rate of return on equity not to exceed 50 basis points over a participating electricity supplier's authorized rate of return.

This law took effect on May 10, 2011. The IURC is required to adopt rules by January 1, 2012 to establish the Voluntary Clean Energy Portfolio Standard Program. The rules must include: (1) the CPS goals established by this law, (2) methods for measuring and evaluating a participating electricity supplier's compliance with the goals, (3) financial incentives and periodic rate adjustment mechanisms, (4) reporting requirements, and (5) a date by which the utility must apply to participate. The rules must also establish provisions for the IURC's approval to ensure that approval will not result in an increase to the retail rates and charges of the electricity supplier above what would reasonably be expected if the application were not approved. The IURC may approve participation in the program if it finds the following: (1) the application submitted is complete and reasonably complies with the purpose of the law, (2) the electricity supplier has demonstrated that it has a reasonable expectation of obtaining clean energy to meet the ultimate goal of 10% by December 31, 2025, and (3) approving the application will not result in an increase to the retail rates and charges of the electricity supplier above what could reasonable be expected if the application were not approved.

Beginning in 2014 and ending December 31, 2025, each participating electricity supplier shall report to the IURC, not later than March 1 of each year, the following: (1) its efforts to meet the applicable goal; (2) the total amount of renewable energy supplied, broken down by the facilities' name and location, total generating capacity and total amount of electricity generated at the facility, price paid if purchased from someone else; (3) the number of clean energy credits purchased; (4) the electricity supplier's plans for meeting the CPS goal applicable in the calendar year in which the report is submitted; (5) advances in clean energy technology that affect activities to produce clean energy; and (6) any other information required in the IURC's rule.

The IURC must include a summary of the information provided by participating electricity suppliers in its annual report to the Regulatory Flexibility Committee starting in 2014.
SEA 251 SECTION 16, Public Law No. 150-2011, Ind. Code 8-2-37, effective may 10, 2011.

LAWS AFFECTING ADMINISTRATIVE ADJUDICATION

The Administrative Orders and Procedures Act ("AOPA"), IC 4-21.5 *et seq.* changed on July 1, 2011 in a number of ways.

AOPA Proceedings Are *de Novo*

Incorporating the Indiana Supreme Court's determination in *Ind. Dept. of Natural Res. v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993) into law, AOPA now states that proceedings before an administrative law just are to be *de novo*. *De Novo* means the case is to be heard anew, afresh -- to consider the matter as if no decision had previously been made, giving no deference to the agency who made the decision.
SEA 67 SECTION 4, Public Law No. 32-2011, Ind. Code 4-21.5-3-14, effective July 1, 2011.

AOPA Rulemaking Authority

The legislature added clarification to the rulemaking authority given to agencies allowing them to adopt rules setting specific procedures to facilitate informal settlements of matters. The General Assembly added the proviso that such rules must be consistent with AOPA.
SEA 67 SECTION 6, Public Law No. 32-2011; Ind. Code 4-21.5-3-34, effective July 1, 2011.

Disqualification of ALJ for Failure to Act With in Prescribed Time

In addition to the provisions allowing for disqualification of an ALJ for bias, prejudice, or interest in the outcome of a proceeding, failure to dispose of a proceeding in an orderly and reasonably prompt manner after written request from a party and any cause for which a judge of a court my be disqualified, starting July 1, 2011, ALJ's may be disqualified for failure to issue an order no later than 90 days after filing a motion to dismiss or a motion for summary judgment, no later than 90 days after conclusion of a hearing or no later than 90 days after completion of a schedule set for briefing or submittal of proposed findings of facts, conclusion of law concerning a motion to dismiss, motion for summary or conclusion of a hearing. This new 90 day time frame applies only to motions to dismiss or motions for summary judgment filed after June 30, 2011 and only for hearings commenced after June 30, 2011. In addition, the 90 days does not apply if waived or extended with the written consent of all parties for good cause shown.
SEA 65 SECTION 3, Public Law No. 32-2011, Ind. Code 4-21.5-3-10, effective July 1, 2011.

Procedure for Selection of a New ALJ after Disqualification Occurs

The law now provides that the individual disqualified due to failure to dispose of a proceeding in an orderly and reasonably prompt manner after a written request or for missing the 90 day time frame for a decision, has the responsibility for providing the parties a list of at least three special administrative law judges from which to select. The parties are given ten days after being provided the list to select one of the three special administrative law judges. If an agreement is not reached, the judge is to be selected under the procedures of Trial Rule 79(D), 79(E) or 79(F).
SEA 67 SECTION 3, Public Law No. 32-2011, Ind. Code 4-21.5-3-10, effective July 1, 2011.

Environmental Law Judges are Administrative Law Judges

AOPA was amended in 1995 to create the Office of Environmental Adjudication to review agency actions of the Indiana Department of Environmental Management. The law provided that the office consisted of a Director appointed by the Governor and Environmental Law Judges ("ELJ") employed by the Director. Since this creation, persons practicing before the Office of Environmental Adjudication have understood that ELJs serve the same function and have the same responsibilities that ALJs serve for other administrative agencies. The new law codifies that an ELJ under AOPA has the same authority and responsibilities as an ALJ.
SEA 67 SECTION 7, Public Law No. 32-2011; Ind. Code 4-21-5-7-5, effective July 1, 2011.

Service of Process

In what started as an effort to save the government money, starting July 1, 2011, parties to an adjudicatory hearing and the ALJ may now give notice, file, and serve documents by electronic mail (e-mail), where previously the law required service be either by personal service or U.S. mail. An exception to this right to use e-mail however was made for: (1) filing the petition for review, (2) the initial notice of the agency's determination, and (3) the issuance of a complaint by an agency. The exception requiring that notice of the agency's initial determination still be by U.S. mail or personal service eliminated much of the hoped-for cost savings.
SEA 67 SECTION 1, Public Law No 32-2011, Ind. Code 4-21.5-3-1, effective July 1, 2011.

Settlements that Require an IDEM Permit Modification Subject to Appeal

The legislature added to AOPA a requirement that any settlement agreement reached by parties must be issued by the ALJ as a final order under AOPA. In addition, if the settlement involves the modification of a permit issued by the Indiana Department of Environmental Management, the ALJ must remand the permit to the issuing office with instructions to modify the permit and to give notice of the permit modification. The

opportunity for appeal is limited to the modification. The ELJ who heard the first appeal retains jurisdiction over any appeals to the modified permit.
SEA 67 SECTION 6, Public Law No. 32-2011; Ind. Code 4-21.5-3-34, effective July 1, 2011.

Summary Judgment under AOPA

AOPA did not previously require summary judgment procedures to follow the Trial Rules. Due to practitioners' confusion over the proper procedure to follow, the law changed on July 1, 2011 to provide that summary judgment under AOPA is to be considered as would a court considering a motion for summary judgment filed under the current Trial Rule 56 of the Indiana Rules of Trial Procedures. The law makes clear that the service provisions of AOPA apply, not those of the trial rules and that reference to the Trial Rules does not change the need for the ultimate authority to act, where the ALJ is not acting as the ultimate authority for the agency.
SEA 67 SECTION 5, Public Law No. 32-2011; Ind. Code 4-21.5-3-23, effective July 1, 2010.

MISC LAWS OF INTEREST

DEPARTMENT OF TOXICOLOGY

Effective July 1, 2011, the legislature has created a new state Department of Toxicology. A Toxicology Department Advisory Board has been created to assist with the transition from the Department of Toxicology at the Indiana University School of Medicine to the new state agency.

The Governor will appoint a Director of the Department. The Director may appoint employees. The Department is to:

(1) Conduct analyses for poisons, drugs and alcohols upon human tissues and fluids submitted by Indiana coroners, prosecuting attorneys, sheriffs, state police, city police and officials of hospitals in cases of suspected poisoning or intoxication of human beings;
(2) Report the analytical findings to the officials requesting the analyses;
(3) Consult with Indiana coroners and coroner's physicians regarding interpretation of analytical findings;
(4) Furnish expert testimony regarding the analytical findings in all legal hearings, including criminal prosecutions;
(5) Provide instruction in toxicology to law enforcement officers and certify law enforcement officers as required by law for administration of breath and other chemical tests;
(6) Provide instruction and technical assistance to prosecutors and defense counsel for the proper admission of test results into evidence or exclusion of test results from evidence;
(7) Provide instruction to judges concerning toxicology and the science of alcohol and drug testing to improve the administration of justice; and

(8) Conduct research on the detection of toxic compounds that may be components of drugs or medicines or may be present in pesticides used for agricultural or other purposes.

The Toxicology Advisory Board is to also provide guidance on obtaining accreditation by a nationally recognized organization that sets toxicology standards and provide recommendations for additional legislation needed regarding the ongoing operations of the Department of Toxicology. The Advisory Board consists of three members appointed by the Governor. Each member must have expertise and experience in toxicology and one must be a judge or retired judge who is knowledgeable in the area of toxicology and in training on toxicological issues. The Advisory Board shall deliver a report to the Governor and Legislative Council by September 1, 2012. The Advisory Board will expire on December 21, 2012.
SEA 431, Public Law No. 158-2011, Ind. Code 10-20, Ind. Code 9-27-5-1, Ind. Code 9-30-6-5, effective July 1, 2011 and Ind. Code 10-20.1, effective May 10, 2011, Ind. Code 21-45-3 repealed effective July 1, 2011.

DRAINAGE BOARD APPROVAL EXPANDED, BUT NOT REQUIRED FOR PUBLIC OR MUNICIPALLY OWNED UTILITY WORK

The Drainage Board law that requires Drainage Board approval of a drainage plan before a person may proceed with development of a subdivision was amended this year to expand the required approval to all commercial, industrial and other land development projects which are located outside the corporate boundaries of a municipality. An exception was made in the law for public or municipally owned utility infrastructure installation or construction.
HEA 1291 SECTION 2, Public Law No. 125-2011, Ind. Code 36-9-27-69.5, effective July 1, 2011.

DRIVING WHILE TEXTING OR READING E-MAIL NOW PROHIBITED IN INDIANA

A law was passed, effective July 1, 2011, prohibiting use of a telecommunications device to: (1) type a text message or an electronic mail message, (2) transmit a text message or an electronic mail message, or (3) read a text message or electronic mail message while operating a moving motor vehicle. A telecommunications device includes a wireless telephone, a personal digital assistant, a pager or a text messaging device. A text message means a communication in the form of electronic text sent from a telecommunications device. It does not include amateur radio equipment being operated by a person licensed as an amateur radio operator or communications system installed in a commercial motor vehicle weighing more than 10,000 pounds. This law also does not apply if the device is used in conjunction with hands free voice operated technology or if the device is used to call 911 to report a bona fide emergency. Furthermore, a police office is not allowed to confiscate a telecommunications device and retain it as evidence pending trial for a violation. A violation of this law is a Class C Infraction, meaning a fine of up to $500 may be imposed for a violation. Whenever a law enforcement officer believes in good

faith that a person has committed an infraction, the law enforcement officer may detain that person for a time sufficient to: (1) inform the person of the allegation, (2) obtain the person's name, address, and date of birth, or driver's license if in the person's possession; and (3) allow the officer to issue a notice to appear.

Confusion stems from the meaning of "operating a moving motor vehicle." The language used in other motor vehicle statutes for operating a motor vehicle while drinking, uses the language "operating a motor vehicle" or "while the vehicle is in operation or the motor vehicle is located on the right-of way of a public highway." By contrast, the new prohibits the activity only while operating a "moving" motor vehicle. There is no definition of "operating a moving motor vehicle" in the statute. The rules of statutory construction and interpretation suggest that the telecommunication prohibitions do not apply while a vehicle is, for instance, idling at a stop light. Adding to the confusion is the legislature's stated exception for "calling" 911, since this legislation does not prohibit using a mobile phone to make calls even while the motor vehicle is moving, and even not using hands free devices. Future amendments to add clarification are expected.
HEA 1129, Public Law No. 185-2011, Ind. Code 9-13-2-177.3, Ind. Code 9-13-2-177.4, and Ind. Code 9-21-8-59, effective July 1, 2011.

LAND SURVEYOR RIGHT TO ENTER FOR PURPOSES OF SURVEYING

Effective July 1, 2011, land surveyors and personnel under the supervision of a land surveyor have the right to enter upon, over or under any land, water or property within Indiana for the limited purpose of the practice of land surveying. The only exceptions are that this right to enter does not apply to property owned or controlled by the Indiana Department of Homeland Security or property owned or controlled by a public utility nor to a building, dwelling or structure that is on the land or property being entered. In addition, the land surveyor may not interfere with any construction, operation, or maintenance activity being conducted upon the land, water or property by the owner or occupant and to the extent practicable, before entering the land surveyor and personnel under his or her supervision must present written identification to the occupant of the land, water or property. Lastly, a land surveyor and personnel under the supervision are liable for any damage that may occur to the land, water or property as a result of entry under this new authority.
SEA 374, Public Law 83-2011, Ind. Code 25-21.5-9-7, effective July 1, 2011.

RESIDENTIAL REAL ESTATE SALES DISLCOSURE

The law changed on July 1, 2011 to require the Indiana Real Estate Commission to adopt a specific disclosure form to be used in the sale of residential property that will require the owner to disclose known contamination caused by the manufacture of a controlled substance, such as meth, that occurred on the property if the property has not been certified decontaminated by an IDEM.
SEA 433 SECTION 35, Public Law No. 159-2011, Ind. Code 32-21-4-5, effective July 1, 2011.

SALE OF ALCOHOL TO PERSON RESONABLY APPEARING TO BE LESS THAN 40 YEARS OF AGE

Indiana's Alcohol Sales Law was changed this year to require, as of July 1, 2011, an employee or agent of a person permitted to sell alcohol to require the person who reasonably appears to be less than 40 years of age to produce a driver's license, an identification card or a government issued document bearing the person's photograph and birth date showing the person is at least 21 years of age, before selling, bartering, exchanging, providing or furnishing another person an alcoholic beverage for consumption off the licensed premises. Prior law had required every person purchasing alcohol to provide such identification.
SEA 78, Public Law No. 216, SECTION 2, Ind. Code 7.1-5-10-23, effective July 1, 2011.

STORM WATER NUISANCES

Procedure to Resolve Storm Water Nuisances

A new chapter was added to the law this year, effective July 1, 2011, to try to address nuisances created by conveyances of storm water. Under this new law an "artificial conveyance" is defined as a man-made structure in or into which storm water runoff or flood waters flow, either continuously or intermittently. Runoff" is defined as the part of precipitation that flows from a drainage area on the land surface, in open channels or in a storm water conveyance system. A "storm water conveyance system" is defined as all methods, natural or man-made, used to conduct storm water to, through or from a drainage area to conduits, canals, channels, ditches, storage facilities, swales, streams, culverts, roadways or pumping stations. A "storm water nuisance" is defined as a condition that arises out of or is related to storm water that is transferred through runoff or an artificial conveyance and is directed to the property of another person or discharges storm water at or near the property line of another person, or that accelerates or increases the flow of storm water onto another person's property creating a condition that is injurious to health or a condition substantially obstructing the free use of property. If the owner of property seeks the removal of a storm water nuisance and the owner of the land on which the storm water nuisance is located does not remove the storm water nuisance upon request, the person seeking removal may file a request asking the town council, the city board of works or the county surveyor to investigate the storm water nuisance. The request must be filed on a form published by the unit of government. An ordinance may be adopted to allow for payment of a fee to the unit of government as a condition of filing a request. The fee may not be an amount greater than is reasonably necessary to defray the expenses incurred in processing the request, conducting the investigation, and completing the assessment.

The unit of government has a right of entry to the land lying within 75 feet of the drain or natural surface watercourse but must use due care to avoid damage to crops, fences, buildings, and other structures. Before exercising a right of entry, oral or written notice must be given to the property owner of record. The notice must state the purpose for the

entry. A unit of government shall investigate and make a visual assessment to determine whether the storm water nuisance exists and whether removal of the storm water nuisance will remove the negative effect from the land of the person making the request and whether removal will cause unreasonable damage to the land on which the nuisance is located. The unit of government must also make any other observations that may be useful in solving a storm water nuisance problem.

The unit of government shall provide the person that filed the request an oral or written report of the investigation and its findings of: (1) whether a storm water nuisance does in fact exist, (2) the need for removal and whether removal will remove the negative effect of the storm water from the land of the person making the request, (3) whether removal will cause unreasonable damage to the land on which it is located, and (4) any other considerations that may be useful in resolving the storm water nuisance. The unit of government must also provide information concerning alternative dispute resolution options. The unit of government may not be compelled to testify in a legal proceeding related to its functions under the law, except under subpoena.

An artificial conveyance or runoff that was constructed and that operates in compliance with a permit issued by the government cannot be pursued under this law as a storm water nuisance.
HEA 1291 SECTION 3, Public Law no. 125-2011, Ind. Code 36-9-28.7, effective July 1, 2011.

Tort Immunity

The law was amended this year to create tort immunity for units of government for acts or omissions in connection with responding to a request to conduct an investigation of a storm water nuisance. Under this law, a governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from an investigation, assessment or opinion of a storm water nuisance.
HEA 1291 SECTION 1, Public Law No. 125-2011, Ind. Code 34-13-3-3, effective July 1, 2011.

ZONING

This year the legislature eliminated review of zoning decisions by *certiorari* and established a judicial review procedure. This procedure is similar to that governing appeals of administrative agencies under the Administrative Orders and Procedures Act: establishing judicial review as the exclusive means to challenge decisions of Boards of Zoning Appeals, Plan Commissions, Preservation Commissions or Zoning Administrators. This new law attempts to clarify challenges to zoning decisions, replacing a *certiorari* and issuance of writ standard established back in the 1800s. All of the following zoning decisions may be appeal by a petition for juridical review:

1. Final decisions by the Board of Zoning Appeals under the 900 series, which relates to appeals of an order, requirement, decision, or determination made by an administrative official, hearing officer, or staff

member under the zoning ordinance, any order, requirement, decision, or determination made by an administrative board or other body except a plan commission in relation to the enforcement of the zoning ordinance and any order, requirement, decision, or determination made by an administrative board or other body except a plan commission in relation to the enforcement of an ordinance requiring the procurement of an improvement location or occupancy permit and the BZA's approval or denial of special exceptions, special uses, contingent uses, and conditional uses;

2. Final Decisions by the Board of Zoning Appeals under section 1015 related to imposition of commitments, and modifications or termination of commitments;
3. Final decisions by the Board of Zoning Appeals on Development Plans;
4. Final Decisions by the Board of Zoning Appeals on Planned Unit Developments;
5. Final decisions of Preservation Commissions related to Historic Preservation;
6. Final Decisions of Zoning Administrators on improvement locations permits within flood plain areas;
7. Primary approval or disapproval by a Plan Commission of a plat;
8. Imposition by a Plan Commission of a condition on primary approval of a plat;
9. Approval or disapproval by a Plan Commission of the vacation of all or part of a plat;
10. Approval or disapproval by a Plan Commission of the vacation of any recorded covenants filed with the plat;
11. Imposition by a Plan Commission of a condition on approval of the vacation of all or part of a plat;

HEA 1311 SECTION 25 and 37, Public Law No. 16-2011, Ind. Code 36-7-4-715 and Ind. Code 36-7-4-1016(b-(d), effective July 1, 2011.

The following actions are considered legislative acts and are not zoning decisions that can be appealed:

1. Adopting or approving a comprehensive plan;
2. Certifying with or without a recommendation a proposal to adopt an initial zoning ordinance or a replacement zoning ordinance;
3. Adopting, rejecting or amending a zoning ordinance;
4. Adopting, rejecting or amending an impact fee ordinance;
5. Designating a zoning district where a development plan is required;
6. Adopting, rejecting, or amending a PUD district ordinance; or
7. Adopting, rejecting or amending a flood plain zoning ordinance.

HEA 1311 SECTION 37, Indiana Code 36-7-4-1016(e), effective July 1, 2011.

A petition for review must: (1) be filed in the right court, (2) by a person who has standing, (3) by a person who has exhausted administrative remedies, (4) who files it in the proper timeframe, and (5) who files the record for review in the proper time frame.

Judicial review of a nonfinal zoning decision is allowed only if the person can establish immediate and irreparable harm and no adequate remedy exists at law.
HEA 1311 SECTION 48, Public Law No. 126-2011, Ind. Code 36-7-4-1601, effective July 1, 2011.

The following persons have standing to petition for judicial review:

1. A person to whom the zoning decision is directed;
2. A person aggrieved by the zoning decision who participated in the hearing that led to the decision either by appearing at the hearing in person, by an agent or attorney and presented relevant evidence or by filing a written statement setting forth facts or opinions related to the decision; or
3. A person otherwise aggrieved or adversely affected the zoning decision. To qualify under this last provision the decision must prejudice or be likely to prejudice the interests of the person. The person must be someone who was eligible for an initial notice of a hearing who was not notified before the last date of the hearing so the person could have objected or otherwise intervened to contest the zoning decision. And the person's asserted interests must be among those that the board was required to consider when it made the decision and a judgment in favor of the person would substantially eliminate or redress the prejudice to the person caused or likely to be caused.

HEA 1311 SECTION 50, Public Law No. 126-2011, Ind. Code 36-7-4-1603.

To exhaust all administrative remedies you must object and participate in all available remedies within the Board of Zoning Appeals or other zoning entity and you must timely appeal.
HEA 1311 SECTION 51, Public Law No. 126-2011, Ind. Code 36-7-4-1604, effective July 1, 2011.

You must file the petition for judicial review no later than 30 days after the date of the zoning decision. In computing a time period under this law, the day of the act or event from which the period of time begins to run is not included. The last day of the computed time period is to be included unless it is a Saturday, Sunday, legal holiday or day that the office is closed. A period runs until the end of the next day after the excluded days described above. The petition must be verified and filed with the clerk of the court and include the following: (1) the name and mailing address of the petitioner; (2) the name and mailing address of the Board whose zoning decision is at issue; (3) identification of the decision at issue with a copy, summary or brief description of the decision; (4) identification of person who participated in any hearing that led to the decision; (5) specific facts to demonstrate that the petitioner is entitled to obtain judicial review; (6) specific facts to demonstrate that the petitioner has been prejudiced by the decision being either: (a) arbitrary, capricious, an abuse of discretion or otherwise not in accord with law, (b) contrary to constitutional right, power, privilege, or immunity, (c) in excess of statutory jurisdiction, authority, or limitations, or short or statutory right; (d) without observance of procedures required by law, or (e) unsupported by substantial evidence; and (7) a request for relief, specifying the type and extent of relief requested..
HEA 1311 SECTION 42, 52 and 54, Public Law No. 126-2011, Ind. Code 36-7-4-111,

Ind. Code 36-7-4-1605, Ind. Code 36-7-4-1607 and Ind. Code 36-7-4-1614, effective July 1, 2011.

The venue is the judicial district where the land affected by the zoning decision is located. The rules of procedure governing civil actions in courts govern pleadings and requests for a change of judge or change of venue to another judicial district that lies within the same county. If more than one person is aggrieved only one proceeding for review may be had, and the court in which a petition for review is first properly filed will have jurisdiction

Each person who was a petitioner or applicant at the hearing before the Board or is aggrieved by the zoning decision and entered a written appearance as an adverse party to the petition before the Board hearing that led to the zoning decision is a party to the petition for review. Any other person who participated in the Board hearing by appearing at the hearing in person, by agent, or by attorney and presenting relevant evidence or by filing with the Board a written statement setting forth any facts or opinions related to the decision may not later than five days after the decision is made, file with the Board a written request to receive notice of any petition for review that may be filed. Any person who has standing has an unconditional right to intervene in a proceeding for review.
HEA 1311 SECTION 53, Public Law No. 126-2011, Ind. Code 36-7-4-1606, effective July 1, 2011.

The petitioner must serve a copy of the petition upon the Board making the zoning decision and must give notice of the petition for review to all parties and to all persons who have filed the written request to receive notice. However if the public record shows that the Board received written requests for notice from more than three persons, the petitioner is only required to give notice to the first 3 persons who required notice.
HEA 1311 SECTION 55, Public Law No. 126-2011, Ind. Code 36-7-4-1608, effective July 1, 2011.

A petitioner may seek a stay of the zoning decision pending review by the court. The court may enter a stay only if the petition shows a reasonable probability that the zoning decision appealed is invalid or illegal and a bond is filed in the amount of at least $500 that is conditioned upon due prosecution of the proceeding and that the petitioner will pay all court costs and abide by the zoning decision if it is not set aside. If the petition for review concerns a revocation or suspension of a previously approved variance, exception or use, any stay ordered is effective during the period of the review and any appeal from the review and until the review is finally determined.
HEA 1311 SECTION 56, Public Law No. 126-2011, Ind. Code 36-7-4-1609, effective July 1, 2011.

Upon written request by the petitioner, the Board making the zoning decision shall prepare the Board's record. If part of the record has been preserved without a transcript, the Board shall, if practicable, prepare a transcript for inclusion in the record transmitted to the court, except for parts that the parties to the judicial review proceeding stipulate to omit. By stipulation of all parties to the review proceedings, the record may be shortened,

summarized, or organized. The court may tax the cost of preparing the transcripts and copies for the record against a party to the judicial review proceeding who unreasonably refuses to stipulate to shorten, summarize or organized the record, or in accordance with the rules governing civil action in courts or other law. The Court may require or permit subsequent corrections or additions to the record.
HEA 1311 SECTION 60, Public Law No. 1260-2011, Ind. C ode 36-7-4-1613, effective July 1, 2011.

Within 30 days after the filing of the petition for judicial review, or within further time allowed by the Court, the petitioner shall transmit to the Court the original or a certified copy of the Board's record for judicial review. The record consists of: (1) any Board documents expressing the decision, and (2) other documents identified by the Board as having been considered by the Board before its decision and used as a basis for its decision. An extension of time to file the record shall be granted by the Court for good cause shown. Inability to obtain the record from the Board within the time permitted is good cause. Failure to file the record within the time permitted is cause for dismissal of the petition for review.

Judicial review is confined to the Board record. The court may not try the cause de novo or substitute its judgment for that of the Board. The court may remand a matter to the Board before final disposition of a petition for judicial review with directions that the Board conduct further fact finding or that the Board prepare an adequate record, if the Board failed to prepare or preserve an adequate record or the Board improperly excluded or omitted evidence from the record or a relevant law changed after the zoning decision and the court determines that the new provision of law may control the outcome.
HEA 1311 SECTIONS 58 and 59, Public Law No. 126-2011, Ind. Code 36-7-4-1611 and Ind. Code 36-7-4-1612, , effective July 1, 2011.

A person may obtain judicial review of an issue that was not raised before the Board, only if the issue concerns whether a person who was required to be notified was notified in substantial compliance or the interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the zoning decision. The Court may receive evidence in addition to that contained in the Board record for judicial review only if the evidence relates to the validity of the zoning decision at the time the decision was made and it is needed to decide disputed issues regarding improper constitution as a decision making body or grounds for disqualification of those making the decision or unlawfulness of procedure or of the decision making process, and the evidence could not by due diligence have been discovered and raised in the Board proceeding.
HEA 1311 SECTIONS 57 and 59, Public Law No. 126-2011, Ind. Code 35-7-6-1610, and Ind. Code 36-7-4-1612, effective July 1, 2011.

The Court must make findings of fact on each material issue on which its decision is based. The court will grant relief only if the court finds the person seeking judicial relief has been prejudiced by a zoning decision that is:

(1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) Contrary to constitutional right, power, privilege, or immunity;
(3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(4) Without observance of procedures require by law; or
(5) Unsupported by substantial evidence.

If the Court finds that a person has been prejudiced, it may set aside a zoning decision and remand the case to the Board for further proceedings or compel a decision that has been unreasonably delayed or unlawfully withheld. The Court's decision on a petition for review is appealable in accordance with the rules governing civil appeals from the courts. HEA 1311, SECTIONS 61, 62 and 63, Public Law No. 126-2011, Ind. Code 36-7-4-1614, Ind. Code 36-7-4-1615 and Ind. Code 36-7-4-1616, effective July 1, 2011.