ENVIRONMENTAL LAW DEVELOPMENTS: A FOCUS ON BROWNFIELDS—OVERCOMING HISTORICAL ENVIRONMENTAL PROBLEMS

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INTRODUCTION

The search for solutions to environmental problems stemming from Indiana's long industrial history was the subject of a number of significant legal developments during the survey period. Indiana appellate decisions resolved a number of important issues relating to "brownfield" cleanups.

Indiana's courts have held that general liability insurance policies issued even decades ago respond to environmental cleanup costs arising from damage which occurred when those policies were in effect. One recent decision determined that a municipality remediating a brownfield site is entitled to maintain a declaratory judgment action against the insurers of the defunct entity which caused the environmental damage. This ruling will allow cities, towns, and private developers facing brownfields problems to find out whether insurance coverage will be available at the outset, before being required to litigate an otherwise potentially pointless underlying environmental liability claim. That same decision of the Indiana Court of Appeals also found that such insurance applies to the liability of a corporate successor. Still at issue is the important question of whether the insurer of the defunct polluter remains obligated to pay, even if the policyholder has been statutorily dissolved. Developments in another case confirmed that an insurer's obligations will not be reduced by the fact that the environmental injury at issue also occurred over a number of other policy years.

In a setback for environmental quality and an increase in the burden on government regulators, the United States Supreme Court restricted the right to obtain contribution from former owners and operators for the cost of a Superfund cleanup performed under the mere threat of government enforcement. This will do nothing but force potentially responsible parties to wait for an enforcement action, delaying cleanups and forcing government to expend scarce resources securing cleanups that otherwise could proceed on a voluntary basis. However, in a case concerning liability for former gasoline stations, the Indiana Supreme Court refused to limit the scope of Indiana's underground storage tank act or the government's ability to recover any costs it expends in a cleanup. This kind of cost recovery action can help stretch government resources to clean up old contamination.

Other significant developments in Indiana law involved cases reinforcing government's power to use redevelopment zones; setting the proper scope of

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citizens' suits and citizens' objections to environmental permits; affirming the powers of solid waste management districts; and illuminating the parameters of environmental takings claims. Indiana's "good character" statute was also upheld against several constitutional challenges.

I. THE BROWNFIELDS PROBLEM

They exist in every Indiana city and town of any size and in many smaller communities. Abandoned factories, gas stations where gasoline is no longer sold, shuttered warehouses, boarded-up stores or rail yards or trucking depots—a brownfield can take many forms. They are generally eyesores, drains on the public fisc and local economy because they produce neither tax revenue nor goods or services, and very often are health and safety threats. Brownfields express the decline of urban markets and neighborhoods. Their size and composition add to the problem. Less permanent structures were more easily removed in earlier centuries when their economic utility vanished. Now, in a consumer-driven culture, these sites are simply thrown away, left to erode and rot.

The Indiana Department of Environmental Management ("IDEM") defines a brownfield as "an industrial or commercial property that is abandoned, inactive, or underutilized, on which expansion or redevelopment is complicated due to actual or perceived environmental contamination."[1] More broadly, brownfields have been defined as the opposite of "'greenfields'—property that has not previously been used for commercial or industrial activities and is presumed free of contamination."[2]

The challenge of resurrecting brownfields is vast. An estimated 450,000 to one million brownfield sites exist nationwide.[3] IDEM's Brownfields Program currently maintains a list of 269 brownfield sites in the state of Indiana that have entered the Brownfields Program for assistance.[4] However, thousands more sites are estimated by IDEM to exist across Indiana.[5] These former plants, factories, shops, dry cleaners, and landfills sit abandoned or underused due to uncertainty about the presence of contamination, limited cleanup resources, and fear by the sites' owners or prospective purchasers that they might be held liable for cleaning

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1. IND. DEP'T OF ENVTL. MGMT., INDIANA BROWNFIELDS DEVELOPMENT RESOURCE GUIDE 7 (May 2003), *available at* http://www.in.gov/idem/land/brownfields/pdffiles/guidance/resourceguide.pdf.

2. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 3, 5 (Todd S. Davis ed., 2d ed. 2002).

3. GOV'T ACCOUNTABILITY OFFICE, BROWNFIELD REDEVELOPMENT, STAKEHOLDERS REPORT THAT EPA'S PROGRAM HELPS TO REDEVELOP SITES, BUT ADDITIONAL MEASURES COULD COMPLEMENT AGENCY EFFORTS 1 (GAO-05-94, 2004), *available at* http://www.gao.gov/new.items/d0594.pdf.

4. IND. DEP'T OF ENVTL. MGMT., PROPOSAL FOR BROWNFIELDS ASSESSMENT GRANT, *available at* http://www.in.gov/idem/land/brownfields/pdffiles/bfgrantproposal.pdf.

5. *Id.*

them up. Remediating and redeveloping these properties can improve and protect the environment, increase local economic and tax bases, preserve historical sites and slow consumption of open land.

Government grants and loans are an important part of the solution to brownfield problems. For instance, since 1995, the U.S. Environmental Protection Agency ("EPA") has awarded over 1200 brownfield grants totaling $400 million to state and local governments and quasi-governmental entities.[6] In addition, clarification of ambiguous legal liabilities can be a significant aid to private brownfields redevelopment. As an example, the Lender Liability and Deposit Insurance Protection Act of 1996 has allowed banks to more easily finance redevelopment of brownfield properties with little risk of incurring environmental liability.[7] Indiana's Voluntary Remediation Program,[8] with its provision of a covenant not to sue, flexible actual risk-based cleanup standards,[9] and provisions of "no further action" letters[10] all can assist in returning such properties to productive use. Much has been written about these traditional approaches to brownfields problems.[11]

It is not clear, however, that despite noticeable individual successes,[12] we are reducing brownfields even as fast as they are being created. The crux of the problem is economic, on several levels. First, cleaning up a contaminated site does not guarantee that it will find an economically useful function. To be viable, the investment has to make economic sense: to be able to return a satisfactory yield on the investment needed. In some cases, the return may need to be broadly defined, and may warrant some degree of public subsidization. All the citizens of a city or town may benefit from the removal of an abandoned factory, even if public "green space" is the only viable next use.

The second economic problem presented by brownfields is less obvious but even more challenging. The classical market model is distorted because a separation of benefits and burdens has occurred. A brownfield passes burdens

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6. *Id*.

7. *See* 42 U.S.C.A. § 9601(20)(F) (West, WESTLAW through 2002 legislation) (codifying EPA's lender liability rules and addressing the CERCLA liability of fiduciaries, including trustees).

8. IND. CODE § 13-25-5 (2004).

9. IDEM, RISK INTEGRATED SYSTEM OF CLOSURE, USERS GUIDE 1-1, 4-3 (2001) [hereinafter RISC USER'S GUIDE], *available at* http://www.in.gov/idem/land/risc/userguide/riscuserguide.pdf.

10. *Id.* at 1-3 (discussing the Leaking Underground Storage Tank ("LUST") Program).

11. *See*, *e.g.*, Davis, *supra* note 2.

12. *See, e.g.*, IND. DEP'T OF ENVTL. MGMT., BAIRSTOW SLAG DUMP (Apr. 8, 2003), *available at* http.//www.in.gov/idem/land/brownfields/sstories/bairstowslagdump.pdf (documenting the former Bairstow Slag Dump in Hammond, Indiana where a property covered with millions of tons of stockpiled steel-mill slag has been converted into a golf course development); Ind. Dep't of Envtl. Mgmt., *Former Uniroyal Mishawaka, St. Joseph County*, *at* http://www.in.gov/idem/land/brownfields/sstories/uniroyal.html (last revised Nov. 8, 2000) (recounting the transition of the former Uniroyal Property in downtown Mishawaka, Indiana where a 1.7 million square foot, forty-two acre, former factory has been remediated, demolished, and readied for redevelopment following 114 years of continuous industrial use).

to later generations of citizens that were not borne by those who reaped the benefits of the properties' prior uses. The shareholders and customers of the long-defunct Studebaker Corporation ("Studebaker"), the former automaker, for example, made profits and used goods obtained at much less than the true costs of production. The cost of removing the contaminants that render the abandoned Studebaker auto plant in South Bend unusable should have been passed along with the benefits, but that does not happen automatically, and often not at all. In brownfields, the present is asked to subsidize the past for the benefit of the future. This probably explains why our tax revenue allocation to attack the brownfields problem is so small relative to the task; $400 million over ten years is a pittance relative to other federal spending. It also points the way to why cost shifting actions, which seek to more closely align costs and benefits, more likely hold the key to brownfields progress.

Two such important pieces of the brownfields puzzle are receiving increasing attention in Indiana: insurance and private cost recovery. Should the liability insurers for defunct entities which caused environmental problems be liable for property damage which occurred during their policy periods? Or does the insolvency or bankruptcy of their policyholder absolve the insurers of responsibility? Also, should the legal successors to former entities which caused environmental problems be permitted to walk away from the damage caused by their predecessors? Or would allowing them to do so provide their shareholders an unearned benefit at the expense of the taxpayers of the communities left to deal with the problems left behind? Answers to questions like these may help convert brownfields sites from eyesores to manageable projects with a reasonable chance of economic revitalization.

The answers should be framed on this economic framework. Full costs should be aligned with benefits whenever this is possible. There is no moral or legal justification, for example, for allowing insurers of or successors to defunct corporations to enjoy a windfall at public expense by rigid application of a corporate dissolution statute.

II. Recent Developments in Indiana Environmental Insurance Law—The Liabilities of Former Insurers for Brownfield Cleanups

A. Declaratory Actions Against Insurers of Dissolved Companies

Typically, when municipalities face the problem of abandoned and tax delinquent properties, the former owners that caused the contamination are bankrupt or insolvent. Often, however, the industries which caused the environmental property damage purchased liability insurance that would provide for the cleanup of these sites if the companies that purchased them were still in business. But is that also true when the entity which purchased the policies is no longer in business in the form in which it was insured? The Indiana Court of Appeals confronted this problem in a recent case.

The City of South Bend has undertaken a significant brownfields project, the remediation and redevelopment of the former Studebaker manufacturing

facilities.[13] Beginning in the 1850s, Studebaker manufactured first wagons and then automobiles in the City of South Bend.[14] Studebaker's facilities in the City ultimately covered 104 acres and approximately 3.65 million square feet under roof.[15] Studebaker discontinued manufacturing automobiles in December 1963.[16] Following Studebaker's diversification into other lines of business and divestiture of its automotive facilities in the city, the facilities were used for a variety of other, less economically vibrant purposes.[17] Through its efforts to revitalize this vast downtown area, the City has become the owner of significant portions of the former Studebaker facilities.[18] Environmental testing of the former Studebaker facilities has determined that there have been significant environmental releases impacting the soil and groundwater at those facilities and surrounding areas.[19]

The City of South Bend asserted claims under the general liability policies purchased by Studebaker between 1949 and 1963.[20] The City sought a declaratory judgment that the Insurers, subject to their respective policy limits, are obligated to provide insurance coverage for Studebaker's environmental liabilities.[21] The Insurers filed motions to dismiss based on the "direct action" rule,[22] which the trial court granted. The trial court found that the City's declaratory judgment action against the Insurers:

> is barred by the direct action rule and falls outside the limited exception [to that rule] created by the courts in *Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mut. Ins. Co.*, 708 N.E.2d 882 (Ind.Ct.App.1999) and *Wilson* [*v. Continental Cas. Co.*], 778 N.E.2d 849 (Ind.Ct.App.2002). Without any dispute between the parties to the insurance contract as to the rights and obligations deriving thereunder, the exception to the direct action rule does not apply.[23]

South Bend appealed. The appeal attracted significant public attention: the cities of Indianapolis, Fort Wayne, Gary, Mishawaka, and Jeffersonville, Indiana

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13. The authors represent South Bend in this litigation.

14. City of South Bend v. Century Indem. Co., 821 N.E.2d 5, 7 (Ind. Ct. App. 2005).

15. *Id.*

16. *Id.*

17. *Id.* at 8.

18. *Id.*

19. *Id.*

20. *Id.* The Insurers are Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies, Century Indemnity Company, and Zurich American Insurance Company. *Id.* at 7.

21. *Id.* at 8.

22. *Id.* The direct action rule generally bars injured plaintiffs from bringing an action directly against the insurers of the defendant seeking payment under those policies. See *Menefee v. Schurr*, 751 N.E.2d 757, 761 (Ind. Ct. App. 2001), *trans. denied*, 774 N.E.2d 511 (Ind. 2002), regarding the scope of the direct action rule.

23. *City of South Bend*, 821 N.E.2d at 9 (quoting Appellants' Appendix at 35).

appeared as *amici curiae* aligned with South Bend. The Complex Insurance Claims Litigation Association, Insurance Institute of Indiana, and Property Casualty Insurers Association of America aligned with the Insurers.[24]

South Bend sought damages against McGraw-Edison Company ("McGraw-Edison") as the successor to Studebaker.[25] In October 1967, Studebaker had combined with Worthington Corporation to form a new company, Studebaker-Worthington, Inc. ("Studebaker-Worthington").[26] As part of that transaction, Studebaker reincorporated under a new name and transferred its assets and business to a wholly-owned subsidiary of Studebaker-Worthington Inc.[27] The wholly-owned subsidiary assumed "all of the liabilities and obligations of [Studebaker] existing on [November 22, 1967]."[28] In 1968, the entity formerly known as Studebaker Corporation sent a notice to creditors advising that its corporate existence terminated in November 1967 and that substantially all of its assets had been transferred to a wholly-owned subsidiary of Studebaker-Worthington, Inc. in a tax-free "reorganization" under which substantially all of the liabilities of the Corporation were assumed by the wholly-owned subsidiary.[29] Studebaker-Worthington later combined with McGraw-Edison in a corporate merger.[30]

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24. *Id*. at 8 n.3. The City of Warsaw joined the other cities in the appeal at the Indiana Supreme Court level.

25. *Id.* at 8.

26. *Id.* at 7.

27. *Id.* at 7-8.

28. *Id.* (quoting Appellants' App. at 900).

29. *Id*. In subsequent proceedings, South Bend has presented other evidence which establishes the succession through time of Studebaker's liabilities to Studebaker-Worthington to McGraw-Edison. This includes the Instrument of Assumption of Liabilities and Obligations, whereby the new corporation agreed to assume Studebaker's liabilities "of any kind, character, or description, whether accrued absolute, contingent, or otherwise and whether or not reflected in the records of Old Studebaker"; repeated references in Studebaker-Worthington's annual reports to the combination of Studebaker and Worthington Corporation as a "merger"; a successful attempt by Studebaker-Worthington in the 1970s to receive tax deductions for pre-1967 operating losses attributable to Studebaker, *see* Chilivis v. Studebaker-Worthington, Inc., 223 S.E.2d 747, 751 (Ga. Ct. App. 1976); a claim in the 1980s by a subsidiary of McGraw-Edison to obtain a pre-1967 tax deduction as a result of a loss of goodwill originating with the formation of Studebaker in 1911 because of Studebaker's cessation of automobile manufacture, *see* Edison Int'l, Inc. (formerly Studebaker-Worthington, Inc.) v. United States, 10 Cl. Ct. 287, 288 (Ct. Cl. 1986); a lawsuit filed in the 1990s by McGraw-Edison's corporate parent, Cooper Industries, Inc., to obtain insurance coverage as the successor to Worthington Corporation, which became part of Studebaker-Worthington on exactly the same terms as Studebaker did; and the fact that McGraw-Edison has paid, and its corporate parent continues to pay, the pensions of certain former Studebaker employees who retired years prior to the 1967 transaction, including prior to 1963.

30. *City of South Bend*, 821 N.E.2d at 7-8. In 1979 the liabilities of Studebaker Corporation became the liabilities of McGraw-Edison Company as a result of the merger between Studebaker-Worthington and McGraw-Edison, a transaction in which McGraw-Edison, through a

The principal issue in *City of South Bend v. Century Indemnity Co.* was whether South Bend's claims against the Insurers ran afoul of the "direct action" rule.[31] South Bend argued that its case was a declaratory judgment action—not an impermissible direct action—like those the Indiana Court of Appeals had allowed in *Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mutual Insurance Co.*,[32] and *Wilson v. Continental Casualty Co.*[33] The Indiana Court of Appeals agreed with South Bend, finding that "[t]he City is not seeking any direct recompense from the Insurers; it is only seeking a declaration that, if it were to prove its underlying case, the Insurers would be obligated to provide coverage under the previously-issued policies."[34] The court gave particular consideration to the fact that "the original insured, Studebaker, no longer exists, and its alleged successor, McGraw-Edison, has not pursued insurance coverage for this action,"[35] and stated that "the City's declaratory judgment action may be the only means by which a determination of insurance coverage can be made."[36]

The insurers have sought transfer on this issue. In *Community Action*, in which the insurers had denied coverage, transfer was denied.[37] In *Wilson*, in which the insurer was defending under a reservation of rights, transfer was granted, but dismissed at the parties' request once a settlement was reached.[38] Here, when as a practical matter no policyholder exists to make a claim to the insurers— McGraw-Edison because it does not want to exercise control which would suggest successor authority and Studebaker because it no longer is a going concern—the need for and usefulness of declaratory relief is especially strong.

The benefits of such relief are plain. As Judge Mathias put it in *Wilson*:

> We believe that allowing such declaratory *actions will prevent the waste of parties' and judicial resources.* All litigants will now be on the same footing in cases where insurance companies either deny coverage or defend under a reservation of rights. *Equal ability to know whether a provable loss is subject to insurance indemnification will be a positive step toward settlement and will make litigation outcomes dispositive, collectible and credible.* We believe Indiana's civil litigants deserve no less.[39]

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subsidiary, assumed all of the obligations and liabilities of Studebaker-Worthington. In 1985, Cooper Industries, Inc. acquired McGraw-Edison, which it merged into one of its subsidiaries and renamed McGraw-Edison.

31. *Id.* at 9-13.

32. 708 N.E.2d 882 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 305 (Ind. 1999).

33. 778 N.E.2d. 849 (Ind. Ct. App. 2002), *trans. dismissed*, 792 N.E.2d 44 (Ind. 2003).

34. *City of South Bend*, 821 N.E.2d at 11.

35. *Id.* McGraw-Edison did not pursue the insurance coverage for fear it would be regarded as an indication of its successorship to Studebaker's liabilities, as well as its rights.

36. *Id.*

37. 726 N.E.2d at 305.

38. 792 N.E.2d at 44.

39. *Wilson*, 778 N.E.2d at 852 (emphasis added).

In a second issue of particular importance to brownfield cleanups, the Insurers and McGraw-Edison alleged that there is no environmental liability to be covered by insurance because claims against Studebaker were barred as of approximately 1971 under a three-year Michigan statute of limitation for filing claims after a published notice of dissolution.[40] The court rejected the Insurers' and McGraw-Edison's contention as moot in light of South Bend's claim that McGraw-Edison is the successor to Studebaker's assets, including the insurance policies with the Insurers, as well as all of Studebaker's liabilities existing as of the date of Studebaker's dissolution.[41] It held that although "the company itself [Studebaker] does not continue to exist, its assets and liabilities may."[42]

A third important issue addressed by the Indiana Court of Appeals in a subsequent decision on a petition for rehearing is whether an "insolvency or bankruptcy" statute, Indiana Code section 27-1-13-7, supports South Bend's declaratory judgment action even in the absence of a judgment against McGraw-Edison.[43] By statute, it is the public policy of Indiana that

> [n]o policy of insurance . . . shall be issued or delivered in this state . . . unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person or persons insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy.[44]

This statute is intended to protect victims by insuring that a tortfeasor's insurance

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40. *City of South Bend*, 821 N.E.2d at 11-12 (citing MICH. COMP. LAWS § 450.75 (1953)). Hallpark Enterprises, Inc., formerly known as Studebaker Corporation, was a Michigan corporation.

41. *Id.* at 13.

42. *Id.*

43. City of South Bend v. Century Indem. Co., 824 N.E.2d 794 (Ind. Ct. App. 2005). The Indiana Court of Appeals, sua sponte, found additional support in this opinion for its original decision on the direct action issue. *Id*. at 795 n.1.

> With respect to direct actions, we note that on January 6, 2005, nearly two weeks before this opinion was handed down, a bill was introduced in the Indiana House of Representatives by Representative Torr which would amend Indiana Code section 34-14-1-2 to add the following section
>
> (b) In an action against an insurer, only a:
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> (1) named insured; or (2) person seeking status as an insured under the terms of the insurance contract; may bring an action for declaration of coverage before judgment has been entered on the underlying claim.
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> Representative Torr is also an insurance adjuster, and as such, insurance is an area within his particular expertise. This proposed amendment would indicate that as of January 6, 2005, the state of the law was that a declaratory judgment action by a third party was not a direct action.

Id. (citations omitted).

44. IND. CODE § 27-1-13-7 (2004). This provision has been part of Indiana law since 1935. *See* Indiana Insurance Law, § 177, 1935 Ind. Acts 162.

remains to answer even if the tortfeasor is insolvent or bankrupt.

The court of appeals disagreed, finding that without a claim against the successor, McGraw-Edison, South Bend would be barred by the Michigan corporation dissolution three-year statute of limitations in effect at the time.[45] The court of appeals gave two reasons for its holding, in a single paragraph.[46] First, it noted that another statute—the receivership statute, Indiana Code section 27-1-13-7—uses *both* the words "dissolution" and "insolvency." Indiana Code section 32-30-5-1(5) declares a receiver may be appointed "[w]hen a corporation: (A) has been dissolved; (B) is insolvent; (C) is in imminent danger of insolvency; or (D) has forfeited its rights." This shows, the Court of Appeals found, that "the legislature has not, in other statutes, used the terms 'insolvency' and 'dissolution' interchangeably."[47] Second, the court of appeals concluded that application of the "insolvency or bankruptcy" statute requires liability on the part of the insured. It stated that a finding of liability against Studebaker was impossible because of Studebaker's dissolution.[48]

South Bend has filed a petition to transfer. Applying the "insolvency or bankruptcy" statute here to prevent a forfeiture of insurance squares perfectly with the statute's purpose[49] and with the interpretation of other states' "insolvency or bankruptcy" statutes.[50] The court of appeals' construction of the

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45. MICH. COMP. LAWS § 450.75 (1953).

46. *City of South Bend*, 824 N.E.2d at 796 (quoting IND. CODE § 32-30-5-1(5)).

47. *Id*.

48. *Id*.

49. Courts construing this statute have eloquently articulated its purpose: "[i]t is obvious that the statute was enacted, not for the protection of the insurer but for the protection of the injured third party and the insured himself. Otherwise the financial responsibility laws enacted for the protection of the public would be rendered nugatory by the insertion in the policy of a clause relieving the insurer from liability where the insured is insolvent or bankrupt and thus leaving the injured third party remediless." Barker v. Sumney, 185 F. Supp. 298, 301 (N.D. Ind. 1960). *See also* Merchants Mut. Auto. Liab. Ins. Co. v. Smart, 267 U.S. 126, 129-30 (1925) (finding that New York's similar statute was enacted to protect "the public, whose lives and limbs are exposed" in order to vest rights in victims at no expense to a destitute injurer or his or her creditors).

50. *See, e.g.,* Penasquitos, Inc. v. Superior Court, 812 P.2d 154 (Cal. 1991) (determining California's "bankruptcy or insolvency" statute required that "if the corporation has liability insurance coverage, its dissolution provides no reason to excuse the insurer from defending the action and indemnifying those injured by the predissolution activities of its insured, just as a corporation's insolvency or bankruptcy does not release its insurer from payment for damages the corporation has caused"); Westoil Terminals Co. v. Harbor Ins. Co., 86 Cal. Rptr. 2d 636, 641 (Cal. Ct. App. 1999) (allowing a dissolved company which had changed from a corporation to a limited partnership to bring suit against the former corporation's insurers even if the policies were not transferred to the partnership, based on that state's "insolvency or bankruptcy" statute); Home Ins. Co. of Ill. v. Hooper, 691 N.E.2d 65, 69-70 (Ill. 1998) (finding a policy provision requiring a bankrupt insured's actual payment of a self-insured retention as a condition precedent to payment to a tort victim violated the public policy expressed in the Illinois "insolvency or bankruptcy" statute, which "makes clear the legislative intent to prevent insurers from using the insured's

claims bar statute[51] unnecessarily brings it into conflict with the insurance "insolvency or bankruptcy" statute[52] and would create a significant problem for those seeking to remedy brownfields problems. The purpose of a dissolution statute is to resolve claims when a corporation goes out of business and thus allow an orderly distribution of any assets remaining to the corporation's owners after all claims are satisfied.[53] The directors, officers and shareholders face no peril in an action solely upon insurance coverage for injuries caused by the corporation. There is no basis for distinguishing dissolution from insolvency. The legislature's use of two terms in a statute is not a sound basis for concluding the terms have entirely distinct meanings. The terms "insolvent" and "bankrupt," for example, in Indiana Code section 27-1-13-7, overlap. They are not defined in the statute. In dictionaries, they mean the same thing.[54] In the receivership

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bankrupt condition and resulting inability to make actual payment to satisfy a judgment or any portion thereof as grounds to avoid payment on a policy"); *In re* Babcock & Wilcox Co., No. CIV.A. 01-912, No. CIV.A. 01-1187, 2001 WL 1095031 (E.D. La. Sep. 18, 2001) (allowing intervention against the debtor's insurers in a bankruptcy proceeding citing Louisana's "insolvency or bankruptcy" statute); Roman v. Hudson Tel. Assocs., 784 N.Y.S.2d 484 (App. Div. 2004) (reasoning New York's "insolvency or bankruptcy" statute required that a post-discharge claim asserted for sole purpose of establishing the liability of a defendant's insurer was not barred by the debtor's discharge in bankruptcy).

51. MICH COMP. LAWS § 450.75 (1953).

52. IND. CODE § 27-1-13-7 (2004). Courts should avoid conflicts between statutes where possible and give effect to all of Indiana's laws. Citizens Action Coalition of Ind., Inc. v. Pub. Serv. Comm'n of Ind., 425 N.E.2d 178, 184 (Ind. Ct. App. 1981) ("In instances where the two acts deal with the same particular subject, the statutes must be examined carefully and harmonized if possible.").

53. The purpose behind Indiana's dissolution statute is made explicit by the official comments to that provision: the "concern of exposing directors, officers and shareholders of the dissolving corporation to uncertain liability for a protracted period." Indiana Code section 27-1-17-5 provides that "[a]fter their publication, the comments may be consulted by the courts to determine the underlying reasons, purposes and policies of this article and may be used as a guide in its construction and application." *See also* Lovold Co. v. Galyan's of Brownsburg, Inc., 764 N.E.2d 281, 286 (Ind. Ct. App. 2002) (stating that the purpose of the dissolution statute is "to shield officers and owners of the corporation from uncertain or unlimited liability").

54. *See, e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY 129 (9th ed. 1988) (defining bankrupt as "a person who becomes insolvent"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 141 (4th ed. 2000) (defining bankrupt as "[h]aving been legally declared financially insolvent"). All the words here—insolvency, dissolution, bankruptcy—are to a large measure interchangeable. For example, "dissolution" and "solvency" share a common Latin etymology. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 523 (4th ed. 2000) ("From Latin dissolvere : dis-, dis- + solvere, to release"). If an entity is "dissolved" or "insolvent," a creditor's grip has been weakened or released. A "solvent" is something "having the power of dissolving. . . ." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1356 (1973). Other words share this root and a common theme of release or loosening: absolve, dissolute, dissolution, indissoluable, insoluable, resolution.

statute, "dissolved" and "insolvent" are treated identically; both are a status (like bankruptcy) warranting use of a receiver to protect creditors.[55] Other, more pertinent, insurance statutes use "dissolution" and "insolvency" interchangeably.[56] A number of courts have treated dissolution the same as insolvency.[57] The very point of Indiana Code section 27-1-13-7 is that it is not necessary for a judgement to be entered capable of being executed against someone other than the insurers.[58]

Often such insurance is all that is left behind. It seems irrational and unfair that whether or not liability insurance can be available to help pay for a cleanup would depend upon whether the policyholder went through dissolution proceedings.

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55. In bankruptcy, the receiver's function is discharged by a statutory creation, the trustee.

56. For instance, Indiana Code section 27-9-3-9 states that dissolution as a matter of law occurs when an insurer is insolvent: "If the dissolution [of a domestic insurer] has not previously been ordered [by the commissioner], the dissolution shall be effected by operation of law upon the discharge of the liquidator if the insurer is insolvent. . . ." IND. CODE § 27-9-3-9.

57. In *James Talcott, Inc. v. Crown Industries, Inc.*, 323 So.2d 311, 314 (Fla. 1975), the court, in interpreting a Florida transfer statute, held that the test of insolvency is "whether the corporation has a general inability to answer in the course of business the liabilities existing and capable of being enforced." That court further held that "once the decisions had been made to liquidate the corporation and wind up its business, then the corporation was insolvent within the meaning of the statute." *Id. See also* Cardozo v. Brooklyn Trust Co., 228 F. 333, 334 (2d Cir. 1915) (payment made "with winding-up as an impending fact" is "made in contemplation of insolvency"); Central States v. Minneapolis Van & Warehouse, 764 F. Supp. 1289, 1294 n.8 (N.D. Ill. 1991) ("a corporation that distributes all its assets in the course of dissolution is rendered insolvent (by definition) by the very act of distribution if it turns out that all of the corporation's obligations have not been paid or provided for").

58. A liability judgment is not required for the statute to apply. In *Barker*, the injured party had entered a "covenant not to execute" with the policyholder which limited its ability to collect to recoveries from the insurer. *Barker*, 185 F. Supp. at 299-300. The insurer in *Barker* pointed out that Section 39-4309 of Burns Indiana Statutes, now Indiana Code section 27-1-13-7, allowed an injured party to recover from an insolvent defendant's insurer if a levy of execution against the insolvent defendant first had been returned "unsatisfied." Due to the covenant, the insurer claimed, no such judgment and return was possible. *Id.* at 300-01. The court did not agree this rendered the statute inapplicable:

> A reading of the statute fails to support the defendant's position that as a condition precedent to the execution against the defendant's insurer of any possible judgment obtained against the defendant the plaintiff must first return an unsatisfied execution against the defendant himself. The portion of the statute pertinent here requires only that an insurance policy issued or delivered in Indiana provide for the right of an injured third party to bring an action against the insurer of the insolvent or bankrupt tort-feasor where an execution has been returned unsatisfied. It does not, however, provide the reverse to be true, that is, that an execution must be returned unsatisfied before suit can be brought against the tort-feasor's insurer.

Id.

B. Allocation Among Successive Former Insurers

Allocation among insurers is a crucial issue in brownfields cleanups. This is a result of the uncertain nature of the timing of releases in the distant past at these properties as well as the long time lag between such releases and their discovery. These problems are exacerbated by the difficulty in locating old insurance policies and the likelihood that some of the insurers which covered the risk have become insolvent over the years. The insurance industry's view of the allocation issue is that insurers should be responsible solely for the fraction of the cleanup costs attributable to damage which occurred solely during their policy period. Policyholders and entities standing in their shoes performing brownfields cleanups point to the fact there is no language in standard insurance policies that provides for a reduction of the insurers' liability if an injury occurs only in part during the policy period.

In *Allstate Insurance Co. v. Dana Corp.*,[59] the Indiana Supreme Court resolved these questions. It held that a policyholder facing a loss which arises from an occurrence spanning more than one policy period is permitted by the "all sums" language commonly found in broad form liability policies to select which policy should respond.[60] An insurer is obligated to indemnify its policyholder for the entire liability caused by an occurrence triggering the policy, not merely for a prorated portion of the damages.[61] This is very helpful in brownfields matters because cities often are unable to locate all of a defunct business's policies. Under *Dana*, one or two policies may be enough to provide sufficient cleanup dollars.

However, in a subsequent case, *Federated Rural Electric Insurance Exchange v. National Farmers Union Property & Casualty Co.*,[62] the Indiana Court of Appeals erroneously described *Dana*'s "all sums" rule, suggesting it somehow is limited to insurers in the same policy period (sometimes called "vertical allocation") and that the policyholder may not select among triggered policies "horizontally" across many years.[63] The *Federated Rural* case involved stray voltage from transmission lines that injured dairy cattle and decreased milk production over several years.[64] *Federated Rural* suggested that *Dana* did not apply to insurers in successive years for claims which trigger policies over a

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59. 759 N.E.2d 1049 (Ind. 2001).

60. *Id.* at 1057-58.

61. Such policies typically provide that the insurer will pay "all sums" for which a policyholder becomes liable arising out of an "occurrence," which is usually defined as an "accident" which results in property damage or bodily injury during the policy period. Nowhere do such policies say all the damage or injury must take place in the policy period, or that they will pay only for damage related only to the injury taking place in the policy period. *Id*.

62. 805 N.E.2d 456 (Ind. Ct. App.), *vacated*, 816 N.E.2d 1157 (Ind. 2004).

63. *Id.* at 467.

64. *Id*. at 461.

number of years.[65] It also concluded that *Dana* did not require any insurer whose policy is triggered to pay a policyholder "all sums" except in the same policy period, and that a policyholder may not select among triggered policies which policy shall respond to the claim.[66] The court of appeals's descriptive mistakes likely stemmed from a conflation of the "all sums" ruling in *Dana*, which applied to all of Dana Corp.'s claims,[67] with *Dana's* discussion of trigger and allocation as to one claim at a particular site.[68]

Federated Rural filed a petition to transfer, which the Indiana Supreme Court granted.[69] The supreme court's grant of the petition thereby vacated the court of appeals' decision pursuant to Indiana Appellate Rule 58(A). After the supreme court granted transfer but before the court issued an opinion, the parties settled and requested that the court dismiss the appeal. The court dismissed the appeal, but specifically noted that "the Court of Appeals decision remains vacated."[70]

Thus, Indiana law remains as it was before *Federated Rural*. *Dana* controls the allocation issue. Under a standard-form "all sums" insuring agreement, an insurer which agrees to indemnify its policyholder for all sums that the policyholder becomes obligated to pay as damages is jointly and severally liable for the entire amount of the policyholder's loss, up to any applicable policy limits,[71] even if some injury or damage took place outside the policy period. As a result, the policyholder may elect any or all triggered policies under which to claim coverage.[72]

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65. *Id*. at 466.

66. *Id*.

67. *Dana Corp.*, 759 N.E.2d at 1058.

68. *Id*. at 1052.

69. 822 N.E.2d 973 (Ind. 2004).

70. 816 N.E.2d 1157 (Ind. 2004).

71. *Dana Corp.*, 759 N.E.2d at 1061.

72. In an additional insurance coverage decision during the survey period, the Seventh Circuit required application of certain arbitration clauses in a coverage dispute, which may complicate resolution of multi-insurer "long tail" claims. In *Reliance Insurance Co. v. Raybestos Products Co.,* 382 F.3d 676 (7th Cir. 2004), two of the four insurers involved had included an arbitration clause in their policies. The policyholder confronted a PCB cleanup arising from discharges over many years. The policyholder opposed arbitration and the district court denied the two insurers' requests due to the danger of possible inconsistent results as between arbitration and litigation against the remaining insurers. For example, both a judge and an arbitrator could find coverage under the terms of the polices in each proceeding, but both also could determine that the property damage occurred during the other proceedings insurers' policy periods. The result: two findings of coverage, but no money for the policyholder. Despite acknowledging potentially inconsistent results, the court held that concern must yield to the broad policy encouraging arbitration in the Federal Arbitration Act. 9 U.S.C. §§ 1-307; *Reliance*, 382 F.3d at 679-80.

III. RECENT DEVELOPMENTS UNDER CERCLA—CHANGING RULES FOR OBTAINING CONTRIBUTION FROM FORMER OWNERS AND OPERATORS

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the United States Supreme Court ruled that a party performing a cleanup may seek CERCLA section 113(f)(1) contribution only if it was a defendant in a CERCLA section 106 or section 107(a) civil action or if the party had previously resolved its liability to federal or state regulators in an administrative or judicially approved settlement.[73] Absent a formal agreement with state or federal regulators that settles liability, costs incurred by a private party under the mere threat of enforcement or in performing a "voluntary" cleanup are not recoverable in a CERCLA contribution action.[74] The decision, which reversed longstanding contribution practice in many circuits,[75] will have the adverse effect of discouraging potentially responsible parties from performing cleanups without first requiring environmental regulatory entities to file an enforcement action. Absent a more adversarial approach to government enforcement, *Aviall* calls into question whether a party performing the cleanup will be able to recover cleanup costs from other responsible parties.

Cooper Industries, Inc., owned four Texas properties until 1981, when it sold them to Aviall Services, Inc.[76] After operating the four sites for a number of years, "Aviall discovered that both it and Cooper had contaminated them when petroleum and hazardous substances leaked into the ground and ground water through underground storage tanks and spills."[77] Aviall sent notification to the Texas Natural Resource Conservation Commission of the contamination.[78] "The Commission informed Aviall that it was violating state environmental laws, directed Aviall to clean up the site, and threatened to pursue an enforcement action if Aviall failed to undertake remediation. Neither the Commission nor the EPA, however, took judicial or administrative measures to compel cleanup."[79] Aviall cleaned up the properties under the State's supervision and sold them to a third party, but remained contractually responsible for $5 million or more in cleanup costs. Aviall filed an action against Cooper to recover its environmental

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73. 125 S. Ct. 577, 580 (2004). This is the same Cooper Industries, Inc. discussed *supra* in connection with the *South Bend* case, but the matters are unreleated.

74. *Id.* at 583.

75. *See* Cadillac Fairview/Cal. Inc. v. Dow Chem. Co., 299 F.3d 1019, 1024 (9th Cir. 2002); Morrison Enter. v. McShares, Inc., 302 F.3d 1127, 1132 (10th Cir. 2002); Kalamazoo River Study Group v. Rockwell Int'l Corp., 274 F.3d 1043, 1046 (6th Cir. 2001); Crofton Ventures Ltd. P'ship v. G & H P'ship, 258 F.3d 292, 294 (4th Cir. 2001); Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 613 (7th Cir. 1998); Control Data Corp. v. SCSC Corp., 53 F.3d 930, 932-33 (8th Cir. 1995); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989).

76. *Aviall*, 125 S. Ct. at 582.

77. *Id.*

78. *Id.*

79. *Id.*

cleanup costs.[80] Aviall asserted a claim pursuant to CERCLA section 113(f)(1), seeking contribution from Cooper as a potentially responsible party (PRP) under section 107(a).[81]

The Supreme Court held that a private party who has not been sued under CERCLA section 106 or section 107(a) may not obtain contribution under section 113(f)(1) from other liable parties.[82] The enabling clause that establishes the right of contribution provides: "Any person may seek contribution . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title."[83] The Court found that this provision must be read to mean "that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action."[84] The Court declined to address Aviall's claim that it may recover costs under section 107(a)(4)(B) even though it is a PRP. The matter had not been briefed or decided by courts below.[85]

Aviall unfortunately should foster a new era of non-cooperation between government regulators and private parties. However, it ought to have no impact upon state law claims under the Indiana Environmental Legal Action Statute ("IELA").[86] While Indiana courts have generally applied case law construing the provisions of CERCLA to this statute, the "during or following any civil action" provision at issue in *Aviall* has no parallel in the Indiana statute.[87]

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80. *Id.*

81. *Id.*

82. *Id.* at 583. In addition, while the Court purported to demure with respect to whether Aviall had an "implied right to contribution" under section 107, it strongly suggested that such claims would, likewise, only be valid if asserted during or following civil actions. *Id.*

83. 42 U.S.C. § 9613(f)(1) (2000).

84. *Aviall*, 125 S. Ct. at 583.

85. *Id.* at 584.

86. IND. CODE §§ 13-30-9-1 to -8 (2004).

87. The Indiana Supreme Court and federal courts interpreting Indiana law have, in other respects, equated the IELA and a similar statute, the Indiana Underground Storage Tank statute, to the liability scheme of CERCLA in several cases. In *Bourbon Mini-Mart v. Gast Fuel & Service, Inc.*, 783 N.E.2d 253 (Ind. 2003), the Indiana Supreme Court compared the liability measures of Indiana's Underground Storage Tank statute to that of CERCLA, in that both encourage voluntary cleanups by allowing the party that initiates corrective action to seek reimbursement from any other owner or operator, regardless of fault. Likewise, the U.S. District Court for the Southern District of Indiana in several decisions has likened the IELA to CERCLA. *See* Taylor Farms LLC v. Viacom, 234 F. Supp. 2d 950, 962 (S.D. Ind. 2002) (stating that like CERCLA, the purpose of the IELA is to recover the reasonable costs of a removal or remedial action); Northstar Partners v. S & S Consultants, 2004 WL 963706, at *8 (S.D. Ind. Mar. 31, 2004) (holding that the IELA is a supplemental state law cause of action closely resembling the cost recovery of CERCLA). The court in *Taylor Farms* also expressly equated a claim under the IELA to a CERCLA Section 107(a) claim. *Taylor Farms*, 234 F. Supp. 2d at 962. The Southern District of Indiana recently reiterated its position in *Commercial Logistics Corp. v. ACF Indiana*, No. 4:04CV00074-SEB-WGH, 2004 WL 2595880, at *3 (S.D. Ind. Nov. 10, 2004), in which the court stated that interpretation of the IELA is aided by analyzing CERCLA.

IV. OTHER RECENT DEVELOPMENTS IN INDIANA ENVIRONMENTAL LAW

A. Cleanups of Old Gasoline Stations—Bourbon Mini-Mart *and the Excess Liability Trust Fund*

In contrast to the U.S. Supreme Court's limitation of remedies in *Aviall*, the Indiana Court of Appeals rejected attempts to limit the scope of Indiana's Underground Storage Tank Act ("UST"),[88] at least as wielded by government. In *Bourbon Mini-Mart, Inc. v. Indiana Department of Environmental Management*[89] the court held that the UST statute allows IDEM to seek recovery of its costs in investigating and cleaning up a gas station spill where the operator ("Mini-Mart") refused to conduct the cleanup.[90] The litigation over this site has been substantial. Mini-Mart previously had lost a claim by an adjacent landowner against Mini-Mart[91] and its own contribution claim against others that Mini-Mart alleged had contributed to the contamination.[92]

The court of appeals rejected all of Mini-Mart's appeals as to the trial court's entry of summary judgment in favor of IDEM. These included Mini-Mart's claim that all four of the criteria of Indiana Code section 13-7-20-19(b)(1)-(4) need to exist before IDEM can undertake corrective action. The court, looking to the Act's remedial purpose, and its use of "or" between sections (3) and (4) concluded that the presence of any one of the four criteria authorized IDEM to act. The court disagreed with Mini-Mart's contention that a 1996 statutory revision changed the statute, since the amending act specifically discounted any intent to change it.[93] The Court found adequate evidence to support at least one of the four criteria—potentially dangerous conditions—necessary to permit IDEM corrective action.[94]

B. Equal Protection, Ripeness, and Redevelopment Lists

Indiana cities and towns can do brownfields planning without facing federal equal protection claims by property owners in designated redevelopment zones. In *Patel v. City of Chicago*,[95] the Seventh Circuit affirmed dismissal of an equal protection claim brought by Chicago hotel owners challenging an ordinance designating ground around the hotels as a redevelopment zone and listing the hotels as potential eminent domain targets. The court held that the claim was not ripe because no eminent domain proceedings had begun.[96] Judge Wood noted

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88. IND. CODE § 13-23-1-1 to -14-4 (2004).
89. 806 N.E.2d 14 (Ind. Ct. App. 2004).
90. *Id.* at 24-25.
91. Bourbon Mini-Mart, Inc. v. Gast Fuel & Serv., Inc., 783 N.E.2d 253, 256 (Ind. 2003).
92. *Id.*
93. 806 N.E.2d at 21-23.
94. *Id.* at 24.
95. 383 F.3d 569 (7th Cir. 2004).
96. *Id*. at 574.

that the court had previously rejected equal protection takings claims based on placement on a redevelopment target list in *SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion County*,[97] pending exhaustion of the state court remedy of an inverse condemnation action.[98]

C. Takings and Clean Water Act Claims

A second Seventh Circuit opinion, *Greenfield Mills, Inc. v. Macklin*,[99] also stressed the viability of state inverse condemnation claims over federal due process or other constitutional claims, while at the same time allowing a landowner's Clean Water Act ("CWA") claim against the State of Indiana to proceed. The Indiana Department of Natural Resources ("DNR") drained a pond into a river, releasing a large amount of silt, killing fish and turning what had been lake land into muddy wetlands. The riparian owners sued, alleging CWA section 404 unpermitted discharges. The district court had dismissed the CWA claim based on the maintenance exception,[100] which under certain circumstances allows maintenance activity without a permit.[101]

The Seventh Circuit reversed, finding a factual issue as to whether the four-hour dredging and release of the pond mud was reasonably necessary or a pretext for an unpermitted discharge, or whether in any event the DNR's actions are subject to the "recapture" provisions of 33 U.S.C. § 1344(f)(2) which recaptures otherwise excused actions and requires a permit where the action was intended to and did cause a use to which the body of water involved "was not previously subject."[102] Here, because the conversion from a clean river to stagnant mud flats could meet the test, summary judgment for DNR was not appropriate.[103]

D. Significant Restraints on Citizen Objections to Environmental Permits

Two supreme court opinions outlined important restraints on citizen attacks on environmental permits. Environmental permits are subject to appeal under the Administrative Order and Procedure Acts ("AOPA").[104] AOPA allows an "aggrieved or adversely affected" person to appeal any permit decision. A short automatic stay of the permit is then activated, and a permit-seeker can be held up for years by the uncertainty created by a permit appeal, with little practical recourse against the objector even if the concerns raised are exaggerated or wrong.

In *Huffman v. Indiana Office of Environmental Adjudication*,[105] the Indiana

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97. 235 F.3d 1036 (7th Cir. 2000).
98. *Id*. at 1039.
99. 361 F.3d 934 (7th Cir. 2004).
100. 33 U.S.C. § 1344(f)(1)(b) (2000).
101. *Greenfield Mills, Inc.*, 361 F.3d at 944-45.
102. *Id.* at 953-54.
103. *Id.* at 956-57.
104. IND. CODE §§ 4-21.5-1-1 to -15 (2004).
105. 811 N.E.2d 806 (Ind. 2004).

Supreme Court clarified the "aggrieved or adversely affected" requirement. The case concerned an objection to a National Pollution Discharge and Elimination System ("NPDES") permit obtained by Eli Lilly and Company. The objector, Rosemary Huffman, claimed a right to object personally and as a land owner. Her land claim was based on her ownership of a company that was sole owner of a limited liability corporation which owned property adjacent to the Lilly facility.[106]

The court treated the question as one of construction of AOPA requirements—did Ms. Huffman meet the criteria or not—rather than one of the judicial doctrine of "standing."[107] The court held that to be "aggrieved or adversely affected" means, under long-established law, to "have suffered or be likely to suffer in the immediate future harm to a legal interest," requiring a "personal stake" in the outcome.[108] The court noted the standards for administrative review and judicial review under AOPA are the same, and require "more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm."[109]

The court held Huffman's petition was properly dismissed as to property damage because she did not own the adjacent property and she could not act for the limited liability company that did own the property.[110] However, the court remanded the claim as to Huffman's claimed bodily health concern for lack of substantial evidence to support dismissal.[111] *Huffman's* requirement of a personalized interest in permit appeals is a significant limitation on who can appeal a permit under AOPA.

Breitweiser v. Indiana Office of Environmental Adjudication,[112] addresses another problem often found in permit appeals. Objectors, particularly pro se citizens, sometimes disregard the procedural requirements of the appeal process. *Breitweiser* shows that can lead to dismissal of the appeal.

Breitweiser was an AOPA challenge to a Confined Animal Feeding Operation ("CAFO") permit. The Environmental Law Judge ("ELJ") issued a notice of proposed default after the Breitweisers failed to respond to discovery requests. The Breitweisers had moved to disqualify the ELJ just before the default notice was issued.[113] The Breitweisers then filed a mandate action in the Marion Superior Court; the action was dismissed when the ELJ agreed to rule on all pending matters, including the motion to disqualify.[114] The Breitweisers did not answer the discovery. The ELJ then denied the disqualification motion and entered the default order. On judicial review, the Marion Superior Court

106. *Id.* at 808.
107. *Id.* at 809.
108. *Id.* at 810-11.
109. *Id.* at 812.
110. *Id.* at 815-16.
111. *Id.* at 816.
112. 810 N.E.2d 699 (Ind. 2004).
113. *Id.* at 701.
114. *Id.*

affirmed.[115]

The court of appeals reversed, holding that the ELJ improperly denied the disqualification motion.[116] The supreme court granted transfer and reversed the court of appeals.[117]

The court noted that on judicial review a court can overturn only an error of law or a purely arbitrary decision. Here the court found the notice of default gave the Breitweisers seven days to respond; they chose not to, and the statute mandates the ELJ to enter a default.[118] The filing of the mandate action was not a sufficient response.[119] AOPA defined the consequence of a failure to act timely.[120]

The Seventh Circuit adopted a slightly less demanding standard for allowing a citizen suit to go forward in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*.[121] *Friends* involved a Clean Water Act ("CWA") citizens suit against Milwaukee over combined sewage overflows ("CSO"). CSOs occur after heavy rain events when storm water overwhelms the combined flow capacity of combined storm and sanitary sewers and a discharge of sanitary and storm sewer water results, damaging the recipient bodies of water. In *Friends* the environmental groups alleged that the State of Wisconsin had failed to enforce the CWA as to the CSOs. Milwaukee claimed a 2002 stipulation of how such CSOs were to be addressed was an adequate enforcement action which would leave the environmental group without the ability to proceed in lieu of the state. The environmentalists argued that a lengthy delay in enforcement as to a prior stipulation (entered into in 1977) showed a lack of actual enforcement. The Seventh Circuit reversed the trial court's dismissal and remanded for a factual determination of whether the changes under the 2002 stipulation had a "realistic prospect" (after giving "some deference" to the state's view on this) of correcting the problem.[122] If not, the CWA citizen suit would be allowed to proceed.

E. "Good Character"—Permits Can Be Denied to Individuals Based on Prior Bad Acts by A Corporation They Operated

Indiana's "good character" statute[123] has had a controversial history.[124] The

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115. *Id.* at 702.

116. *Id.*

117. *Id.*

118. *Id.* at 703.

119. Justices Dickson and Rucker dissented on this point, suggesting the ELJ's entry of the notice of default immediately after the disqualification motion was filed suggested "the possibility it was motivated by vindictive retaliation." *Id.* at 704.

120. *Id.* at 703-04.

121. 382 F.3d 743 (7th Cir. 2004).

122. *Id.* at 765.

123. IND. CODE §§ 13-19-4-1 to -10 (2004).

124. Ind. Dep't of Envt'l Mgmt. v. Chem. Waste Mgmt. of Ind., Inc., 604 N.E.2d 119 (Ind.

statute was designed to allow IDEM to deny permits based upon the applicant's prior environmental record. An initial constitutional attack, successful at the trial court level, was overturned on most though not all points on appeal.[125]

In the *Indiana Department of Environmental Management v. Boone County Resource Recovery Systems, Inc.*,[126] the court of appeals held IDEM could use the statute to deny a permit to Boone County Resource Recovery Systems, Inc., and various Bankert family members who own that company.[127] IDEM denied the permit based on Indiana Code section 13-19-4-5(a)(5), finding that the applicants "knowingly and repeatedly violated state or federal environmental protection laws."[128] On administrative appeal the ELJ sustained IDEM, but a trial court reversed, in large part because IDEM had failed to suspend or revoke the applicants' existing permit based on the alleged violation it now was using to deny the new application.[129]

The court of appeals reversed. It focused the issue as whether a person who was an officer, director, or employee of one or more corporations which had a history of violations can be a "responsible party" who has "knowingly and repeatedly" violated environmental laws. The Bankert family members were not defendants in any prior enforcement action. The statute is silent on what level of personal involvement is required before a person has "knowingly and repeatedly" violated environmental laws.

IDEM construed the statute, the court held, to mean that "when a corporation violates environmental laws, its officers and directors may, under certain circumstances, be deemed responsible for those violations in the context of the Good Character law."[130] The court held this interpretation was deemed "reasonable" by the ELJ, and decreed that should end the analysis.[131]

This conclusion seems at odds with established precedent that an erroneous construction of a statute by an administrative agency is entitled to no deference.[132] At the very least, a court, not an ELJ, should make at least one determination that a particular construction of a statute is reasonable, or effectively no judicial review has taken place.

The opinion is troubling in that the court declines to address whether the facts of the case actually meet the "reasonable corporate office" standard for

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Ct. App. 1992) ("CWMI I"); Ind. Dep't of Envt'l Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331 (Ind. 1994) ("CWMI II").

125. *CWMI II*, 643 N.E.2d at 331.

126. 803 N.E.2d 267 (Ind. Ct. App. 2004).

127. *Id.* at 276.

128. *Id.* at 270.

129. *Id.* at 274 n.1.

130. *Id.* at 274.

131. *Id*.

132. Comm'r, Dep't of Rev. v. Partlow, 769 N.E.2d 1212, 1217 (Ind. Ct. App. 2002) (citing Comm'r, Dep't of Rev. v. Fort, 760 N.E.2d 1103, 1106 (Ind. Ct. App. 2001) ("An interpretation of a statute by an agency charged with the duty of enforcing it is entitled to great weight, unless the interpretation would be inconsistent with the statute itself.")).

personal liability under *Indiana Department of Environmental Management v. RLG, Inc.*[133] The facts recited by the court seem less than conclusive as to personal involvement by the parties now to be barred in directing or controlling prior unlawful activities. The court also excused IDEM from having to explain how it considers, as it must, mitigating factors in the assessment of "good character." In *CWMI II*, the Indiana Supreme Court declared that a section of the statute which expressly excused IDEM from explaining its mitigating factors decision, even if it based a good character denial solely on allegations of wrongdoing, to be void.[134] If a government agency is required to consider a fact, but not to explain how it did so, how can there be meaningful judicial review?

F. Solid Waste Management Districts

Solid Waste Management Districts ("Districts") are a relatively new creation of Indiana law. Composed of single counties or groups of counties, the Districts were established to develop solid waste management plans for their district, which can include contracts with private entities to perform collection and disposal services or creating and running their own facilities. Created pursuant to Indiana Code section 13-21, passed in 1990,[135] these Districts have the capacity to generate substantial revenue, and have become powerful actors on the local scene. They are especially powerful in smaller counties where a great deal of money, at least relative to other local revenue sources, can be produced from a landfill or other facility.

The Indiana Supreme Court this year decided that these Districts properly exercise both executive and legislative powers, and that they are not preempted from regulating solid waste.[136] The *Worman* case arose in a dispute over ex parte communication between board members and citizens over a permit the District required a long-term clean fill recycling facility to obtain. The case challenged the right of the District to require such a permit and the conditions the District imposed in the permit regarding what materials the facility could accept. The Indiana Supreme Court held that because a District has hybrid adjudicative and legislative functions, ex parte communications were not improper.[137] The court also affirmed that the District had the power to impose permit conditions generally and the specific conditions (asphalt and time restrictions, fire and dust control) at issue.[138] The court reasoned that the permitting process is not purely adjudication, but legislation, and because District boards are mainly composed

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133. 755 N.E.2d 556 (Ind. 2001).

134. 643 N.E.2d at 341-42.

135. An Act of Mar. 20, 1990, 1990 Ind. Acts 10.

136. Worman Enters., Inc. v. Boone County Solid Waste Mgt. Dist., 805 N.E.2d 369, 374 (Ind. 2004).

137. *Id.* at 376.

138. *Id.* at 394. The court noted that in 2003 the legislature passed a statute, which became effective after the court of appeals decision, that no District can issue permits for activity regulated by IDEM. IND. CODE § 13-21-3-14(a)(5) (2004).

of public officials who need to communicate with and respond to citizens on local issues, they are not bound by rules concerning ex parte communication.[139]

The problem remaining is that *Worman* invites treatment of permits not as licenses that should be issued if one meets the qualification criteria, but as discretionary decisions based on arbitrary considerations. Moreover, prohibiting ex parte communication does not prohibit communication from citizens. It merely means it must be public and open. Public communication tends to push objective criteria to the forefront. Adjudicatory proceedings at both state and federal levels prohibit ex parte communications.[140] While the court reasoned that license decisions are not adjudication proceedings, the license decisions lead directly to adjudication proceedings. It may not be wise to encourage ex parte decision formation, especially since these local officials, unlike agency personnel, are: (1) subject to intense local political pressure; and (2) often lack technical experience or expertise necessary in the permit decision-making process.

Finally, the court rejected the applicant's equal protection argument that the District had imposed more restrictive conditions on it than on other facilities. The court determined these differences either had a rational basis for differential treatment or were the result of new regulations passed by the District after those other permits were issued.[141]

CONCLUSION

The cases in the survey period reflect the changing priorities of environmental law. Prohibitory regulation is slowly giving way to efforts to justly and efficiently align costs and benefits. Cost recovery and insurance claims should be allowed to play the maximum possible role in this process because they offer great hope at precision in this process.

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139. *Worman*, 805 N.E.2d at 375.

140. *See* Administrative Order and Procedure Act, IND. CODE § 4-21.5-2-3 (2004); Administrative Proceedings Act, 5 U.S.C. § 557(d)(1) (2000).

141. *Worman*, 805 N.E.2d at 381.