

2008-2009 ENVIRONMENTAL LAW SURVEY

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INTRODUCTION¹

Here, we survey the federal and Indiana court decisions decided between October 1, 2008 and September 30, 2009 most likely to affect Indiana environmental law practitioners.² As with the prior year's developments, this

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1. All opinions expressed in this Article are solely those of its authors, and should not be construed as opinions of Ice Miller LLP or any other person or entity.

2. Additional decisions of interest, include: *Catawba County, N.C. v. EPA*, 571 F.3d 20, 42-43 (C.A.D.C. 2009) (holding that, in general, EPA's methodology for designating areas as being in attainment, or non-attainment, for the annual National Ambient Air Quality Standards applicable to fine particulate matter was not arbitrary and capricious or in violation of CAA § 107(d)); *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 570 F.3d 856, 857-58 (7th Cir. 2009) (dismissing an appeal of a trial court's order relating to contribution for cleanup costs because there was not a final judgment issued by the court below); *Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466, 489 (C.A.D.C. 2009) (holding that Interior's actions leasing areas for offshore oil and gas development within the Outer Continental Shelf violated the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a, because the lease program's environmental sensitivity rankings were irrational and did not comply with the requirements of the Act); *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 923 (7th Cir. 2008) (holding that a CAA permit for construction of a facility had expired, requiring application for a new permit, where it was undisputed that excavation of the proposed facility did not begin within eighteen months of the issuance of the permit and permit specifically required that certain boilers be constructed within eighteen months for permit to remain valid); *Bitter Investment Venter II, LLC v. Marathon Ashland Petroleum, LLC*, No. 1:04-CV-477-TS, 2009 WL 1107796, *6-8 (N.D. Ind. Apr. 24, 2009) (granting partial summary judgment for claims involving a leased location where the parties had entered into an unambiguous cancellation and release document regarding the lease agreement); *City of Mishawaka v. Uniroyal Holdings, Inc.*, No. 3:04-cv-125 CAN, 2009 WL 499105, *7-8 (N.D. Ind. Feb. 26, 2009) (holding that a corporate successor to Uniroyal Holdings

year's survey period presented several key decisions. In Part I, we survey issues surrounding the Clean Air Act (CAA),³ with several seminal cases in and around Indiana. In Part II, we discuss federal cases involving CERCLA and RCRA, including key U.S. Supreme Court guidance on joint and several liability. Part III examines cases under the Clean Water Act. In Part IV, this Article considers case law under state law. Finally, Part V examines opinions that may affect environmental insurance coverage cases under Indiana law.

I. UPDATE ON ISSUES ARISING UNDER THE CLEAN AIR ACT

Cases involving the CAA produced noteworthy decisions, including a jury verdict and subsequent judgment in Indianapolis. For reference, we summarize the CAA regulatory context in Part A. We then discuss the appellate review of CAA permits as decided in *Sierra Club v. EPA*.⁴ We devote substantial attention to the jury verdict and subsequent bench trial on remedies in *United States v. Cinergy Corp.*⁵ This discussion concludes with an examination of two abstention cases and an additional challenge to EPA rulemaking.

A. Regulatory Framework of the Clean Air Act

The CAA requires the EPA to set National Ambient Air Quality Standards (NAAQS) for pollutants found in ambient air because of stationary or mobile sources and that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."⁶ EPA has set NAAQS for the six pollutants, known as "criteria" pollutants: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead.⁷ The CAA requires EPA to divide the country into areas and dub them as "non-attainment," "attainment," or "unclassifiable" for each pollutant. These categories indicate whether the area meets the NAAQS.⁸

was not liable for environmental clean-up expenses associated with its corporate predecessor because such liabilities were assigned via contract to another party); *United States v. Jupiter Aluminum Corp.*, No. 2:07-CV-262 PPS, 2009 WL 418091, *6-7 (N.D. Ind. Feb. 18, 2009) (holding that technically achievable standards agreed to by a party in a consent decree will still apply even if the agreed technology or actions are more onerous than those that would apply in the absence of the consent decree); *American Chemical Service Site RD/RA Agreement Members v. Admiral Insurance Co.*, 396 B.R. 14, 1:08-cv-0741-RLY-JMS, 2008 WL 4615780, *17-19 (S.D. Ind. Oct. 17, 2008) (holding that assignment of insurance policies by bankrupt company to a third party resolve liability for environmental clean-up was not, in itself, sufficient to grant jurisdiction over a coverage dispute between a third party and the insurers because the declaratory action was not related to the original bankruptcy).

3. 42 U.S.C. §§ 7401-7515 (2006).

4. 551 F.3d 1019 (D.C. Cir. 2008).

5. 618 F. Supp. 2d 942 (S.D. Ind. 2009).

6. Clean Air Act § 108(a)(ii)(A) and (B), 42 U.S.C. § 7408(a)(ii)(A) and (B) (2006).

7. 40 CFR §§ 50.4-50.12 (2009).

8. Clean Air Act § 107, 42 U.S.C. § 7407(c), (d) (2006).

Once EPA sets the NAAQS, each state must develop and submit to EPA for its approval a state implementation plan (SIP) that establishes how the state will meet the NAAQS for each criteria air pollutant.⁹ The SIP must contain provisions that prohibit any source within the state from emitting a criteria air pollutant that will “contribute significantly” to non-attainment in, or interfere in maintenance by, any other state’s compliance with NAAQS.¹⁰ EPA deems a state either in attainment with the NAAQS, meaning it meets the EPA-set pollutant level, or in non-attainment, meaning it does not meet the NAAQS.¹¹ Different programs apply to sources in areas based on whether they are in an area in attainment with the NAAQS.¹²

Besides requiring state compliance with NAAQS and each state’s SIP, the CAA also addresses individual air pollution sources through the regulation of specific industries. The CAA does so through New Source Performance Standards (NSPS) that require the installation of the “best available control technology” (BACT) for any new major source of air pollution within the designated industry¹³ and the use of “reasonably available control technology” (RACT), after considering technological and economic feasibility, for existing major stationary sources of pollution in non-attainment areas.¹⁴ The NSPS provides that major stationary sources and major sources implementing major modifications¹⁵ are required to comply with standards set out in either the New Source Review (NSR) or Prevention of Significant Deterioration (PSD) permit programs.¹⁶ NSR standards are applied to major sources in areas not in attainment with NAAQS; PSD standards are applied to major sources in areas where emissions are in attainment with NAAQS. The program’s goal is to reduce the aggregate level of criteria pollutants in non-attainment areas by preventing new pollution sources that are not offset by either the closing of or a reduction in pollution from an existing source.¹⁷ The program seeks to maintain attainment status for each criteria pollutant in the area, thereby preventing any deterioration of air quality.¹⁸

The CAA addresses individual air pollution sources through the regulation of releases of hazardous air pollutants (HAPs)—less widely emitted, but highly

9. *North Carolina v. EPA*, 531 F.3d 896, 901-02 (D.C. Cir. 2008) (citing 42 U.S.C. §§ 7407(a), 7410 (2006)).

10. *North Carolina*, 531 F.3d at 902 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(1) (2006)).

11. *Id.* at 902.

12. *Id.* at 903.

13. Clean Air Act § 165(a)(4), 42 U.S.C. § 475(a) (2006).

14. Clean Air Act § 172(c)(1), 42 U.S.C. § 7502(c)(1) (2006).

15. A “modified” source is one that has any physical or process change that increases a criteria pollutant emission by more than a de minimis amount. Clean Air Act § 111(a)(4); 42 U.S.C. § 7411(a)(4) (2006).

16. Clean Air Act §§ 171-93, 160-69, 42 U.S.C. §§ 7501-7515, 7470-7492 (2006).

17. Clean Air Act § 160-69, 179-93, 42 U.S.C. §§ 7501-7515, 7509-7515 (2006).

18. *Id.*

dangerous, hazardous, or toxic pollutants not covered by the NAAQS or SIPs.¹⁹ Section 112 of the CAA requires EPA to regulate the emissions of HAPs based upon either EPA or congressional determination that HAPs could cause serious health problems.²⁰ EPA deems over one hundred pollutants a HAP.²¹ EPA is required to list all major HAP sources and establish emission standards²² requiring the maximum degree of reductions in emissions, taking into consideration the cost and any non-air quality health and environmental impacts and energy requirements.²³ Once EPA has listed a HAP's facility source, the EPA has a limited ability to remove a source unless it determines that the source's emissions are adequate to protect public health and not harm the environment.²⁴

*B. Hazardous Air Pollutants: Sierra Club v. EPA*²⁵

In *Sierra Club*, an EPA-issued rule exempting major HAP sources "from normal emission standards during periods of startups, shutdowns, and malfunctions (SSM) and imposing alternative, and arguably less onerous requirements," was challenged and vacated.²⁶

Under the CAA, EPA must establish an emission standard for each HAP requiring "the maximum degree of" emission reductions.²⁷ The CAA defines "emission standard" as

a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard.²⁸

Also relevant is the Title V permit, which, among other things, requires sources to certify compliance with the applicable requirements in the permit and to report

19. Clean Air Act § 112, 42 U.S.C. § 7412 (2006).

20. *Id.*

21. *Sierra Club v. EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008).

22. The CAA defines "emission standard" as

a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

Clean Air Act § 302(k), 42 U.S.C. § 7602(k) (2006).

23. *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008) (citing 42 U.S.C. § 7412(d) (2006)).

24. Clean Air Act § 112(c)(9), 42 U.S.C. § 7412(c)(9) (2006).

25. *Sierra Club*, 551 F.3d 1019.

26. *Id.* at 1021.

27. *Id.* (citing 42 U.S.C. § 7412 (2006)).

28. *Id.* (citing 42 U.S.C. § 7602(k)).

any deviations from compliance.²⁹ The Title V permit also creates a “permit shield” for sources that comply with the permit, deeming them in compliance with the other CAA provisions.

Four decades ago, the EPA introduced the concept of an exemption from emission standards during SSM under section 111 of the CAA. EPA granted an exemption during SSM, but created what is referred to as the “general duty” standard, in which EPA requires that at all times owners and operators, to the extent practicable, must maintain and operate any affected facility and air pollution control equipment in a manner consistent with good air pollution control practices. EPA later extended the SSM exemption to cover section 112 HAPs as well, such that only the general duty of good practices would apply. This extension required that each source develop and implement an SSM plan which would be subject to EPA review and approval and incorporated into the source’s Title V permit. Because the SSM plan was available for public comment and incorporated into the Title V permit, it was part of the permit shield. In the SSM plan, a source was to demonstrate how it would meet the “general duty” even during periods of SSM, describing the procedures for operating and maintaining a source during SSM and a program for correcting any malfunctioning process and air pollution control equipment.³⁰

In a 2002 rule amendment, EPA removed the requirement that the SSM be in the Title V permit and instead required the Title V permit to require the source to adopt and follow an SSM.³¹ EPA also removed the requirement that the SSM plan be made publicly available only upon request. This meant that the SSM was no longer part of the permit shield. The EPA faced a challenge to this rule revision and agreed to make the source produce the SSM plan to the permitting authority along with the Title V application, but in 2003 relaxed this requirement and again made the SSM plan be produced only upon request.³² In 2006, EPA made yet another rule revision and removed the requirement that sources implement the SSM plan during the SSM periods, stating that plan specifics are not applicable requirements under Title V and therefore do not have to be followed, but at any rate the general duty would still apply.³³ Under the 2006 revision, EPA no longer had to obtain copies of the SSM plan after public request; the public could only access those SSM plans obtained by the permitting authority at its own discretion.³⁴

Sierra Club challenged the 2002, 2003, and 2006 rules as unlawful, arbitrary, and failing to assure Title V compliance.³⁵ EPA contended that the Sierra Club waived its challenge to the exemption by not challenging the 1994 rule, which set

29. *Id.* at 1022.

30. *Id.*

31. *Id.* at 1023.

32. *Id.* (citing 66 Fed. Reg. 16,318, 16,326 (Mar. 23, 2001)).

33. *Id.* (citing 70 Fed. Reg. 43,992, 43,994 (July 29, 2005)).

34. *Id.*

35. *Id.* at 1024.

forth the general duty standard for SSM events.³⁶ Sierra Club argued that the reopening doctrine applies and a challenge is proper.

The reopening doctrine provides that “the time for seeking review starts anew where the agency reopens an issue ‘by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form.’”³⁷ However,

when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter.³⁸

The court found that although EPA did not have an actual reopening of the 1994 rule, there was a “constructive reopening.”³⁹ The changes EPA made to the SSM plan requirements were significant, and essentially “eliminated the only effective constraints that EPA originally placed on the SSM exemption.”⁴⁰ The court found that although the general duty remained unchanged, the “stakes of judicial review” were significantly altered in that the general standard may not have been worth challenging in 1994 because of the SSM plan requirements at that time, but the relaxation of these requirements put new significance on the general duty’s importance.⁴¹ The court found that a constructive opening occurred and the challenge was timely.⁴²

The court then turned to the Sierra Club’s claim that the EPA’s exemption of major sources from compliance with emission standards during SSM events is contrary to the CAA and arbitrary and capricious.⁴³ The court looked to *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*⁴⁴ to review the EPA’s rule, as well as the CAA, which provides that the court may reverse agency actions found “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁴⁵

According to the Sierra Club, the SSM exemption was contrary to the CAA definition of emission standard, which requires an emission to be controlled on a continuous basis, because the SSM exemption excuses a source from

36. *Id.*

37. *Id.* (citing to *Am. Iron & Steel Inst. V. EPA*, 866 F.2d 390, 397 (D.C. Cir. 1989)).

38. *Id.* (citing *Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996)).

39. *Id.* at 1025.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1026.

44. 467 U.S. 837 (1984).

45. *Sierra Club*, 551 F.3d at 1027 (citing 42 U.S.C. § 7607(d)(9)(A) (2006)).

compliance during such events, which would not result in continuous compliance.⁴⁶ EPA responded that the general duty would apply during SSM events and would require the source to meet emission limits. However, the court determined that the general duty standard is not a section 112 compliant standard and because this is the only standard that applies during SSM events, the SSM exemption violates the CAA requirement that a section 112 emission standard apply continuously.⁴⁷

There was a dissenting opinion filed in this case which disagreed that the court had jurisdiction to hear the challenge.⁴⁸ The dissent argued that the EPA did not alter the SSM exemption during the subsequent rulemaking, it simply changed the requirements for the SSM plan. Therefore, any challenge to the SSM exemption should have been brought in 1994 when the agency first promulgated the exemption.⁴⁹ According to the dissent, the Sierra Club should have filed a request to EPA to rescind the regulation, which EPA would deny. Sierra Club could then challenge EPA's denial and raise the issue.⁵⁰

C. New Source Review Regulations: United States v. Cinergy Corp.

During the survey period, in *United States v. Cinergy Corp.* the U.S. District Court for the Southern District of Indiana issued a series of opinions⁵¹ pertaining to the relief available to the government for permit violations under the NSR Program of the CAA. Here the United States, and other plaintiffs,⁵² alleged that Cinergy violated the NSR provisions of the CAA when it made physical changes, each constituting a "major modification,"⁵³ to coal-fired boiler units at several of

46. *Id.*

47. *Id.* at 1028

48. *Id.* at 1028-29 (Randolph, J., dissenting).

49. *Id.* at 1029.

50. *Id.* at 1029-30.

51. Two of the opinions issued by the Court during the survey period will be discussed in this section, *United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055 (S.D. Ind. 2008) and *United States v. Cinergy Corp.*, 618 F. Supp. 2d 942 (S.D. Ind. 2009). The Court issued five other opinions in the matter that this Article will not address in detail. *See* 2009 U.S. Dist. LEXIS 44181 (S.D. Ind. Apr. 24, 2009) (ruling regarding motions in limine regarding expert and witness testimony or both); 2009 U.S. Dist. LEXIS 44179 (S.D. Ind. Apr. 24, 2009) (regarding motions in limine seeking expert testimony exclusion); 2009 WL 126231 (S.D. Ind. Jan. 12, 2009) (granting plaintiffs' motion for new trial due to Cinergy's failure to correct expert witness's testimony regarding employment status to include contract with Cinergy, while finding a lack of evidence to Cinergy's counsel); 2009 WL 77680 (S.D. Ind. Jan. 9, 2009) (ruling on various motions in limine); 2009 WL 94515 (S.D. Ind. Jan. 7, 2009) (denying plaintiff summary judgment motion); 1:99-CV-1693-LJM-JMS, 2008 U.S. Dist. LEXIS 104928 (S.D. Ind. Dec. 30, 2008) (regarding plaintiff's motion to compel).

52. New York, New Jersey, and Connecticut, the Hoosier Environmental Council, and the Ohio Environmental Council, intervened in the lawsuit. *See Cinergy Corp.*, No. 1:99-CV-LJM-JMS, 2007 U.S. Dist. LEXIS 76941, at *4 (S.D. Ind. Sept. 28, 2007).

53. A major modification consists of any physical change that would result in a significant

its facilities in Indiana and Ohio without first obtaining a permit as required by the CAA.⁵⁴ Particularly, at issue were Cinergy's modifications at its Wabash Valley plant⁵⁵ and Beckjord plant.⁵⁶ In this regard, Cinergy, in the mid-1980s, began assessing whether it was more cost-effective to "refurbish" the units at its plants or to replace them with new units.⁵⁷ Cinergy's "refurbishment plan" had the "ultimate goal . . . to extend the life of existing generating plants so as to defer the need to build new, costly generating units."⁵⁸

1. *Procedural Background.*—In 2007, the court ruled that Cinergy had violated the terms of a 1998 settlement contract between Cinergy and EPA. The contract, effective from 1998 to 2000, was subject to the provisions of the Ohio SIP that established limits on particulate matter (PM) emissions at Cinergy's Beckjord plant.⁵⁹ Specifically, the court found that Cinergy exceeded PM emissions limits on October 12, 1999; October 21-22, 1999; May 4, 2000; and May 26, 2000.⁶⁰ In addition, the court concluded that Plaintiffs could hold each party liable under the two sets of obligations because the duties under the EPA settlement contract and Ohio SIP were essentially separate.⁶¹

In May 2008, the court held a jury trial regarding the claims that Cinergy violated the NSR provisions of the CAA when it performed certain work on its coal-fired boiler units at several of its Indiana and Ohio facilities without a permit.⁶² The jury returned a verdict for the Plaintiffs in May 2008 and found that Cinergy violated the CAA by failing to obtain permits for four of its Wabash Valley plant projects.⁶³ The jury found that "a reasonable power plant owner or operator would have expected" a net increase of forty-plus tons in SO₂ emissions, NO_x emissions, or both, as a "proximate result" of the Wabash River refurbishment projects at three units.⁶⁴

2. *Remedies for Cinergy's Violations.*—In response to the unfavorable liability decisions, Cinergy filed a partial summary judgment motion in which

net emissions increase of a pollutant covered by the CAA. See 40 C.F.R. § 52.21(a)-(b)(2)(1) (2009).

54. See *Cinergy Corp.*, 2007 U.S. Dist. LEXIS 76938, at *4.

55. Cinergy's Wabash River plant is located in Vigo County, Indiana, near the City of Terre Haute, Indiana. *Cinergy Corp.*, 618 F. Supp. 2d at 945.

56. The Beckjord plant is located in Beckjord, Ohio, and is subject to an Ohio State Implementation Plan ("SIP") establishing particulate matter emissions limits. *Id.* at 944.

57. *Cinergy Corp.*, 618 F. Supp. 2d at 945.

58. *Id.* (citations omitted).

59. See *Cinergy Corp.*, 618 F. Supp. 2d at 957; *Cinergy Corp.*, No. 1:99-cv-1693-LJM-JMS, 2007 U.S. Dist. LEXIS 76938 (S.D. Ind. Sept. 28, 2007).

60. *Cinergy Corp.*, 618 F. Supp. 2d at 957.

61. *Id.*

62. See *id.* at 944.

63. See *id.* The district court later ordered retrial on ten of the Plaintiffs' claims, and retrial took place in May 2009; see also *United States v. Cinergy Corp.*, No. 1:99-cv-1693-LJM-JMS, 2009 U.S. Dist. LEXIS 1886 (S.D. Ind. Jan. 12, 2009).

64. *Cinergy Corp.*, 618 F. Supp. 2d at 945-46.

Cinergy sought to limit the government's relief.⁶⁵ Cinergy claimed that the scope of relief available under NSR was limited to prospective relief, such as additional limitations on future emissions and did not include "remediation for past health and environmental effects."⁶⁶ The government disagreed and sought both prospective relief for the violations. First, prospective relief to reduce emissions and retrospective through installing state-of-the-art pollution controls and obtaining any necessary permits. Second, retrospective relief to further reduce pollution beyond what is required for prospective compliance to "make up for" the past pollution caused by the violations.⁶⁷

Cinergy argued that relief under NSR should be limited to prospective relief by claiming the language in section 313 of the CAA,⁶⁸ allowing for "any other appropriate relief," should be read as limiting relief only to those provided for in that section.⁶⁹ In this regard, Cinergy contended that the legislative history pertaining to the remedies available under the CAA did not authorize retrospective remediation because Congress relied in part on RCRA, which does not permit retrospective relief to address violations.⁷⁰ Finally, Cinergy argued that the costs of retrospective relief in terms of financial costs and judicial economy were too great and should be precluded because the government had failed to specifically mention these types of remedial measures in its brief.⁷¹

Cinergy's arguments did not persuade the court. The court denied Cinergy's motion for partial summary judgment, holding that the relief available was not limited to prospective relief as the court could order any other appropriate relief.⁷² In this regard, the court concluded that "unless otherwise specified by statute, a court has the equitable authority to order a full and complete remedy for harms caused by a past violation, and in doing so may go beyond what is necessary for compliance with the statute."⁷³ The court further noted that section 113 of the CAA authorizes the district court to "restrain [a] violation [of the CAA], to require compliance, to assess [a] civil penalty, to collect any fees owed to the United States" and award appropriate relief.⁷⁴ Ordering Cinergy to "remedy, mitigate, and offset" the harms it caused gave effect to the CAA's purpose "to protect and enhance the quality of the Nation's air resources so as to promote the

65. *United States v. Cinergy Corp.*, 582 F. Supp 2d. 1055, 1057 (S.D. Ind. 2008).

66. *Id.*

67. *Id.* at 1057-58.

68. Section 113 of the CAA authorizes the district court to "restrain [a] violation [of the CAA], to require compliance, to assess [a] civil penalty, collect any fees owed the United States . . . and to award any other appropriate relief." Clean Air Act § 113(b)(3), 42 U.S.C. 7413(b)(3) (2006).

69. *Cinergy Corp.*, 582 F. Supp 2d. at 1063.

70. *Id.* at 1059, 1064-65 (citing *Meghrig v. KFC W., Inc.* 516 U.S. 479, 484 (1996)).

71. *Id.* at 1066.

72. *Id.* at 1060.

73. *Id.* at 1061-62 (citations omitted).

74. *Id.* at 1058 (quoting 42 U.S.C. 7413(b) (2006)).

public health and welfare.”⁷⁵ Accordingly, the court held that its equitable authority under section 113(b) included ordering relief redressing the harms Cinergy’s violations caused.⁷⁶

Subsequently, in February 2009, the court presided over a bench trial on the proper remedy for the violations found by the court at Beckjord, and by a jury at Wabash River.⁷⁷ On May 29, 2009, the court issued its order setting out the remedy for Cinergy’s CAA violations at its Beckjord and Wabash River facilities.⁷⁸

With regard to the Beckjord plant, the court found that Cinergy exceeded PM emissions limits on several occasions.⁷⁹ The court noted that it was undisputed that: 1) as a result of the PM emissions tests failure of October 12, 1999; May 4, 2000; and May 26, 2000; unit 1 at Beckjord was not in compliance for twenty-three days; and 2) unit 2 was not in compliance for two days in October 1999 as a result of PM emissions test failures.⁸⁰ Furthermore, Plaintiffs presented evidence at the remedy phase trial about additional PM emissions test failures at Beckjord: that unit 1 failed another PM emissions test in October 2003 and that unit 2 failed a PM emissions test in April 2006.⁸¹

In light of this evidence, the Plaintiffs asserted that the appropriate remedy for Cinergy’s violations at Beckjord units 1 and 2 was for Cinergy to install a compliance measurement tool and pay the statutory maximum penalty of \$1.32 million.⁸² Plaintiffs argued that such a penalty comported with the purposes of the CAA’s penalty provisions, which include retribution, deterrence, and restitution.⁸³ Plaintiffs reasoned that none of the evidence justified anything but the maximum penalty.⁸⁴

In contrast, Cinergy argued that the maximum penalty was “not warranted because of its good faith efforts to comply with its permit obligations.”⁸⁵ Specifically, Cinergy argued that: 1) as soon as it became aware of a violation, it shut the unit down, hired inspectors, and made the inspector’s recommended repairs and changes; 2) Cinergy spent significant time and money assessing the proper changes; and 3) by addressing the problems quickly, the company minimized the violations’ seriousness. Cinergy also argued that Plaintiffs

75. *Id.* at 1061-62 (citation omitted).

76. *Id.* (“In other words, this Court’s equitable authority is not limited to providing prospective relief only.”).

77. *Cinergy Corp.*, 618 F. Supp. 2d at 944-45.

78. *Id.* In the remedy order, the district court noted that the court had previously concluded that Cinergy exceeded the limits established for particulate matter emissions at its Beckjord Plant by order dated September 28, 2007. *See Cinergy Corp.*, 2007 U.S. Dist. LEXIS 76938, at *5.

79. *Cinergy Corp.*, 618 F. Supp. 2d at 957.

80. *Id.* at 955-57.

81. *Id.* at 957-60.

82. *Id.* at 969 (citation omitted).

83. *Id.* (citing *Tull v. United States*, 481 U.S. 412, 422 (1987)).

84. *Id.*

85. *Id.*

improperly “sought a double penalty for identical violations of the Ohio SIP and . . . at Beckjord unit 1.”⁸⁶

The court ordered Cinergy to pay a penalty in the amount of \$687,500,⁸⁷ and to install a particulate matter continuous emissions monitor on Beckjord units 1 and 2 as soon as practical.⁸⁸ In reaching this conclusion, the court noted that the statutory maximum penalty should apply to Cinergy’s violation of the Ohio SIP, but additional recovery under the Administrative Order would not serve the “interests of justice.”⁸⁹ The court further noted that it took Cinergy, in many cases, years to implement key changes to the units despite “a history of successive failures.”⁹⁰ Furthermore, Cinergy’s testing methods did not consist of “continuous monitoring” and therefore did not account for the potential that Cinergy violated the Ohio SIP at other times during which no test was performed.⁹¹ As such, ordering Cinergy to pay the maximum daily penalty for all violations under the Ohio SIP served the retribution, deterrence, and restitution purposes of the CAA penalty provisions. The court went on to hold that “[t]here is little doubt that the harm caused by violation of emissions limits is irreparable” and that “monetary penalties cannot deter completely the harm caused by Cinergy’s multiple violations of emissions limits.”⁹² As a result, continuous emissions monitoring on Beckjord units 1 and 2 for compliance purposes was necessary to ensure that Cinergy complied with the Ohio SIP.⁹³

With regard to the Wabash Valley plant, the Plaintiffs asserted that “significant and irreparable harm to the environment had resulted from emissions from Wabash Valley units 2, 3, and 5.”⁹⁴ As such, the Plaintiffs argued “for: (1) the immediate shutdown of Wabash River units 2, 3, and 5; and (2) mitigation of the excess emissions from Wabash River units 2, 3, and 5, by (a) installation of BACT on Wabash River units 4 and 6 (or retirement of unit 4); and (b) over a twenty-year period, surrender of SO₂ allowances corresponding to the total SO₂

86. *Id.*

87. *Id.* at 971. To arrive at this amount, the court multiplied \$27,500 (the statutory maximum penalty per day violation) by twenty-five, which equaled the number of days Cinergy exceeded limits established for particulate matter emissions at Beckjord units 1 and 2. *Id.*

88. *Id.* The parties agreed that PM continuous emissions monitors (“PM CEMS”) should and could be installed on Beckjord units 1 and 2. *Id.* at 958, 970-71.

89. *Id.* at 969-70 (citing *United States v. B&W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994)); see U.S.C. § 7413(e)(1) (2006) (noting that Court should take into account several factors when setting penalty)). A penalty may be assessed for each day of violation. *Id.* § 7413(e)(2).

90. *Cinergy Corp.*, 618 F. Supp. 2d at 969-70.

91. *Id.* at 970.

92. *Id.* at 970-71.

93. *Id.*

94. *Id.* at 960. “The irreparable harm includes significant PM_{2.5} effects that extend throughout the Midwest and into the Eastern states of New York, New Jersey and Connecticut; ground-level ozone effects in the same regions; acid rain deposition effects in the forested areas of the Midwest; and mercury effects within a 250-mile area of the Wabash River plant.” *Id.* at 960, 948-59.

excess emissions.”⁹⁵ Although closure of Wabash River units 2, 3, and 5, would have an immediate positive impact on the health effects from those emissions, Plaintiffs argued that “additional future reductions in the same airshed [were] necessary to balance out the pollution that Cinergy never would have emitted if it had followed the law.”⁹⁶ In addition, Plaintiffs claimed that “surrender of SO₂ allowances in an amount equal to the total SO₂ excess emissions, with the total allowance surrender coming prior to 2029,” was necessary “to ensure that reductions taken at Wabash River units 4 and 6, do not result in increased emissions elsewhere.”⁹⁷

In contrast, Cinergy claimed “that the most equitable remedy was for Cinergy to retire the units [2, 3, and 5] in 2012,” and that in the interim, these units be operated “at a rate approximately equivalent to the pre-project emissions levels, or the Rosen baseline levels.”⁹⁸ Cinergy also claimed that “because Plaintiffs dropped their claims against Cinergy for any violations at Wabash River units 4 and 6, . . . the Plaintiffs should not be allowed to achieve through mitigation what they chose not pursue in court,” i.e., use a remedy for violations at units 2, 3, and 5 to control pollution at units 4 and 6.⁹⁹ Instead, any requirement to mitigate any “excess emissions,” would be accomplished by the retirement of units 2, 3, and 5.¹⁰⁰

After considering the parties’ arguments, the court ordered Cinergy to 1) shut down units 2, 3, and 5 of the Wabash River Plant no later than September 30, 2009; 2) run units 2, 3, and 5 at a rate that does not exceed the Rosen baseline emissions until the time said units are shut down; and 3) permanently surrender sulfur dioxide emission allowances in an amount equal to the amount of sulfur dioxide emissions from units 2, 3, and 5 from the period beginning on May 22, 2008 through shutdown of those units on September 30, 2009.¹⁰¹ In reaching this conclusion, the court noted that Cinergy had emitted excess emissions of SO₂ totaling 359,000 tons, and of NO_x totaling 4,865 tons.¹⁰² The court further pointed out that at the time of the projects, the Wabash River plant was in a nonattainment area with respect to SO₂ emissions and in an attainment area with respect to NO_x emissions.¹⁰³ As such, if Cinergy had applied for a permit, as it was required, it would have been required to install lowest achievable emissions rate (LAER) technology¹⁰⁴ for each of the Wabash River projects with respect to SO₂ and BACT for its NO_x emissions.¹⁰⁵ Furthermore, the evidence of

95. *Id.* at 960.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 961.

100. *Id.*

101. *Id.* at 964-65, 967.

102. *Id.* at 962-63.

103. *Id.* at 946-49, 963.

104. *Id.* at 946-47.

105. *Id.* at 948, 960-61.

environmental harm from non-permitted SO₂ emissions and, to a lesser extent, NO_x emissions, compelled a finding of irreparable injury for which there is no adequate remedy at law.¹⁰⁶ As such, a relatively quick shutdown of the units was necessary.¹⁰⁷

*D. The Abstention Doctrine: Federal Court Review of CAA Claims
When Substantially Similar CAA Decisions by IDEM
Are Pending Review by the State*

In *Sierra Club v. Duke Energy, Inc.*,¹⁰⁸ the Sierra Club sued Duke Energy, Indiana, Inc., pursuant to the citizen suit provision of the CAA,¹⁰⁹ claiming that Duke had improperly modified an existing Indiana plant in violation of the CAA and that IDEM had improperly erred in granting Duke a minor source permit for its facility modifications.¹¹⁰ In particular, the Sierra Club claimed that IDEM departed from the PSD program guidelines when issuing the permit to Duke and erred in determining that Duke's proposed action constituted an environmental improvement over the existing facility based on the improper assumption that thirteen past improvements by Duke to this same facility were legally done.¹¹¹ The Sierra Club contended these thirteen prior modifications were improper, unpermitted, major modifications that placed the facility in total violation of the PSD program, precluding approval of any new modifications by IDEM until Duke fixed prior errors. Duke disputed these arguments, and claimed that the federal district court should abstain from hearing the case because Indiana's Office of Environmental Adjudication (OEA) had not issued a final decision on a separate appeal pending before the OEA that the Sierra Club filed on these issues.¹¹²

In rejecting Duke's claim that the court should abstain from hearing the lawsuit, the court first noted that the issues pending before the OEA did not sufficiently overlap with the issues currently before the court.¹¹³ In this regard,

106. *Id.* at 961. Potential affects included "decreased lung function, increased prevalence of respiratory symptoms, worsened respiratory infections, heart attacks, and early death." *Id.* at 963.

107. *Id.* at 963-67.

108. *Sierra Club v. Duke Energy, Inc.*, No. 1:08-cv-0437-SEB-TAB, 2009 WL 363174, 2009 U.S. Dist. LEXIS 10472 (S.D. Ind. Feb. 11, 2009).

109. 42 U.S.C. § 7604 (2006).

110. *Id.* at *1-2.

111. *Id.*

112. *Id.* at *2-3. The abstention doctrine, relied on by Duke, was set out in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and provides that if a district court finds that a station action that is parallel to the federal action before the district court, the court must decide whether to abstain from exercising jurisdiction. See *Schneider Nat. Carriers, Inc. v. Carr*, 903 F.2d 1154, 1156 (7th Cir. 1990). The Supreme Court, applying its holding in *Burford*, set forth the specific circumstances under which a federal court must abstain in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 358-59 (1989).

113. *Sierra Club*, 2009 WL 363174 at *3-4.

the court pointed out that the OEA appeal involved a challenge by the Sierra Club to IDEM's reliance on existing emissions levels at the plant to calculate probable changes in emissions to justify a new modification; whereas the issue before the District Court was whether Duke had violated the CAA by failing to obtain permits for previous modifications to its plant that preceded the current plant modification being disputed before the OEA.¹¹⁴ In other words, the court would be looking at whether Duke had engaged in "historic, unlawful modifications" at the plant while the OEA would be looking at whether IDEM had properly determined if Duke could construct a new generating unit at the plant under the PSD program.¹¹⁵ Furthermore, the court held that its review of the Sierra Club's claims did not involve any difficult questions of state law because the modifications at issue took place when the EPA, and federal regulations, were directly responsible for regulating the PSD program in Indiana.¹¹⁶ As such, a ruling by the court would not interfere with state policy because the CAA and federal regulations require Indiana to implement air quality standards laid out by the EPA.¹¹⁷ The court similarly rejected Duke's request for a stay until a ruling was issued in the appeal pending before the OEA, particularly because the issue before the District Court involved a question of federal law, and the CAA was about rectifying past wrongs.¹¹⁸

Similarly, the U.S. District Court for the Northern District of Indiana in *Natural Resource Defense Council, Inc. v. BP Products North America, Inc.*,¹¹⁹ held that it would abstain from hearing claims brought by a party if those exact claims were pending review before the OEA. In that case, the Natural Resource Defense Council, Inc. (NRDC) sued BP Products North America, Inc. to contest the legality of modifications BP made to its oil refinery located in Whiting, Indiana, pursuant to a "minor source" IDEM permit.¹²⁰ In particular, the NRDC claimed that it was improper for IDEM to grant BP a "minor source" permit because BP's modifications would actually cause air pollution emissions that required a major source permit, that IDEM had been "duped" as to this fact, and that BP had improperly begun modifying its facility before it obtained any permit in violation of the CAA.¹²¹ BP asserted that the district court did not have jurisdiction to hear the case, or in the alternative, should stay any decision until a decision was issued by the OEA with regard to an appeal by other environmental groups that involved claims that substantially mirrored the

114. *Id.* at *4.

115. *Id.*

116. *Id.* at *4-5.

117. *Id.* at *5.

118. *Id.* at *6-7.

119. *Natural Res. Def. Council, Inc. v. BP Prods. N. Am., Inc.*, No. 2:08-CV-204 PS, 2009 WL 1854527, 2009 U.S. Dist. LEXIS 54363 (N.D. Ind. June 26, 2009).

120. *Id.* at *1. BP requested "a 'minor source' permit because it claimed its modifications would not trigger the more rigorous restrictions of the [CAA]." IDEM agreed and issued the permit. *Id.* at *1-2.

121. *Id.* at *1, 4-5.

NRDC's claims pending before the district court.¹²²

In holding that it would abstain from hearing the two claims set out in the NRDC's complaint pertaining to whether IDEM's issuance of a "minor source" permit for BP's extra heavy crude project was proper, the court stated that NRDC's allegations with respect to these claims were "nearly identical to the" claims in the appeal currently pending before the OEA.¹²³ The court held that an OEA de novo review of an IDEM permit decision was a specialized proceeding necessary for *Burford* abstention, particularly where the same issues were pending appeal before the OEA.¹²⁴ In this regard, the court pointed out that proceeding to hear these two claims would require the district court to second guess the expert state agency's decision as to a state-issued permit and would improperly frustrate the state's efforts to establish a coherent environmental policy.¹²⁵ But at the same time, the district court ruled that it would exercise jurisdiction over the NRDC's claim that BP violated the CAA for alleged construction activities at the plant undertaken without a permit from 2005 through 2008.¹²⁶ In this regard, the court noted that this claim involved alleged actions taken by BP that were taken before IDEM issued the permit currently in dispute before the OEA, that were the subject of notice of violation findings by the EPA, and did not overlap with issues pending before the OEA.¹²⁷

As such, following the decisions in *Sierra Club v. Duke Energy, Inc.* and *Natural Resources Defense Council, Inc. v. BP Products North America, Inc.*, whether a plaintiff will be able to challenge a permit decision in federal court by IDEM while a simultaneous OEA appeal for that same facility is pending will depend on whether the claims pending before the OEA do not substantially overlap with the claims raised at the district court level.¹²⁸

E. Revising the Ozone NAAQS: Natural Resources Defense Council v. EPA

In 1997, the EPA revised the NAAQS for ozone from a one-hour standard to an eight-hour standard, and began rulemaking to implement this new standard.¹²⁹ Phase II of the rules was final in 2005; however, EPA published a Reconsideration Notice for the Phase II rule in 2007. The NRDC challenged the portions of the Phase II rule, including those that allowed facilities in nonattainment areas (those areas not meeting NAAQS standards for a particular pollutant) to achieve emission reductions by using RACT, the review of new

122. *Id.* at *1-2.

123. *Id.* at *1, *5.

124. *Id.* at *1, *8, *10-14.

125. *Id.* at *1, *8-14.

126. *Id.* at *6.

127. *Id.* at *4-6.

128. *See, e.g.*, *Natural Res. Def. Council*, No. 2:08-CV-204 PS, 2009 WL 1854527, at *6 (N.D. Ind. June 26, 2009); *Sierra Club v. Duke Energy, Inc.*, No. 1:08-CV-0437-SEB-TAB, 2009 WL 363174, at *3 (S.D. Ind. Feb. 11, 2009).

129. 571 F.3d 1245, 1250 (D.C. Cir. 2009).

sources of pollution, and provisions implementing the statutory requirement that a SIP for a nonattainment area could provide for specific emission reductions and for certain contingency measures.¹³⁰ In regards to RACT, the NRDC challenged the portion of the rule, which it contended allows a state to not consider RACT in all nonattainment areas. Specifically, the rule states that nonattainment areas “shall meet the RACT requirement by submitting an attainment demonstration SIP demonstrating that the area has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable.”¹³¹ The court found that EPA’s interpretation of the rule was appropriate in light of the text of the CAA, which requires all nonattainment areas to achieve reasonably available control measures (which the court found analogous to RACT) as expeditiously as practicable, including any reductions that may be available at a minimum through RACT.¹³² To the extent an area is already achieving attainment as expeditiously as possible, implementing additional controls through RACT would not hasten compliance and therefore may not be necessary.¹³³

The NRDC also took issue with EPA allowing sources to use RACT approved under the one-hour standard to satisfy RACT under the eight-hour standard because RACT changes over time.¹³⁴ The court, however, found EPA’s approach sufficient because the EPA performs the RACT analysis on a case-by-case basis. EPA requires states to consider available information in addition to guidance documents on control technologies available, when submitting RACT certifications states must provide support documentation, and states and EPA are required to consider additional information provided to them under any notice and comment rulemaking (which is part of the SIP process).¹³⁵ All of these mechanisms would ensure that EPA would be required to make a case-by-case determination regarding RACT that would include any new technology and its decision to not revise its RACT guidelines was reasonable.¹³⁶

The NRDC also challenged the portion of the rule allowing a state to forego a NO_x RACT analysis for sources subject to the state’s emission cap and trade program if that program meets the NO_x SIP Call requirements.¹³⁷ Specifically, the rule provided that the state need not perform or submit a NO_x RACT analysis for sources subject to the state’s emission cap-and-trade program where that program meets the NO_x SIP Call requirements. But under the CAA, reductions in emissions for RACT purposes must come from sources within the nonattainment area, not regionally as may be the case under the NO_x SIP Call.

130. *Id.* at 1251.

131. *Id.* at 1252.

132. *Id.* (citing Clean Air Act § 172(c)(1)).

133. *Id.*

134. *Id.* at 1253-54.

135. *Id.* at 1254.

136. *Id.* at 1255.

137. *Id.* at 1256. The NO_x SIP Call is a cap and trade program regulating NO_x emissions whereby states can meet their emission targets by installing controls or by purchasing allowances from other sources located in the area covered by the NO_x SIP Call.

Therefore, the EPA's determination that compliance with the NO_x SIP Call could satisfy the NO_x RACT requirement was inconsistent with the CAA and the court remanded this section of the rule.¹³⁸

Phase II also impacted issues regarding NSR. Specifically, under NSR, a permit may be issued for a new or modified source in a nonattainment area only if sufficient off-setting emission reductions are obtained or if the source will comply with lowest achievable emission rates.¹³⁹ The new rule allowed new and modified sources to meet the NSR off-setting requirement by using credits from sources that shut down or ended operations as far back as 1977.¹⁴⁰ The NRDC challenged the policy of allowing offsetting, which the court rejected as untimely because this policy had been in place since the late 1980s and the time to challenge had passed. But the court did find that EPA acted arbitrarily in eliminating an attainment demonstration requirement from NSR permit in non-attainment areas because it did not provide any other safeguard to ensure emission reductions would be achieved upon commencement of operations, and not "sometime down the road."¹⁴¹ Also challenged was whether EPA acted improperly in waiving an eighteen-month time limit under which permits could be issued in a state while the SIP was being approved.¹⁴² The court held that relaxing this time limit constituted "anti-backsliding" because it allowed for waiver of NSR for an unlimited time pending SIP approval, which is less stringent than limiting the waiver to eighteen months.¹⁴³ The court remanded the rule back to EPA for further consideration of the foregoing provisions.¹⁴⁴

II. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

Several opinions within the survey period address CERCLA and RCRA. The U.S. Supreme Court endorsed apportionment of CERCLA liability and rejected arranger liability for certain defendants. The Southern District of Indiana has already confronted the Court's new apportionment decision and applied its theory to complex environmental litigation involving numerous parties. Finally, this Part's opinions discuss whether costs were recoverable, the disclosure of damages, and the sanctionability of discovery violations.

138. *Id.* at 1258.

139. *Id.* at 1263-64.

140. *Id.* at 1264.

141. *Id.* at 1266. In making the emission off-set analysis, EPA requires the permitting agency to ensure the offsetting reductions will be in place by the time the source begins operations. *Id.* at 1263.

142. *Id.* at 1271. Under NSR, a state is required to implement NSR regulations into their SIP programs, and in areas of non-attainment, the EPA developed interim NSR regulations to apply with the state SIP was being finalized.

143. *Id.*

144. *Id.*

A. Burlington Northern: *CERCLA Liability Can Be Apportioned*

In *Burlington Northern & Santa Fe Railway Co. v. United States*,¹⁴⁵ the Supreme Court limited the reach of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in two ways. First, the Court approved the “useful products” defense, refusing to assign “arranger” liability to sellers of hazardous chemicals.¹⁴⁶ Second, the Court found that factors such as geography and duration could be used, rather than joint and several liability, to apportion an indivisible harm such as a plume of contaminated groundwater.¹⁴⁷

The case involved two cost recovery actions addressing the same site. The EPA and the California Department of Toxic Substances Control (DTSC) brought the first action against the Burlington Northern & Santa Fe and Union Pacific railroad companies.¹⁴⁸ The EPA and DTSC brought the second action against Shell Oil Company alleging that supply of chemical products and the provision of safeguards against the release of those products created liability as an “arranger” for the disposal of these products and therefore Shell was a responsible party with respect to the subsequent contamination.¹⁴⁹

The District Court for the Eastern District of California held for the government but refused to hold the defendants jointly and severally liable as requested by the government. Instead, the court allocated reduced portions of the site costs among the parties.¹⁵⁰ The Court of Appeals for the Ninth Circuit affirmed Shell’s liability as an “arranger,” but reasserted the application of joint and several liability to this claim.¹⁵¹

The Supreme Court first considered whether Shell could be held liable as an arranger. Under section 107(a)(3) of CERCLA, liability is imposed on arrangers for the disposal of hazardous substances.¹⁵² In this case, Shell sold new chemicals to an agricultural chemical distribution business, which ultimately went out of business. The Government argued to impose arranger liability on Shell as a seller of a useful, new product because Shell knew that some “disposal,” spilling and leaking would occur during at the facility and Shell had provided directions on avoiding releases.¹⁵³ The Supreme Court rejected the argument, holding “an entity may qualify as an arranger under § 9607(a)(3), when it takes intentional steps to dispose of a hazardous substance.”¹⁵⁴ Simply having knowledge that spills and leaks would occur, or providing instructions for reducing leaks and spills was not sufficient to transform a sale into arranging for disposal of those

145. 129 S. Ct. 1870 (2009).

146. *Id.* at 1878-80.

147. *Id.* at 1880-84.

148. *Id.* at 1876.

149. *Id.* at 1876-77.

150. *Id.*

151. *Id.* at 1877.

152. 42 U.S.C. § 9607(a)(3) (2006).

153. *Burlington N.*, 129 S. Ct. at 1879-80.

154. *Id.* at 1879.

materials. As a result, the Supreme Court held that Shell was not liable.¹⁵⁵

With regard to the liability of the Railroads, the Court rejected joint and several liability. The Supreme Court reinstated the trial court's finding as the owner and property owner for a portion of the facility, the Railroads were only subject to a portion of the damages.¹⁵⁶ Although CERCLA imposes strict liability on owners of contaminated property under section 107(a)(1), the Court held that CERCLA did not mandate joint and several liability in every case.¹⁵⁷ The Court relied upon section 433A of the Restatement (Second) of Torts, which provides: "[W]hen two or more persons acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused."¹⁵⁸

Thus, the Court affirmed the allocation, which was based on basic, known site characteristics.¹⁵⁹ The Court found that the District Court appropriately applied and reasonably considered basic and easily identifiable factors such as geography (percentage of land owned), duration of ownership, and relative cost of remediation of different hazardous substances.¹⁶⁰

*B. Contribution, Who May Sue Under CERCLA, and Applying
Burlington Northern*

In *Evansville Greenway & Remediation Trust v. Southern Indiana Gas & Electric Co.*,¹⁶¹ the court addressed several motions for summary judgment filed by various parties. This case involved several contaminated sites, some of which had been remediated by the Greenway Trust, a trust formed by the former site owner and operator (GWP) who had been identified as potentially responsible party (PRP).¹⁶² The trust then sued several defendants for cost recovery of site remediation costs pursuant to section 107(a)¹⁶³ of CERCLA and the Indiana

155. *Id.* at 1880. Justice Ginsburg dissented from this holding, based on the fact that Shell knew that spills occurred repeatedly and the "control rein held by Shell over the mode of delivery and transfer." *Id.* at 1885 (Ginsburg, J., dissenting).

156. *Id.* at 1883.

157. *Id.* at 1880-81 (citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983)).

158. *Id.* at 1881 (quoting *RESTATEMENT (SECOND) OF TORTS* §§ 453A, 881 (1976)) (alterations omitted).

159. *Id.* at 1881-83. Justice Ginsburg also dissented on the apportionment issue because the District Court's efforts, while "heroic," did not allow the parties to rebut the court's apportionment calculations. As such, Justice Ginsburg would have remanded the case in order to give the parties such an opportunity. *Id.* at 1185-86.

160. *Id.* at 1883.

161. 661 F. Supp. 2d 989 (S.D. Ind. 2009).

162. *Id.* at 992-93.

163. 42 U.S.C. § 9607(a) (2006).

Environmental Legal Actions (ELA) statute.¹⁶⁴ Some of the defendants assigned their rights to an entity called the PRP Group, which in turn sued several third party defendants.¹⁶⁵

The PRP Group sought summary judgment on the liability of the GWP. The court reasoned that the PRP Group could seek summary judgment on the liability of the GWP under section 113(f)(1)¹⁶⁶ of CERCLA, even though the PRP Group was not seeking specific contribution allocation at this stage of the litigation.¹⁶⁷ In order for a party to pursue contribution from other PRPs, there must first be a determination of liability under section 107(a) of CERCLA. The court granted the PRP Group's summary judgment motion and held that GWP and its owner liable or potentially liable under section 107(a) because they admitted that they owned, operated, and arranged for transport and disposal, or both, of hazardous waste at the site.¹⁶⁸

Several other defendants moved for summary judgment against the Greenway Trust on the theory that the Greenway Trust was not a valid entity and therefore lacked capacity to sue. The court denied this motion because the Greenway Trust was a valid trust under the Indiana Trust Code.¹⁶⁹ The court found that the Greenway Trust satisfied the statutory requirements for a trust because it was created through a written agreement and was statutorily permitted not to have a beneficiary because it was formed as a non-charitable trust.¹⁷⁰ The court also rejected the related argument that the Greenway Trust could not sue the other parties under section 107 because the GWP, which assigned its rights to the trust, was not itself sued under CERCLA and the trust was a PRP by virtue of the fact that the settlors of the trust were identified as PRPs.¹⁷¹ The court found that the trust was not required to be a "innocent landowner" in order to pursue other PRPs under section 107.¹⁷² In the court's view, if a party has incurred necessary response costs under the NCP "that party is eligible to seek recoupment of those response costs via [section] 107(a) *even if it is itself a PRP.*"¹⁷³

The court addressed a motion for summary judgment filed by the Greenway Trust against Southern Indiana Gas and Electric Company (SIGECO). The court granted summary judgment on whether SIGECO was a PRP, but denied summary

164. IND. CODE § 13-30-9-1 (2004 & 2009 Supp.).

165. *Evansville Greenway*, 661 F. Supp. 2d at 993.

166. 42 U.S.C. § 9613(f)(1) (2006).

167. *Evansville Greenway*, 661 F. Supp. 2d at 996. A PRP who voluntarily cleans up a property, rather than in response to a suit, cannot seek contribution from other PRPs under Section 113(f), but can only sue under Section 107(a). *Id.* at 995-96 (citing *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160-61 (2004)).

168. *Id.* at 999.

169. *Id.* at 1004. For background information on the history of the Greenway Trust, see *id.* at 1000-03.

170. *Id.* at 1004-05 (citing IND. CODE §§ 30-4-2-1(b), -19 (2008)).

171. *Id.* at 1005.

172. *Id.* at 1006 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 139-40 (2007)).

173. *Id.* at 1009 (citations omitted).

judgment in regards to imposing joint and several liability on SIGECO.¹⁷⁴ SIGECO did not dispute that it was a PRP because the facts in the case indicated that it had transported and arranged for the transport of waste to the site, which included batteries that likely contributed to the lead contamination at the site.¹⁷⁵ SIGECO argued that it should not be held jointly and severally liable for the costs because the contamination at the site was divisible, based on *Burlington Northern*.¹⁷⁶ After reviewing *Burlington Northern*,¹⁷⁷ the court “decline[d] . . . to commit to a particular interpretation of *Burlington Northern* and how it might apply in” this case.¹⁷⁸ But the court determined that it was not timely to decide whether there was sufficient evidence within the record to apportion liability based on divisibility of the harm among the PRPs, particularly in light of the fact that the “applicable law appears to be in flux.”¹⁷⁹ Instead, the court viewed this as a matter properly reserved for trial. Lastly, the court held that a jury trial was not available in this case because the PRP Group sought contribution and a declaratory judgment under CERCLA and the ELA, which were equitable claims for which there was no right to a jury trial.¹⁸⁰

*C. Enrollment in a Voluntary Remediation Program Does Not
Create a Presumption that Remediation Costs Comply with
CERCLA’s National Contingency Plan*

In *City of Gary v. Shafer*,¹⁸¹ the District Court for the Northern District of Indiana denied defendants’ motion for summary judgment in part because issues of material fact remained regarding whether the site contamination at issue occurred during the defendants’ automobile salvage and scrap yard operations at the site. This case involved contaminated land within an area targeted for redevelopment by the City of Gary.¹⁸² The court agreed with the plaintiff that the moving and spreading of contaminated soil when leveling the site could constitute “disposal” under CERCLA if it exacerbated pre-existing contamination.¹⁸³

The court also rejected defendants’ arguments that response costs were not recoverable due to non-conformance with the National Contingency Plan (NCP).¹⁸⁴ Enrollment in IDEM’s Voluntary Remediation Program (VRP) was not, on its face, sufficient to show plaintiff’s remediation plan complied with the

174. *Id.* at 1009-10.

175. *Id.* at 1009.

176. *See* discussion, *supra* notes 145-60 and accompanying text.

177. *Id.* at 1011-13.

178. *Id.* at 1012.

179. *Id.*

180. *Id.* at 1013-15.

181. No. 2:07-CV-56-PRC, 2009 WL 1605136 (N.D. Ind. June 2, 2009).

182. *Id.* at *2.

183. *Id.* at *12-13; 42 U.S.C. § 9601(29) (2006).

184. *City of Gary*, 2009 WL 1605136 at *14-16.

NCP; IDEM had to be involved with the remediation plan in order to argue that VRP enrollment demonstrated that costs were in conformance with the NCP.¹⁸⁵ The court distinguished remediation costs from initial site investigation and monitoring costs and held that a plaintiff is not required to show that those costs were consistent with the NCP.¹⁸⁶ IDEM had not yet approved a remediation plan for the site, and the inclusion of any dollar amounts for site clean-up within the complaint were based on estimates, which the plaintiff clearly explained. The plaintiff sought declaratory judgment for defendants to pay for past and future response costs, and the lack of certainty about the cleanup plans for the site made this an appropriate remedy.¹⁸⁷

D. Additional RCRA and CERCLA Cases

1. Disclosure of Damages in Environmental Cases.—In *Barlow v. General Motors Corp.*,¹⁸⁸ property owners brought an action alleging that General Motors contaminated their land with polychlorinated biphenyls (PCBs), seeking damages on a variety of theories including trespass and nuisance.¹⁸⁹ Plaintiffs did not claim that the PCBs released by General Motors had caused any of them to become ill and General Motors was already engaged in a cleanup effort involving the U.S., EPA, and IDEM.

In its opinion, the U.S. District Court for the Southern District of Indiana ruled on multiple pending motions. These motions related to the court's earlier rulings that the plaintiffs were not entitled to medical monitoring damages or damages based on the estimated costs of a more thorough cleanup than required by the U.S., EPA, and IDEM, and that General Motors was entitled to summary judgment on plaintiffs' unjust enrichment claims and that plaintiffs' claims for long term stigma damages were not yet ripe for adjudication.¹⁹⁰

First, the court excluded the plaintiffs' late disclosed damages claims because they violated the court's order requiring such disclosures, there was no plausible excuse provided for the late disclosures and the late disclosures prejudiced both General Motors and the court. In addition, the court sanctioned the plaintiffs and their attorneys by requiring them to pay for General Motors' fees and costs incurred in its motion to exclude the late disclosures.¹⁹¹

Second, the court denied General Motors' motion for summary judgment on plaintiffs' claims for damages for the loss of enjoyment of their property. In doing so, the court limited plaintiffs' evidence on such claims to plaintiffs' own

185. *Id.* at *14.

186. *Id.* at *15 (citing *Cont'l Title Co. v. People's Gas Light & Coke Co.*, No. 96 C 3257, 1999 WL 753933, at *3 (N.D. Ill. Sept. 15, 1999)).

187. *Id.* at *15-16.

188. 595 F. Supp. 2d 929 (S.D. Ind. 2009).

189. *Id.* at 930.

190. *Id.* at 931-32; see *Allgood v. Gen. Motors Corp.*, No. 102-CV-1077-DFH-TAB, 2006 WL 2669337 (S.D. Ind. Sept. 18, 2006).

191. *Barlow*, 595 F. Supp. 2d at 935-39.

description of their experiences and own opinions as to the fair market values of their properties due to plaintiffs' failure to timely disclose any evidence regarding lost rental value of their properties, thereby precluding the introduction of any lost rental value evidence at trial.¹⁹²

Third, the court granted General Motors' motion for summary judgment on plaintiffs' emotional distress damage claims, holding that plaintiffs would not be permitted to offer evidence of "emotional distress based upon fears about their own health or the health of relatives."¹⁹³ But the court permitted the plaintiffs to offer evidence of "discomfort or annoyance resulting from the pollution and clean-up efforts, including emotional and aesthetic dimensions of loss of enjoyment."¹⁹⁴ Fourth, the court denied General Motors' motion to exclude testimony of one of plaintiff's experts as to the background of PCBs and their health risks, allowing the testimony with the qualification that the jury know that plaintiffs have all tested negative for PCB exposure and there is no evidence of increased health risks to the plaintiffs because of General Motors' operations at the site.¹⁹⁵

Finally, the court granted General Motors' motion for summary judgment regarding plaintiffs' claims for damages based on contamination of three groundwater wells where the plaintiffs were served by city utilities and had failed to present evidence or explanation addressing the loss of use of the wells as an element of damages.¹⁹⁶

2. *Discovery Violations Lead to Default in Environmental Suit.*—Candor with the court, and between client and attorney in an environmental litigation were in the spotlight in *1100 West, LLC v. Red Spot Paint & Varnish Co.*¹⁹⁷ Here, District Judge McKinney issued a lengthy order granting 1100 West's motion for sanctions for discovery violations in an environmental contamination case.¹⁹⁸ In 2005, 1100 West sued Red Spot Paint & Varnish Co., Inc., alleging that contamination migrated from Red Spot's site to 1100 West's property.¹⁹⁹ 1100 West sought injunctive relief under the Resource Conservation and Recovery Act (RCRA)²⁰⁰ and claimed that part of the contamination was caused by trichloroethylene and tetrachloroethylene used at Red Spot's facility.²⁰¹ The

192. *Id.* at 938-41.

193. *Id.* at 945.

194. *Id.*

195. *Id.*

196. *Id.* at 948.

197. No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118 (S.D. Ind. June 5, 2009).

198. *Id.* at *36.

199. *Id.* at *1-4. 1100 West sued Red Spot in state court with similar allegations in 2003, and that suit was subsequently consolidated with the 2005 federal claim. *Id.* at *2-3.

200. 42 U.S.C. §§ 6901-6908a (2006).

201. *1100 West*, 2009 WL 1605118, at *1, 3. The Indianapolis law firm Bose McKinney & Evans LLP represented Red Spot prior to the filing of the motion for sanctions. Following the filing of the motion, Bose McKinney withdrew its representation of Red Spot. Thereafter, Ice Miller LLP appeared on the defendant's behalf.

discovery violations centered around Red Spot's and its attorneys' assertions, both in documents to the court and in deposition testimony by several Red Spot employees, that the chemicals were not used at Red Spot's facility.²⁰² As a result, the court imposed "the most onerous sanction," default judgment, and found that "pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 6972(a)," Red Spot was "liable for taking all necessary action to abate and otherwise respond to the aromatic contamination plume and the TCE/PCE contamination plume on [1100 West's] property."²⁰³

3. *Clean Up Order in RCRA Litigation Is Not a Debt Discharged in Bankruptcy.*—In *United States v. Apex Oil Co.*,²⁰⁴ the Seventh Circuit Court of Appeals decided that an injunction ordering the clean-up of contamination is not discharged by the defendant's bankruptcy.²⁰⁵ The court examined the applicable bankruptcy code provisions that defined claims²⁰⁶ and determined that an injunction ordering the defendant to clean up a site is not the same as a right of payment.²⁰⁷ The EPA had sued the defendant under section 6973(a) of RCRA, and the court reasoned that an injunction ordering remediation was not a right of payment in part because that RCRA "does not authorize *any* form of monetary relief."²⁰⁸ The court further held that discharge could not be applied to injunctions such as this simply because money would be spent in carrying out the injunction.²⁰⁹

Recognizing the complexities of environmental remediation, the court made it clear that injunctions outlining what a defendant was required to do to effectuate a site clean up did not need to outline every standard or method.²¹⁰ Federal Rule of Civil Procedure 65(d) requires specificity within the terms of an injunction,²¹¹ and the defendant attempted to argue that the trial court's mandatory injunction was impermissibly vague.²¹² The court held that "[t]o specify the details of the project in the decree would either impose impossible rigidity on the performance of the clean up or, more likely, require constant recourse to the district judge for interpretation or modification of the decree."²¹³

202. *1100 West*, 2009 WL 1605118 at *1.

203. *Id.* at *35 (citing 28 U.S.C. § 2201 (2006); 42 U.S.C. § 6972(a) (2006)).

204. 579 F.3d 734 (7th Cir. 2009).

205. *Id.* at 735-36, 740.

206. 11 U.S.C. § 101(5)(A)-(B) (defining claim as either a right of payment or a right to an equitable remedy that gives rise to a right to payment).

207. *Apex Oil*, 579 F.3d at 735-36.

208. *Id.* at 736 (citing 42 U.S.C. § 6973(a) (2006)); *see also id.* (citing *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483-87 (1996) (interpreting a similar part of the RCRA statute, 42 U.S.C. § 6972(a)(2) (2006))).

209. *Id.* at 737.

210. *Id.* at 739-40.

211. FED. R. CIV. P. 65(d).

212. *Apex Oil*, 579 F.3d at 739. The defendant tried to argue that installing a vapor-control system that has "adequate capacities and efficiencies" was vague without specific standards. *Id.*

213. The court noted that "[a] degree of ambiguity is unavoidable in a decree ordering a

III. DEVELOPMENTS UNDER THE CLEAN WATER ACT

During the survey period, the U.S. Supreme Court and the Seventh Circuit decided cases related to the Clean Water Act (CWA)²¹⁴ that touched upon whether agencies may issue fill mining waste permits,²¹⁵ the use of cost-benefit analysis in drafting regulations for cooling water intake structures,²¹⁶ challenges to CWA sewer permits,²¹⁷ and facts that demonstrate injury for standing purposes.²¹⁸

A. Tension Within the Section 404 Fill Permit Process

*Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*²¹⁹ highlighted the regulatory tension between the EPA and the U.S. Army Corps of Engineers when issuing fill permits pursuant to section 404²²⁰ of the CWA. In this case, Coeur Alaska sought to reopen a gold mine and utilize a froth flotation technique where crushed rock is churned with a chemical and water mixture to separate out the gold-bearing minerals.²²¹ In order to discharge this mining waste into a nearby lake, referred to as slurry, Coeur was required to obtain a section 404 permit from the Corps.²²² To complete these processes, Coeur also proposed to dam a downward stream in order to isolate the lake into which the slurry was discharged from other surface water.²²³ Coeur proposed to then treat this lake water and discharge the purified water into a stream.²²⁴ To do so, Coeur was also required to obtain a section 402²²⁵ permit from the EPA.²²⁶

Under the CWA, discharge of crushed rock is not allowed,²²⁷ but the CWA also “empowers” the Corps to issue a permit for the discharge of “dredged or fill

complicated environmental clean up.” *Id.* at 740. If the defendant wanted clarification on the order, or had a dispute with the EPA about the meaning of something within the injunction, it could then seek guidance from the district court. *Id.*

214. 33 U.S.C. §§ 1251-1387 (2006).

215. *Coeur Alaska, Inc. v. Se. Alaska Conversation Council*, 129 S. Ct. 2458 (2009).

216. *Energy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

217. *Friends of Milwaukee’s Rivers & Alliance for Great Lakes v. Milwaukee Metro. Sewerage*, 556 F.3d 603 (7th Cir. 2009).

218. *Pollack v. U.S. Dep’t of Justice*, 577 F.3d 736 (7th Cir. 2009).

219. 129 S. Ct. 2458 (2009).

220. 33 U.S.C. § 1344 (2006).

221. *Coeur Alaska*, 129 S. Ct. at 2463-64.

222. *Id.* at 2464.

223. *Id.*

224. *Id.*

225. 33 U.S.C. § 1342 (2006).

226. *Coeur Alaska*, 129 S. Ct. at 2463-65.

227. 33 U.S.C. § 1311(a) (2006). The crushed rock within the slurry is classified as a “pollutant” under the CWA. *Id.* § 1362(6); *Coeur Alaska*, 129 S. Ct. at 2464.

material.”²²⁸ In this case, the Corps considered the environmental effects of the proposed discharge activity and applied EPA guidelines to determine that this was the “‘least environmentally damaging practicable’ way to dispose of the” slurry as compared to possible alternatives.²²⁹ Although the environmental groups sought an EPA veto of the Corps permit, the EPA did not exercise its veto authority despite the EPA’s view that the discharge was not “‘environmentally preferable.’”²³⁰ The EPA also granted Coeur’s requested section 402 permit to allow the discharge from the slurry lake into a downstream creek, but the permit required compliance with strict water quality rules.²³¹

Several environmental groups challenged these actions, arguing that Coeur should have obtained a section 402 permit from the EPA to discharge the slurry into the lake.²³² The U.S. Supreme Court rejected this argument, determining that section 402 expressly exempts fill permits from EPA’s permitting authority,²³³ and that EPA’s authority in regards to fill material was limited to writing guidelines for the Corps and the ability to veto the Corps’ issuance of a section 404 permit.²³⁴ Because the slurry met the definition of fill material, and because section 404 gives the Corps the authority to issue permits for discharging fill material into waterways, the Corps, not the EPA, had the authority to issue the fill permit to Coeur Alaska.²³⁵

In addition, the petitioners argued that an EPA new source performance standard (NSPS) that prohibits discharge of process wastewater barred the discharge.²³⁶ A point source is not permitted to operate in violation of a performance standard under section 306(e) of the CWA.²³⁷ The Court examined the CWA, EPA’s regulations, and EPA’s interpretations of the CWA in order to determine whether section 404 permits had to comply with NSPS.²³⁸ Section 402, which grants EPA permitting authority, references section 306, but section 404 does not.²³⁹ The Court inferred this silence to mean that Congress did not intend the Corps to consider section 306 when issuing a permit under section 404.²⁴⁰ The CWA and relevant regulations were ambiguous on this point, so the Court examined how the EPA itself interpreted these statutes. An EPA memorandum

228. 33 U.S.C. § 1344(a) (2006); *Coeur Alaska*, 129 S. Ct. at 2464.

229. *Coeur Alaska*, 129 S. Ct. at 2465.

230. *Id.*

231. *Id.* at 2465-66.

232. *Id.* at 2463.

233. *Id.* at 2467 (citing 33 U.S.C. § 1342(a)(1) (2006)).

234. *Id.* (citing 33 U.S.C. §§ 1344(b)-(c) (2006)).

235. *Id.* at 2468-69. Fill material is defined as “material [that] has the effect of . . . [c]hanging the bottom elevation” of a water body. 40 C.F.R. § 232.2 (2009).

236. *Coeur Alaska*, 129 S. Ct. at 2466. The EPA published the NSPS relating to froth flotation at 40 C.F.R. § 440.104(b)(1) (2009).

237. 33 U.S.C. § 1316(e) (2006).

238. *Coeur Alaska*, 129 S. Ct. at 2467-68.

239. 33 U.S.C. § 1342(k) (2006); *Coeur Alaska*, 129 S. Ct. at 2471.

240. *Coeur Alaska*, 129 S. Ct. at 2471.

evaluating a similar project said that effluent guidelines do not apply to the placement of slurry into a closed body of water.²⁴¹ The Court viewed this as a “reasonable” interpretation of the CWA regulatory scheme that was “not ‘plainly erroneous or inconsistent with the regulation[s].’”²⁴² The Court outlined five factors that supported its conclusion that the EPA memorandum complied with the CWA’s framework. Those factors were: 1) the “[m]emorandum preserve[d] a role for the EPA’s performance standard” by limiting its application to situations involving closed bodies of water; 2) the EPA’s interpretation “guard[ed] against the possibility of evasion of those standards” by applying to situations in which the applicant is disposing of slurry that falls squarely within the definition of fill material; 3) this interpretation “employ[ed] the Corps’ expertise in evaluating the effects of fill material on the aquatic environment;” 4) toxic pollutants are not allowed to be discharged; and 5) “we have been offered no better way to harmonize the regulations.”²⁴³

Writing for a three-member dissent, Justice Ginsburg characterized the majority’s interpretation as creating an “escape hatch” and “loophole.”²⁴⁴ In her view, joined by Justices Stevens and Souter, the majority’s opinion allowed industry to discharge waste into bodies of water by being able to call it fill material because it raised the bottom of a body of water.²⁴⁵ This seemed contrary to the CWA’s “goal of eliminating water pollution, and Congress’ particular rejection of the use of navigable waters as waste disposal sites.”²⁴⁶

B. Use of a Cost-Benefit Analysis when the CWA Is Silent

May the EPA consider cost in a regulation that is supposed to “reflect the best technology available for minimizing adverse environmental impact”?²⁴⁷ The U.S. Supreme Court answered in the affirmative in *Entergy Corp. v. Riverkeeper, Inc.*²⁴⁸ Environmental groups and several states challenged regulations for existing cooling water intake structures that the EPA promulgated under section 316(b) of the CWA.²⁴⁹ Power plants use these intake structures to cool the facilities by taking water from nearby water sources.²⁵⁰ The regulations at issue set national performance standards (NPS) for existing power plants that called for a large reduction in harm to aquatic wildlife typically harmed by the water intake process.²⁵¹ The EPA crafted these regulations based on “‘commercially available

241. *Id.* at 2474-76.

242. *Id.* at 2473 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

243. *Id.* at 2473-74.

244. *Id.* at 2483 (Ginsburg, J., dissenting).

245. *Id.*

246. *Id.*

247. 33 U.S.C. § 1326(b) (2006).

248. 129 S. Ct. 1498 (2009).

249. 33 U.S.C. § 1326(b) (2006); *Entergy Corp.*, 129 S. Ct. at 1502.

250. *Entergy Corp.*, 129 S. Ct. at 1502.

251. *Id.* at 1504 (citing 40 C.F.R. § 125.94(b)(1) (2009) (requiring an eighty to ninety-five

and economically practicable” technologies.²⁵² The EPA refused to require a closed-cycle system for existing facilities based on the large costs associated with retrofitting existing facilities with this new technology, particularly in light of the small difference in the reduction in harm.²⁵³

These regulations also allowed for site-specific variances if a facility could demonstrate that “costs of compliance are ‘significantly greater than’ the costs considered by the agency in setting the standards”²⁵⁴ or that compliance costs “‘would be significantly greater than the benefits of complying with the applicable performance standards.’”²⁵⁵ If a variance were granted, remedial measures would be imposed in order to reach results “‘as close as practicable to the applicable performance standards.’”²⁵⁶

After examining the standard set forth in section 316(b), “the best technology available for minimizing adverse environmental impact”²⁵⁷ (BTA), the Court determined that the EPA’s interpretation was reasonable because the standard “does not unambiguously preclude cost-benefit analysis.”²⁵⁸ The Court characterized the “minimizing” portion of the standard as “less ambitious” than those that used the term eliminate, indicating that the EPA still held some discretion in setting the NPS.²⁵⁹

The petitioners argued that the structure of the CWA, and the various technology standards within it, precluded consideration of costs unless it was explicitly part of the standard.²⁶⁰ The Court examined four of the tests within the CWA: “‘best practicable control technology currently available’” (BPT),²⁶¹ “‘best conventional-pollutant control technology’” (BCT),²⁶² “‘best available technology economically achievable’” (BATEA),²⁶³ and “‘best available demonstrated control technology’” (BADT).²⁶⁴ The factors for each of these tests instructed whether the EPA could consider costs when formulating a standard.²⁶⁵ The petitioners argued that because the BADT and BATEA tests did not allow cost-benefit analysis, and BTA was similarly silent on the issue, that the EPA was

percent reduction in impingement, where organisms are trapped against the screens, and sixty to ninety percent reduction in entrainment, where organisms are sucked up into the cooling structures)).

252. *Id.* at 1504 (quoting 69 Fed. Reg. 41576, 41602 (2004)).

253. *Id.* (citing 69 Fed. Reg. at 41601, 41605 (2001)).

254. *Id.* (citing 40 C.F.R. § 125.94(a)(5)(i) (2009)).

255. *Id.* at 1504-05 (citing 40 C.F.R. § 125.94(a)(5)(ii) (2009)).

256. *Id.* at 1505 (citing 40 C.F.R. § 125.94(a)(5)(i), (ii) (2009)).

257. 33 U.S.C. § 1326(b) (2006).

258. *Entergy Corp.*, 129 S. Ct. at 1506.

259. *Id.*

260. *Id.* at 1506-08.

261. *Id.* at 1507 (citing 33 U.S.C. § 1311(b)(1)(A) (2006)).

262. *Id.* (citing 33 U.S.C. § 1311(b)(2)(E) (2006)).

263. *Id.* (citing 33 U.S.C. § 1311(b)(2)(A) (2006)).

264. *Id.* (citing 33 U.S.C. § 1316(a)(1) (2006)).

265. *Id.*

not permitted to engage in cost-benefit analysis in promulgating standards under the BTA.²⁶⁶

This reasoning did not persuade the Court because all four of the tests allowed cost considerations.²⁶⁷ Additionally, the Court noted that BTA differed from the other four tests in that it did not explicitly include factors that the EPA was instructed to consider when applying it.²⁶⁸ Extending the reasoning offered by the petitioners would mean that “the EPA could not consider *any* factors” at all when applying BTA.²⁶⁹ The Court asserted that the lack of factors in the BTA was “nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to what degree.”²⁷⁰ The Court conceded that, “sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion,” but the Court believed statutory silence could not be interpreted in this manner as it related to section 316(b).²⁷¹ The Court recognized that the NPS for cooling intake towers would require large expenditures with “meager financial benefits” to the operators, indicating that the EPA was not attempting to craft standards where benefits equaled costs, but rather to “avoid extreme disparities between costs and benefits.”²⁷² In previous decisions interpreting section 316(b), the EPA determined that this part of the statute did not “requir[e] use of technology whose cost is wholly disproportionate to the environmental benefit to be gained.”²⁷³

Reversing the Second Circuit, the Court “conclude[d] that the EPA permissibly relied on cost-benefit analysis” when drafting the NPS and establishing a cost-benefit variance.²⁷⁴ Justice Stevens, joined by Justices Souter and Ginsburg, dissented, arguing that the legislative history and text of the CWA indicate “that Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others, and that Congress intend to control, not delegate, when cost-benefit analysis should be used.”²⁷⁵

266. *Id.* at 1506-08.

267. *Id.* at 1508.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* (citing *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 467-68 (2001)).

272. *Id.* at 1509.

273. *Id.* (quoting *In re Pub. Serv. Co. of N.H.*, 1 E.A.D. 332, 340 (1977)). In a concurring and dissenting opinion, Justice Breyer noted that the “wholly disproportionate” standard was different from the “significantly greater” standard outlined in the regulations’ variance provisions. *Id.* at 1515 (Breyer, J., concurring in part, dissenting in part). Justice Breyer would have permitted the lower court to remand the case to the EPA to either apply the “wholly disproportionate” standard or explain why it was employing a different standard. *Id.* at 1516.

274. *Id.* at 1510.

275. *Id.* at 1518 (Stevens, J., dissenting) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

C. Difficulties in Challenging Post-Stipulation Violations of a CWA Permit

Municipal separate storm sewer systems are an enforcement priority for the EPA in Fiscal Years 2008 to 2010,²⁷⁶ and they are a candidate for being an enforcement priority in Fiscal Year 2011 to 2013.²⁷⁷ Heavy rainfalls can cause overflows in storm sewer systems that in turn lead to the release of sanitary sewage into waterways.²⁷⁸ As seen below, municipalities that work to update their infrastructure to address CWA compliance may encounter hurdles, such as the evidentiary issues encountered by the City of Milwaukee.

In *Friends of Milwaukee's Rivers & Alliance for Great Lakes v. Milwaukee Metropolitan Sewerage District*,²⁷⁹ the Seventh Circuit heard an appeal of a citizen suit against the Milwaukee Metropolitan Sewerage District (MMSD) for overflows that occurred after the district settled with Wisconsin.²⁸⁰ The appeal centered around whether the trial court had afforded sufficient weight to evidence presented by the plaintiffs that a 2002 Stipulation entered into between the state and MMSD did not address sanitary sewer overflows (SSOs) that resulted in violations of the CWA.²⁸¹ In an earlier case, the Seventh Circuit reviewed whether the district court properly dismissed the suit against MMSD on the ground that the settlement with the state barred the suit under the doctrine of res judicata.²⁸² The court remanded the case after determining that the trial court did not adequately address one of the three elements of res judicata.²⁸³ In essence, privity between the state and the petitioners was not present because there was not enough evidence in the proceedings below to support a finding that the 2002 Stipulation would bring the MMSD into compliance with the CWA, therefore satisfying the requirement that a "prosecution" is "diligent."²⁸⁴

On remand, the district court found there was sufficient evidence to show that the 2002 Stipulation was a diligent prosecution for privity purposes and dismissed the suit.²⁸⁵ The appellate court applied the clear error standard of review to

276. Environmental Protection Agency, *National Enforcement Initiatives for Fiscal Years 2008-2010: Clean Water Act: Storm Water*, available at <http://www.epa.gov/compliance/data/planning/priorities/cwastorm.html>.

277. Environmental Protection Agency, *Background Paper for Candidate National Enforcement Priority: Wet Weather Municipal Infrastructure* (Jan. 2010), available at <http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2011candidate/s/fy2011candidate-municipal.pdf>.

278. See, e.g., *Friends of Milwaukee's Rivers & Alliance for the Great Lakes v. Milwaukee Metro. Sewerage Dist.* (*FMR II*), 556 F.3d 603, 606 (7th Cir. 2009).

279. *Id.*

280. *Id.* at 605.

281. *Id.* at 605-09.

282. *Friends of Milwaukee's Rivers & Lake Michigan Fed'n v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 757 (7th Cir. 2004).

283. *Id.* at 765.

284. *Id.* at 760, 763-65.

285. *Friends of Milwaukee's Rivers & Lake Michigan Fed'n v. Milwaukee Metro. Sewerage*

determine whether the trial court gave sufficient weight to evidence of SSOs and agency actions taken after the 2002 Stipulation.²⁸⁶ The court noted that the long history of the case presented a unique issue as to how to handle post-stipulation evidence when evaluating whether Wisconsin's entry into the 2002 Stipulation satisfied the diligent prosecution prong.²⁸⁷ Although post-stipulation evidence presented practical difficulties, the court determined that it was still relevant to evaluating *res judicata*.²⁸⁸

The court rejected the petitioners' argument that the trial court failed to give sufficient weight to post-stipulation SSOs.²⁸⁹ The scope of the 2002 Stipulation required improvements that would take some time to implement, and therefore overflows that occurred in the years after the stipulation did not indicate that the MMSD would not become compliant with the CWA once all components of the 2002 Stipulation were in place.²⁹⁰ The petitioners also bore the burden of laying a proper foundation for post-stipulation SSO evidence, and the petitioners had to show that the court should afford the evidence significant weight.²⁹¹ In order to demonstrate this significant weight, the petitioners had to demonstrate:

that the SSO (1) resulted from the same underlying causes as were addressed by the 2002 Stipulation; (2) was a violation of the applicable permit; (3) would not have been prevented by the stipulation's projects, if those projects had been completed; and (4) that the proffered evidence satisfies all other generally applicable evidentiary requirements.²⁹²

In addition, the fact that the state had pursued a new enforcement action against MMSD for CWA violations was not sufficient to show that the earlier Stipulation was not diligent.²⁹³

D. The Challenge of Showing Injury in Fact in CWA Citizen Suits

In *Pollack v. U.S. Department of Justice*,²⁹⁴ the Seventh Circuit evaluated whether an environmental group and its executive director had standing to sue the government for allegedly violating several environmental laws, including the CWA.²⁹⁵ The federal government owned a gun range where lead bullets had been

Dist., No. 02-C-0270, 2007 WL 4410402, at *11 (E.D. Wis. Dec. 14, 2007).

286. *FMR II*, 556 F.3d at 609-10 (citing *Trs. of Chi. Painters & Decorators Funds v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782, 785 (7th Cir. 2007)).

287. *Id.* at 610.

288. *Id.* at 610-11.

289. *Id.* at 612-13.

290. *Id.*

291. *Id.* at 613.

292. *Id.*

293. *Id.* at 614-15. The 2005 enforcement action resulted in a new 2008 Stipulation. *Id.* at 614.

294. 577 F.3d 736 (7th Cir. 2009).

295. *Id.* at 737.

discharged into Lake Michigan over several decades, and the plaintiffs claimed the deterioration of the lead bullets in the lake injured the environment.²⁹⁶ The court evaluated whether the plaintiffs showed they were at risk of suffering a concrete injury, the “injury in fact” requirement for standing.²⁹⁷

The environmental group based its standing on injuries supposedly suffered by two of its members, none of which the court found sufficient to establish standing.²⁹⁸ Fear of contaminated drinking water can be enough to establish an injury so long as the alleged contamination would actually affect the plaintiff’s drinking water.²⁹⁹ The plaintiff members both lived in an area that obtained its drinking water from a different part of Lake Michigan; so, it was unlikely the water affected them.³⁰⁰ The court rejected the plaintiffs’ reliance on *Sierra Club v. Franklin County Power of Illinois, LLC*,³⁰¹ a case involving a petitioner who challenged a proposed power plant on the basis that air pollution would impact her enjoyment of a nearby lake.³⁰² As opposed to air pollution that can travel several miles, this case is distinguishable because the plaintiffs were not able to demonstrate that the lead bullets were contaminating the area of the lake thirteen miles away from which they drew their water.³⁰³ In addition, the alleged contamination’s impact on the plaintiffs’ desire to eat ocean and freshwater fish was not enough to establish an injury because the plaintiffs failed to make it clear that the fish they wanted to eat actually came from the affected area of Lake Michigan.³⁰⁴ The plaintiffs’ claims of the contamination impacting bird watching in the Great Lakes watershed and visiting parks along Lake Michigan were also rejected because they did not provide a nexus between the area harmed by the lead bullets and these areas.³⁰⁵ Writing in concurrence, Circuit Judge Cudahy noted that this was a “close case”³⁰⁶ and “that the farther the plaintiff is from the ‘area of injury,’ the more evidence he generally must put forth to prove that he

296. *Id.* at 737-38.

297. *Id.* at 739.

298. *Id.* at 738. As noted in the concurring opinion, “the broad nature of the citizen-suit provisions means that in many cases, like this one, the real test will be proof of standing, not of the merits.” *Id.* at 743-44 (Cudahy, J., concurring).

299. *Id.* at 741 (majority opinion).

300. *Id.* The court differentiated the instant case from *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), in which a plaintiffs were able to show standing in a case involving a polluted river, in part because they were located downstream from the contamination. *Pollack*, 577 F.3d at 741.

301. 546 F.3d 918 (7th Cir. 2008).

302. *Id.* at 925.

303. *Pollack*, 577 F.3d at 740-41.

304. *Id.* at 742. Their “desire to eat ocean fish is not implicated because Lake Michigan is not the ocean.” *Id.*

305. *Id.* at 742-43 (citing *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149-50 (2009); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 886, 889 (1990)).

306. *Id.* at 743 (Cudahy, J., concurring).

is ‘among the injured.’”³⁰⁷

IV. ENVIRONMENTAL CASES UNDER STATE LAW

Indiana courts issued several prominent environmental opinions during the survey period. As previewed in last year’s Article,³⁰⁸ the Indiana Supreme Court announced new authority on the statute of limitations governing Indiana’s Environmental Legal Action statute.³⁰⁹ Although the opinion clearly permitted South Bend’s claim to proceed,³¹⁰ questions persist regarding application of the newly announced standard. In other litigation, the Indiana Supreme Court refused to find IDEM breached its obligation when it encouraged EPA to pursue a site for which IDEM had previously entered into an agreed order.³¹¹ Two state court opinions addressed nuisance claims between neighbors,³¹² while two additional decisions regarding standing³¹³ round out this Part’s discussion.

A. Statute of Limitations in Indiana’s Environmental Legal Action Statute

In last year’s survey Article, we previewed *Cooper Industries, LLC v. City of South Bend*³¹⁴ in which the Indiana Supreme Court addressed the statute of limitations period for common law trespass and nuisance claims arising from environmental contamination and the ELA statute.³¹⁵ The ELA allows a person to

bring an environmental legal action against a person that caused or contributed to the release . . . of a hazardous substance or petroleum into the surface or subsurface soil or groundwater that poses a risk to human health and the environment . . . to recover reasonable costs of a removal or remedial action involving the hazardous substances or petroleum.³¹⁶

The ELA contains no specific statute of limitations provision.

The City of South Bend and the South Bend Redevelopment Commission (collectively “South Bend”) sued Cooper Industries, the corporate successor of the Studebaker Corporation.³¹⁷ Studebaker manufactured automobiles and other

307. *Id.* at 746.

308. Freedom S.N. Smith et al., *2007-2008 Environmental Law Survey: A System in Flux*, 42 IND. L. REV. 973, 988 (2009).

309. *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274 (Ind. 2009).

310. *Id.* at 1286.

311. *Ind. Dep’t of Env’tl. Mgmt. v. Raybestos Prods. Co.*, 897 N.E.2d 469, 477 (Ind. 2009).

312. *Borewitz v. Parker*, 912 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009); *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App.), *aff’d*, 898 N.E.2d 1251 (Ind. 2009).

313. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Save the Valley, Inc. v. Ferguson*, 896 N.E.2d 1205 (Ind. Ct. App. 2008).

314. 899 N.E.2d 1274 (Ind. 2009).

315. Smith et al., *supra* note 308, at 988.

316. IND. CODE § 13-30-9-2 (2009 Supp.).

317. *Cooper Indus.*, 899 N.E.2d at 1277-78.

products from the 1850s until 1963 in facilities covering over 100 acres in the South Bend.³¹⁸ South Bend sought recovery for contamination to land it acquired for redevelopment from 1986-1997.³¹⁹ South Bend sued in 2003, pursuant to Indiana tort theories and under the ELA.³²⁰ The defendant argued that the statute of limitations barred South Bend's claims because South Bend had comprehensive knowledge of the contamination at issue as early as 1988.³²¹ Although the legislature only created the ELA in 1998, the defendants argued the statute of limitations began running upon discovery, even if South Bend's knowledge accrued before the passage of the ELA.³²² The court of appeals agreed, holding that the statute of limitations barred South Bend's claims under the ELA and its common law tort theories (negligence, trespass, and public and private nuisance).³²³

The Indiana Supreme Court reversed, the decision of court of appeals, in part, holding that South Bend's tort claims for property damage under Indiana Code section 34-11-2-7 were barred by the statute of limitations because they accrued more than six years before a claim was filed.³²⁴ The court rejected South Bend's argument that the cause of action could not accrue until it owned the contaminated property because "Indiana adheres to the rule that 'third parties are usually held accountable for the time running against their predecessors in interest.'"³²⁵ Between 1986 and 1997, South Bend requested and received several environmental reports that showed contamination at the subject site, and in 1995 even summarized those reports in an internal memorandum.³²⁶ This was sufficient to show that South Bend knew about the contamination more than six years before suing.³²⁷

Claims, however, brought under the ELA were timely, as South Bend did not have a complete cause of action until the ELA became effective in 1998, and therefore the statute of limitation did not begin to accrue until that time.³²⁸ The court reviewed the ELA's legislative history and determined that, because the

318. *Id.*

319. *Id.* at 1277-78, 1280.

320. *Id.* at 1278.

321. *Id.* at 1278-79.

322. *Id.*

323. *Id.* at 1279 (citing *Cooper Indus., LLC v. City of South Bend*, 863 N.E.2d 1253, 1261 (Ind. Ct. App. 2007)).

324. *Id.* at 1279-80. The court distinguished this case from *Pflanz v. Foster*, in which a ten-year statute of limitations applied because it involved a contribution action and not a property damage claim. *Id.* at 1279 (citing *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. 2008)). The cause of action in *Pflanz v. Foster* began to run after the claimant was ordered to clean up the property, which gave rise to the contribution claim. *Pflanz*, 888 N.E.2d at 759-60.

325. *Cooper Indus.*, 899 N.E.2d at 1279 (quoting *Mack v. Am. Fletcher Nat'l Bank & Trust Co.*, 510 N.E.2d 725, 734 (Ind. Ct. App. 1987)).

326. *Id.* at 1280.

327. *Id.*

328. *Id.* at 1280, 1284-86.

legislature drafted the statute to prohibit a person from seeking claims under both the ELA and Indiana's Underground Storage Tank Act,³²⁹ "the General Assembly clearly intended to create a new and separate cause of action."³³⁰ In addition, a statute of limitation could not begin to run before the cause of action even existed.³³¹

The court did not clearly choose a limitations period to apply to claims brought under the ELA.³³² Because South Bend filed suit within five years of passage of the statute, the suit was timely under even the shortest applicable period, the six-year statute of limitations for property damage.³³³ Although the court explained South Bend's case was permitted under this period, it did not expressly address whether the six-year or ten-year "catch-all" statute of limitation³³⁴ applies to ELA claims.³³⁵ The defendant raised concerns about claims relating to "ancient contamination" being brought long after facts were known.³³⁶ But the court concluded that the discovery rule would apply to the ELA as it would to the USTA: "the statute of limitation will begin to run on the earlier date of actual discovery or when a reasonable person would discover the facts."³³⁷ The court's opinion provides assurance for plaintiffs who filed suit under the ELA before 2004 (or 2008 assuming the ten year statute applies). But it does not answer how to apply the discovery rule to environmental contamination claims.

The court also rejected defendants' assertions that South Bend could not bring an ELA claim.³³⁸ Even though the ELA was unclear whether a "private person,"³³⁹ includes municipalities, the court allowed South Bend's claim.³⁴⁰ Because the legislature sought to "shift the financial burden of environmental remediation to the parties responsible for creating contaminations," the court rejected the defendants' narrow interpretation of "private person" which excluded cities, in part because cities were expressly defined within the definition of "person."³⁴¹

329. IND. CODE § 13-23-13-8 (2004).

330. *Cooper Indus.*, 899 N.E.2d at 1282-83 (citing IND. CODE § 13-30-9-6 (2000)).

331. *Id.* at 1285 (quoting *Martin v. Richey*, 711 N.E.2d 1273, 1284 n.12 (Ind. 1999)).

332. *Id.* at 1286.

333. *See* IND. CODE § 34-11-2-7(3) (2008).

334. *See id.* § 34-11-1-2(a).

335. *Cooper Indus.*, 899 N.E.2d at 1286.

336. *Id.*

337. *Id.*

338. *Id.* at 1284.

339. IND. CODE § 13-30-9-1 (2004). P.L. 221-2007, § 22 deleted the word "private" from the statute. IND. CODE § 13-30-9-1 (2009 Supp.).

340. *Cooper Indus.*, 899 N.E.2d at 1284.

341. *Id.* The court also held that the defendant was the corporate successor of Studebaker for the environmental contamination claims. *See id.* at 1286-91.

B. IDEM's Communications with EPA Do Not Breach an Agreed Order

Do the terms of an agreed order bar IDEM from communicating with the EPA about requiring higher clean up standards for a site? In *Indiana Department of Environmental Management v. Raybestos Products Co.*,³⁴² the Indiana Supreme Court determined IDEM was not in breach of contract after it communicated with the EPA regarding a site clean up.³⁴³ In this litigation, IDEM and Raybestos Products Co. (Raybestos) entered into an Agreed Order for the remediation of a ditch contaminated with polychlorinated biphenyls (PCBs).³⁴⁴ The Agreed Order did not specify a numerical clean up level, and IDEM and Raybestos disputed the proper level and method to use for PCB removal.³⁴⁵ After IDEM unsuccessfully attempted to remove its approval of the site, it “urged EPA to require” a stricter clean up, which resulted in EPA issuing a Unilateral Agreed Order to Raybestos requiring it to more thoroughly clean up the site.³⁴⁶

Raybestos brought a breach of contract claim against IDEM, arguing that the Agreed Order represented a contract between IDEM and Raybestos that IDEM breached by attempting to withdraw approval of the Risk Assessment and by requesting that EPA pursue a more stringent cleanup standard at the site.³⁴⁷ Raybestos sought declaratory judgment and money damages for the difference between EPA’s clean up standards and IDEM’s Agreed Order.³⁴⁸ Because of IDEM’s communications with EPA, which the court found to trigger EPA’s enforcement action against Raybestos, the trial court entered judgment in favor of Raybestos.³⁴⁹ The court of appeals reversed because the Agreed Order outlined cleanup levels much less stringent than those allowed by federal regulations, making them unenforceable as contrary to public policy if the Agreed Order was indeed a contract.³⁵⁰

After granting transfer, the Indiana Supreme Court held that the Agreed Order was not a contract that supported a damages claim.³⁵¹ Further, the court held IDEM’s communications with EPA did not violate the agreement.³⁵² The court

342. 897 N.E.2d 469 (Ind. 2008), *reh’g granted in part, reh’g denied in part, corrected by* 903 N.E.2d 471 (Ind. 2009).

343. *Id.* at 477.

344. *Id.* at 471-72.

345. *Id.*

346. *Id.* at 472. Discussions with IDEM had resulted in Raybestos agreeing to remediate “hot spots” of contamination only to a level of 238 parts per million (“ppm”) PCBs, whereas the EPA’s order required Raybestos to clean up the entire ditch to a level of no greater than 10 ppm. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 473.

350. *Id.* (citing *Ind. Dep’t of Env’tl. Mgmt. v. Raybestos Prods. Co.*, 876 N.E.2d 759, 763 (Ind. Ct. App. 2007)).

351. *Id.*

352. *Id.*

determined that Indiana Administrative Orders and Procedures Act (AOPA)³⁵³ governed review of the agency's actions and money damages are not available under AOPA.³⁵⁴ The Indiana Supreme Court also determined that the federal PCB Spill Cleanup Policy³⁵⁵ gave EPA the flexibility to deviate from federal standards because of site-specific considerations, and that IDEM had this same flexibility.³⁵⁶ Although the court recognized that this EPA action was likely the result of IDEM's "prodding," the Agreed Order did not "forbid IDEM's communication with EPA, and IDEM could not bind itself to fail to carry out its statutory obligations, including compliance with the federal regulations requiring communication between the agencies."³⁵⁷ Although the Agreed Order bound IDEM to suspend its own enforcement efforts, it did not preclude all communications with the EPA about the site, or prohibit enforcement actions by other agencies under other environmental laws.³⁵⁸

*C. Indiana Court of Appeals Allows and Rejects Nuisance Claims
Against Neighbors*

In *Bonewitz v. Parker*,³⁵⁹ the plaintiffs appealed from the trial court's judgment on their complaint alleging that the defendant was maintaining a nuisance by operating a furnace to dry mycelium next to their home.³⁶⁰ In 1997, plaintiffs bought an old farmhouse in North Manchester, which the defendant's farmland surrounded.³⁶¹ At the time of the plaintiffs' purchase, the adjacent farmland produced hay.³⁶² But in 2003, the defendant began using the property to dry mycelium to sell as animal feed.³⁶³ The defendant dried the mycelium in a furnace that used sawdust as fuel, which emitted gases and sawdust ash through a smokestack located approximately 100 to 150 feet from the plaintiffs' home.³⁶⁴ Before the defendant could operate his business, he had to "[obtain] a variance from agricultural use to business/commercial use," which was granted over the plaintiffs' objections.³⁶⁵

When the mycelium-drying business was fully operational, semi-trucks

353. IND. CODE §§ 4-21.5-1-1 to -7-9 (2005 & 2009 Supp.).

354. *Raybestos Prods.*, 897 N.E.2d at 474-75.

355. 40 C.F.R. §§ 761.120-761.135 (2009).

356. *Raybestos Prods.*, 897 N.E.2d at 476 (citing 40 C.F.R. § 761.120(c) (2009)).

357. *Id.* at 477 (citing 40 C.F.R. §§ 300.505, 300.515 (2009)).

358. *Id.*

359. *Bonewitz v. Parker*, 912 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

360. *Id.* at 380. "Mycelium is a byproduct of the manufacture of food-grade citric acid." *Id.* at 379.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at 379-80.

delivered wet mycelium several times each day, the furnace dried the mycelium, trucks delivered sawdust and picked up dried mycelium, with the whole process running “24/7.”³⁶⁶ The business affected the plaintiffs’ enjoyment of their property due to: the smell of the mycelium, both when it was stored outside wet and during the drying process; the intrusion of sawdust on their property; vibrations from the drying process; and truck traffic at all hours of the day.³⁶⁷ The defendant took “steps to reduce the sawdust and stack emissions blowing onto the [plaintiffs’] property,” decrease the dryer’s vibrations, and curtail “the noise and lights associated with the trucks during the night.”³⁶⁸

Several years after the mycelium drying business began, the plaintiffs brought a nuisance claim against the defendant requesting a permanent injunction, or, in the alternative, damages.³⁶⁹ The trial court found the defendants’ “improvements” had “greatly reduced” the adverse effect the business on the plaintiffs’ home, and the court declined to enter a total permanent injunction against the business, though it did enjoin the defendant from unloading the sawdust outside.³⁷⁰ The court of appeals reversed, “conclud[ing] that notwithstanding the improvements, [the defendant] continu[e]d to maintain an unabated nuisance which deprive[d] the plaintiffs of the free use and comfortable enjoyment of their property.”³⁷¹

The evidence presented by the plaintiffs included the pervasiveness of the smells throughout their home, and the effect of the defendant’s business on the plaintiffs’ ability “to use their yard or even to open [their] windows.”³⁷² The court of appeals concluded that the plaintiffs “suffered a number of unreasonable infringements on the use and enjoyment of their property as a result of [the defendant’s] business.”³⁷³ The court also concluded that “[w]hile the nuisance may have been partially ameliorated, it has not been abated.”³⁷⁴ The defendant argued that the plaintiffs “came to the nuisance” and that his business was similar to other agricultural uses in the area.³⁷⁵ The court rejected this contention because the business was independent of an agricultural operation, which was why he was required to get a use variance.³⁷⁶ Although mycelium drying for use on one’s own farm does not require a variance, the scale of the defendant’s business was much greater, and compared to a smaller personal production, emitted more smells and noises.³⁷⁷

Despite this finding, the court of appeals did not enter a permanent

366. *Id.* at 380.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 381.

371. *Id.* at 379.

372. *Id.* at 382.

373. *Id.*

374. *Id.*

375. *Id.* at 382-83.

376. *Id.*

377. *Id.* at 384.

injunction. The court shared the lower court's concern that entry of a permanent injunction "would effectively destroy [the defendant's] business."³⁷⁸ The court of appeals remanded with instructions to consider whether the plaintiffs could "be made whole with a money judgment."³⁷⁹ The court noted that the "proper measure of damages" would be "the difference between the market value of the [plaintiffs'] home if the . . . mycelium-drying operation ceased and its current market value with an active nuisance next door."³⁸⁰ The plaintiffs "may also be entitled to damages for their discomfort and annoyance" during their time as occupants and for "consequential damages, such as moving expenses" if the plaintiffs chose to move "without suffering any financial loss."³⁸¹ The court of appeals instructed that if damages would not make the plaintiffs whole, the trial court had to issue a permanent injunction against the defendant's entire business.³⁸²

In *Lindsey v. DeGroot*,³⁸³ the Indiana Court of Appeals clarified when a nuisance claim can be filed against agricultural operations classified as a Confined Feeding Operation (CFO), which IDEM's regulates.³⁸⁴ In 1998, the Lindseys built a home in a rural, agricultural area.³⁸⁵ In 2001, the DeGroots bought a hog farm and converted it into a dairy a year later with about 1500 milking cows.³⁸⁶ After a boundary dispute, the Lindseys sued DeGroot in 2003 to enjoin the dairy's operations and for damages for nuisance, among other tort claims.³⁸⁷ The trial court entered summary judgment in favor of the DeGroot Dairy, in part because the Indiana Right to Farm Act (IRFA)³⁸⁸ barred the nuisance claim.³⁸⁹ IRFA was adopted in order "to limit the circumstances under which agricultural operations could become subject to nuisance suits."³⁹⁰

The court analyzed whether IRFA barred the suit.³⁹¹ The legislature adopted the IRFA protects farms that have been in operation for more than one year from nuisance claims "unless there has been a significant change in the type of

378. *Id.* (quoting Appendix of Appellants at 5-6, *Bonewitz*, 912 N.E.2d 378 (Ind. Ct. App. 2009)).

379. *Id.* at 385.

380. *Id.*

381. *Id.* at 385 & n.5.

382. *Id.* at 385.

383. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

384. *Id.* at 1255.

385. *Id.*

386. *Id.*

387. *Id.* at 1255-56.

388. IND. CODE § 32-30-6-9 (2008).

389. *Lindsey*, 898 N.E.2d at 1256.

390. *Id.* at 1257.

391. The state constitutional law aspect of this case involving whether the law was a taking is explored further in Jon Laramore, *Indiana Constitutional Law Developments*, 43 IND. L. REV. ____ (2010). The negligence per se aspects of this case are examined in Milton Turner, *Recent Developments in Indiana Tort Law*, 43 IND. L. REV. ____ (2010).

operation, the operation would have been a nuisance at the time the operation began in its current locality, or the nuisance results from the negligent operation of the agricultural operation.”³⁹² The Lindseys sued eighteen months after the DeGroot Dairy opened, but failed to present evidence that a significant change in the type of operation occurred or that the dairy was a nuisance when it opened.³⁹³ The Lindseys’ based their nuisance claim partially on alleged violations of IDEM’s CFO regulations from a manure spill and run-off, which the Lindseys believed demonstrated the negligent operation of DeGroot Dairy.³⁹⁴ The court held that statutory violations like this could be used to show a nuisance if those violations were the “proximate cause” of the plaintiffs’ injury or that the plaintiffs’ claimed injuries would be the “foreseeable consequence of the violation[s].”³⁹⁵ The Lindseys claimed that the Dairy was a nuisance because its noises and smells interfered with the enjoyment of their property, but they failed to show a nexus between the problems and the violations.³⁹⁶

D. Standing and Jurisdictional Issues

In *Save the Valley, Inc. v. Ferguson*,³⁹⁷ a CFO case examined in last year’s Article,³⁹⁸ the Indiana Court of Appeals affirmed the trial court’s holding that it lacked subject matter jurisdiction to hear neighboring property owners’ claims regarding IDEM’s grant of a permit to construct a CFO where the neighboring property owners did not seek monetary damages or make common law trespass or nuisance claims.³⁹⁹

In *Summers v. Earth Island Institute*,⁴⁰⁰ several environmental groups (including one that covers Indiana and Illinois) challenged a U.S. Forest Service (USFS) rule that exempted salvage-timber sales of 250 acres or less from certain requirements.⁴⁰¹ This exemption meant that an environmental impact statement (EIS) or environmental assessment (EA) did not have to be prepared, nor did the USFS have to provide for public notice, comment, or an appeal process.⁴⁰²

Specifically, the groups appealed the application of the regulations to the sale of salvage-timber from part of the Sequoia National Forest burned by a forest fire (“the Burnt Ridge project”).⁴⁰³ The district court granted a preliminary injunction barring the timber sale, after which the parties settled the dispute specific to the

392. *Lindsey*, 898 N.E.2d at 1259.

393. *Id.* at 1259-60.

394. *Id.* at 1260.

395. *Id.* at 1260-62.

396. *Id.*

397. 896 N.E.2d 1205 (Ind. Ct. App. 2009).

398. Smith et al., *supra* note 308, at 997-98.

399. *Id.* at 1207.

400. 129 S. Ct. 1142 (2009).

401. *Id.* at 1147-48.

402. *Id.* at 1147.

403. *Id.* at 1147-48.

Burnt Ridge project.⁴⁰⁴ The government argued that the settlement of that dispute eliminated the groups' standing to challenge the USFS regulations.⁴⁰⁵ The district court entered a nationwide injunction against the application of the regulations at issue to any USFS project, which the Ninth Circuit affirmed.⁴⁰⁶

The U.S. Supreme Court reversed, holding in a 5-4 opinion that, for several reasons, the groups no longer had standing.⁴⁰⁷ The Court so held because the regulations at issue only governed the conduct of USFS officials, not the environmental groups; the plaintiffs were unable to identify other projects to which the regulations would apply that would impact the plaintiffs' recreational or aesthetic enjoyment; and a general intent by the organizations' members to visit National Forests was too weak to establish standing because no imminent or actual harm was present.⁴⁰⁸

The Court also rejected an argument that the deprivation of a "procedural right" (elimination of the notice, comment, and appeal process for some USFS projects) was enough to create standing.⁴⁰⁹

Deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a "person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy."⁴¹⁰

Although the procedural right was a result of Congressional action, that was not enough to create standing for Article III purposes (especially for the injury in fact prong).⁴¹¹

The dissent believed the organizations put forth sufficient evidence that their members would use parcels that would likely have timber sales without notice, comment, and appeal.⁴¹² Members had used those parcels in the past; so, it was likely there would be future harm to the groups' members.⁴¹³ The dissent questioned the majority's stance that there be more specific information about the areas that members would visit (and that would be impacted by USFS regulations).⁴¹⁴ In the dissent's view, there was a "realistic" threat of future harm to the groups' members: "[A] threat of future harm may be realistic even where

404. *Id.* at 1148.

405. *Id.*

406. *Id.* (citing *Earth Island Inst. v. Rutherback*, 490 F.3d 687, 696 (9th Cir. 2007)).

407. *Id.* at 1153.

408. *Id.* at 1149-51.

409. *Id.* at 1151.

410. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

411. *Id.*

412. *Id.* at 1156 (Breyer, J., dissenting).

413. *Id.* at 1157.

414. *Id.*

the plaintiff cannot specify precise times, dates, and GPS coordinates.”⁴¹⁵ The dissent noted that the USFS admitted that there were thousands of sites that would be likely targets of future USFS actions exempt from notice, comment and appeal procedures.⁴¹⁶

V. DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW

During the survey period, Indiana courts decided several cases that address a number of important insurance coverage issues pertinent to insurance claims in environmental cases. These cases generally involve disputes regarding an insurer’s duty to defend its insured based, for instance, on notice, policy exclusions, or prior known losses. Although an insurer has the right to defend itself in a coverage lawsuit, this right is not without limits. Because an insured must depend on the insurer’s good faith and performance, Indiana courts have imposed on insurers duties “of good faith and fair dealing.”⁴¹⁷ An insurer’s breach of these duties to its policyholder may be actionable bad faith, but, depending on the situation, an insurer may breach these duties and deny coverage or limit liability.⁴¹⁸

A. The Effect of Delayed Notice on an Insurer’s Duty to Defend

In *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*,⁴¹⁹ the Indiana Supreme Court, held that an insurer’s duty to defend its insured does not begin until notice has been given to the insurer.⁴²⁰ After it received a suit letter from the IDEM on November 17, 2000 Dreaded, Inc. took steps to respond to environmental contamination.⁴²¹ Dreaded did not tender the claim to its liability insurer, however, until several years had passed. Nonetheless, Dreaded sought reimbursement for costs incurred before the time it notified its insurer of the claim.⁴²² The insurer agreed to pay defense costs that were incurred after it received notice, but refused to pay any of Dreaded’s defense costs incurred before the notice date.⁴²³ Dreaded disagreed and sued, seeking pre-tender defense costs from its insurer. The insurer fought Dreaded’s claims by arguing that the policy language clearly required prompt notice of a claim and disclaimed liability for financial obligations incurred without the insurer’s consent, thus precluding pre-notice costs.⁴²⁴ Both sought summary judgment.⁴²⁵

415. *Id.* at 1156.

416. *Id.*

417. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 520 (Ind. 1993).

418. *See id.* at 518-19.

419. 904 N.E.2d 1267 (Ind. 2009).

420. *Id.* at 1273.

421. *Id.* at 1268-69.

422. *Id.* at 1269.

423. *Id.*

424. *Id.*

425. *Id.*

Both the trial court and the court of appeals found that Dreaded's delay in notifying its insurer was unreasonable, and thus a presumption existed that the delay prejudiced the insurer.⁴²⁶ The court of appeals further held, however, that because Dreaded had submitted sufficient evidence that the delayed notice did not actually prejudice the insurer a genuine issue of material fact existed that precluded summary judgment for the insurer.⁴²⁷

The Indiana Supreme Court reversed, holding that the issue of whether the late notice prejudiced the insurer was "irrelevant" because the true issue was "whether the insurer *had any duty to defend at all*."⁴²⁸ In this regard, the court noted that the policy was "clear and unambiguous" that the insurer's duty to defend did not begin until the insured informed the insurer of the claim.⁴²⁹ The court went on to point out that:

[a]n insurer cannot defend a claim of which it has no knowledge. The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. The insurer's duty to defend simply does not arise until it receives the foundational information designated in the notice requirement. Until an insurer receives such enabling information, it cannot be held accountable for breaching this duty.⁴³⁰

Thus, the court affirmed the grant of summary judgment to the insurer with regard to pre-notice costs.⁴³¹ The *Dreaded* court did indicate, however, that an insurer may not be able to avoid payment of pre-notice costs if the insurer had either disclaimed its duty to defend its insured or had previously received constructive notice of the claim.⁴³² As such, there may still be situations where, under Indiana law, an insured may be able to recover pre-notice costs from its insurer.

B. The Propriety of an Insurer's Reliance on a Pollution Exclusions to Avoid Defense

Another instance when a coverage dispute may exist between an insured and its insurer is when a policy specifically excludes certain types of claims for

426. *Id.*

427. *Id.* (citing *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 878 N.E.2d 467, 474 (Ind. Ct. App. 2007)).

428. *Id.* at 1273 (emphasis added).

429. *Id.* at 1271.

430. *Id.* at 1273.

431. *Id.*

432. *Id.* at 1272-73. *See also* *Tri-etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E.2d 997, 1004-05 (Ind. 2009) (citing *Dreaded, Inc.*, 940 N.E.2d at 1271-72); *Great N. Ins. Co. v. Precision Plastics of Ind., Inc.*, No. 92A05-0808-CV-500, 2009 WL 2447828, at *6-7 (Ind. Ct. App. Aug. 11, 2009) (finding that the insurer had an ongoing duty to defend and that in line with *Dreaded*, 909 N.E.2d at 1273, the insurer was not obligated to pay for expenses incurred prior to receiving notice of the claim but was responsible for post-notice costs)).

coverage. In the environmental context, a common policy exclusion is an exclusion for losses arising from “pollutants.”⁴³³ This “pollutant” exclusion can be an “absolute pollution exclusion” or an exclusion that seeks to bar coverage unless a release was “sudden and accidental.”⁴³⁴ The Indiana Supreme Court has previously found that both forms of the “pollutants” exclusion found in most general liability and excess liability policies are ambiguous, and thus unenforceable.⁴³⁵ Nonetheless, insurers have still sought to challenge the “ambiguity” of the pollution exclusions and their general obligations to provide coverage to their policyholders.

For instance, in *Royal Crown Bottling Corp. v. Cincinnati Insurance Co.*,⁴³⁶ the insurer refused to defend its insured, Royal Crown, even under a reservation of rights, based on the presence of a pollution exclusion in its policy.⁴³⁷ IDEM issued a letter to Royal Crown that required remediation of Royal Crown’s property after discovering contamination. Royal Crown remediated the property and brought a cost recovery action against the former property owners. Royal Crown timely sought defense for the IDEM claim, and the cost recovery claim, from its insurer, the Cincinnati Insurance Company, who refused coverage. Royal Crown sued.

In holding that the insurance company had a duty to defend its insured, the Marion County Superior Court first noted that a cleanup demand received by Royal Crown from IDEM was a “suit” under the policy and triggered the

433. See, e.g., *Wolf Lake Terminals, Inc. v. Mut. Marine Ins. Co.*, 433 F. Supp. 2d 933, 948 n.6 (N.D. Ind. 2005); *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996); *Travelers Indemn. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 934-35 (Ind. Ct. App. 1999).

434. Sudden and Accidental Pollutant exclusions will generally contain language that states the insurance will not apply to

[b]odily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases or pollutants into or upon land, the atmosphere or any watercourse or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

See, e.g., *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 648 N.E.2d 1214, 1218 (Ind. Ct. App. 1995), *opinion vacated*, 665 N.E.2d 891 (1996). On the other hand, “absolute pollutant exclusions,” typically exclude coverage for most, if not all, pollution-type claims and are usually characterized by broader exclusionary language and lack the “sudden and accidental” exception. See, e.g., *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 946 (Ind. 1996).

435. *Seymour Mfr. Co., Inc. v. Commercial Union Ins. Co.*, 665 N.E.2d 891, 892 (Ind. 1996); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 949 (Ind. 1996).

436. Cause No. 49D02-0708-PL033992 (Marion Co. Super. Ct. Oct. 27, 2008); see also *Pollution Control Ind., Inc. v. Greenwich Ins. Co.*, (Lake County Sup. Ct., Aug. 26, 2008) (awarding attorney fees to insured when insurer refused to defend based on pollution exclusion).

437. *Royal Crown Bottling Corp.*, Cause No. 49D02-0708-PL033992 (Marion Co. Super. Ct. Oct. 27, 2008).

insurer's duty to defend.⁴³⁸ The court then pointed out that Indiana courts had consistently held that pollution exclusions like that at issue were ambiguous⁴³⁹ and that the insurer should have been well aware of this fact. The court went on to hold that an exclusion that removed coverage for damage to property Royal Crown owned, rented, or occupied also did not preclude liability coverage to third parties like IDEM.⁴⁴⁰ As such, the court held that an award of attorney fees to Royal Crown pursuant to Indiana Code section 34-52-1-1(b)⁴⁴¹ was proper as this was the only way to make the policyholder whole.⁴⁴²

C. The Duty to Defend and Known Loss Doctrine

During the survey period, the Indiana Court of Appeals issued a decision in *Crawfordsville Square, LLC v. Monroe Guaranty Insurance Co.*,⁴⁴³ regarding the insurer's duty to defend when the insurer has denied coverage because a known loss existed before the issuance of a policy. In that case, Crawfordsville Square bought a property where dry cleaners and gas tanks were located.⁴⁴⁴ Before the sale, the insured found out about site contamination and wrote a letter to the seller demanding that funds be put in escrow to pay for the cleanup.⁴⁴⁵ After the sale,

438. *Id.* at *14. The court also noted that an insurer is jointly and severally liable for *all* of its insured's costs and not a pro-rate share, regardless of whether the policy stated the insurer would pay "those sums" or "all sums" that the insured became obligated to pay. *Id.* at *16 (citing *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1056 (Ind. 2001)). The court rejected Cincinnati's assertion that "those sums" language was different than the more traditional "all sums" policy language and that the presence of "those sums" language allowed for the allocation of damages among different insurers. *Id.* The court viewed "those sums" as similar to "all sums" policy language, meaning the entire claim could be covered by Royal Crown's policy, even though the damage took place outside Cincinnati's policy period. *Id.* As such, Cincinnati was ordered to pay all of Royal Crown's damages, up to the policy limits. *Id.*

439. *Id.* at *10-11. Based on Indiana precedent in *American States Insurance Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996) and *Seymour Manufacturer Co. v. Commercial Union Insurance Co.*, 665 N.E.2d 891 (Ind. 1996), the court found that the pollution exclusions were ambiguous. In reaching this conclusion, the court discussed the definition of "pollutants" in the policy, which included petroleum products and by-products within it (but not petroleum by itself). The court found that the definition was overbroad, and if strictly applied, could negate "virtually all coverage." *Id.* at *10. Furthermore, the court stated that "Cincinnati's addition of a sentence at the end of its 'pollutants' definition stating that pollutants 'include but are not limited to' substances generally recognized as harmful or toxic to people, property or the environment exacerbates the overbreadth." *Id.* at *11.

440. *Id.* at *20.

441. IND. CODE § 34-52-1-1(b) (2008) authorizes an award of attorney fees if a position advanced in litigation is "unreasonable, or groundless."

442. *Id.* at *22-23

443. 906 N.E.2d 934 (Ind. Ct. App. 2009).

444. *Id.* at 936.

445. *Id.*

Crawfordsville Square added the parcel to its insurance policy with Monroe, but did not tell Monroe about the contamination or potential existence of contamination at the property.⁴⁴⁶ Several years later, an environmental consultant reported evidence of contamination on the site to IDEM. IDEM then notified Crawfordsville Square of the contamination and required Crawfordsville Square to investigate and clean up the property.⁴⁴⁷ Crawfordsville Square then sued the former owners, and sought defense costs from its insurer, Monroe Guaranty Insurance Company. Monroe, however, denied that it had a duty to defend Crawfordsville Square and sued for a declaratory judgment as to this issue.⁴⁴⁸

In granting summary judgment to Monroe, the court held that if an insured knows or is “substantially certain” that a loss will happen “on or before the effective date of the policy, the known loss doctrine will bar coverage.”⁴⁴⁹ In this regard, the court of appeals held that Crawfordsville Square’s letter to the seller of the subject property noting that remediation of contamination was required by Indiana law and seeking the establishment of an escrow account for clean-up was enough to show that Crawfordsville Square knew about the contamination (and therefore knew about the possibility of probable loss).⁴⁵⁰ But the court was careful to point out “that the mere presence of a dry cleaning business” does not “invariably lead[]” to the conclusion that a party had knowledge of actionable contamination of the land on which it sits.⁴⁵¹

*D. Defense Obligations When Policies, or Rights Under Policies,
Are Assigned*

In *Travelers Casualty & Surety Company v. U.S. Filter Corp.*,⁴⁵² the Indiana Supreme Court reaffirmed the “widely recognize[d]” rule that an insured can assign to a third party insurance coverage rights arising out of a liability claim after the claim is known or identified. The court made clear that such assignments could take place even if the liability policies expressly forbid assignments without the insurer’s consent.⁴⁵³ The court also clarified that this rule did not apply to assignments of insurance policies or coverage rights in the context of latent product liability claims not yet known or identified at the time of the assignment.⁴⁵⁴ This case involved “a complex ownership history” of Wheelabrator⁴⁵⁵ machines “spanning nearly a hundred years.”⁴⁵⁶ Following the

446. *Id.*

447. *Id.*

448. *Id.* at 936-37.

449. *Id.* at 938 (quoting STEVEN PLITT, COUCH ON INSURANCE § 102:8, at 21, 23 (3d ed. 1997)).

450. *Id.* at 938-40.

451. *Id.* at 941.

452. 895 N.E.2d 1172, 1178-79 (Ind. 2009) (*U.S. Filter*).

453. *Id.* at 1180-81.

454. *Id.*

455. A Wheelabrator is “an airless blast machine, developed to mechanically clean pieces of

initiation of various product liability lawsuits relating to the exposure to silica from the machines, several companies sued the insurers of the machines' owners.⁴⁵⁷ The insurance policies in dispute had been issued to corporate predecessors and contained provisions requiring the insurers' consent to transfers or assign merits of certain policy rights.⁴⁵⁸ The insurers argued that neither the policies nor rights under the policies at issue were transferred to the plaintiffs through corporate transactions.⁴⁵⁹ The plaintiffs, however, argued that rights under the policies were transferred to them through various transactions.⁴⁶⁰

After reviewing the written transaction agreements, the court of appeals found that the alleged exposure injuries had been assigned as choses in action under the general rule expressed above.⁴⁶¹ The Indiana Supreme Court reversed, holding that the policies were not transferred by one of the predecessors in interest as the policies were not listed in any of the assets to be transferred in a 1986 transaction.⁴⁶² Furthermore, the court held that, although a separate 1996 corporate transaction did list the insurance policies as a transferred asset, the predecessors offered no evidence of compliance with policy provisions governing assignment.⁴⁶³

The corporations argued that these policy provisions did not preclude the assignment of the insurance assets because the claims were "choses in action" at the time of the assignment.⁴⁶⁴ The Indiana Supreme Court noted that some courts in other jurisdictions have allowed the transfer of policies without consent⁴⁶⁵ while others have disallowed the transfer.⁴⁶⁶ The Indiana Supreme Court adopted the view that disallowed transfer in this context because the injuries for which coverage was sought had not been reported at the time of the corporate transactions; therefore they were not assignable choses in action.⁴⁶⁷

metal in a way that, relative to traditional sandblasting methods, dramatically reduces . . . manpower and the release of silica." *Id.* at 1175 n.1.

456. *Id.* at 1175.

457. *Id.* at 1174-76.

458. *Id.* at 1175.

459. *Id.* at 1176.

460. *Id.*

461. *Id.*

462. *Id.* at 1177 (finding that because transferor did not list the predecessor's insurance policies as an asset being transferred, the predecessor remained the owner of the policies).

463. *Id.* at 1178-80.

464. *Id.* at 1178.

465. *Id.* at 1179 (citing *N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219 (Pa. 2006); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756 (Minn. Ct. App. 1999)).

466. *Id.* (citing *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003)).

467. *Id.* at 1178-80.

E. The Insured's Evidentiary Requirements to Demonstrate Its Insurer Acted in Bad Faith

The Indiana Court of Appeals addressed the issue of bad faith, and the evidence necessary to prevail on this type of claim in *Sadler v. Auto-Owners Insurance Co.*⁴⁶⁸ In that case, the insured, Sadler, sought costs and expenses of an environmental clean-up occasioned by leakage from underground petroleum storage tanks from its insurer, Auto-Owners Insurance Co.⁴⁶⁹ A dispute over payment of the defense costs arose and Sadler sued Auto-Owners claiming Auto-Owners breached its duty of good faith and fair dealing.⁴⁷⁰ Auto-Owners responded by claiming that it had not acted in bad faith and by arguing that Sadler had not suffered any "adverse financial effects" because she had elected to pursue "such costs and expenses" from other insurance companies instead of Auto-Owners.⁴⁷¹ The insurer further argued bad faith did not exist because there was no coverage under Auto-Owner's policies because the contamination occurred after the policies from Auto-Owners had expired.⁴⁷²

The trial court granted summary judgment to Auto-Owners on Sadler's claim of bad faith.⁴⁷³ On appeal, Sadler argued that Auto-Owners "sent inconsistent and ambiguous communications" to her, improperly reduced its settlement offers over time, and eventually wrongfully denied her claim.⁴⁷⁴ The court of appeals disagreed, noting that insurance companies have a right to fully investigate claims and deny them with good cause.⁴⁷⁵ The court further held that Indiana courts will only step in and allow bad faith claims when the insurance company commits some act of "conscious wrongdoing."⁴⁷⁶ As such, an insured must present "evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will."⁴⁷⁷ The court opined that such evidence did not exist because the changes in Auto-Owners' position appeared to result from later discoveries of new policies or confusion pertaining to the insurer's limited agreement to pay a percentage of certain specified costs while it continued to investigate general coverage.⁴⁷⁸ As such, *Sadler* indicates that an insured wishing to recover damages against their insurance company for bad faith must specifically assert facts showing the element of conscious wrongdoing.

468. 904 N.E.2d 665 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

469. *Id.* at 667.

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at 668.

474. *Id.* at 672.

475. *Id.* at 673.

476. *Id.*

477. *Id.* (citing *Colley v. Ind. Farmers Mut. Ins. Group*, 691 N.E.2d 1259, 1261 (Ind. Ct. App. 1998)).

478. *Id.* at 672-73.

CONCLUSION

Significant decisions filled the survey period, including U.S. Supreme Court clarification on joint and several liability, a substantial plaintiffs' jury verdict under the Clean Air Act, and numerous decisions under state law theories. Courts also continue to wrestle with insurance coverage of environmental liabilities. Yet courts left considerable room for future litigation. Some time may pass before the clouds begin to clear for environmental practitioners.