Environmental Issues in Property Development in Indiana

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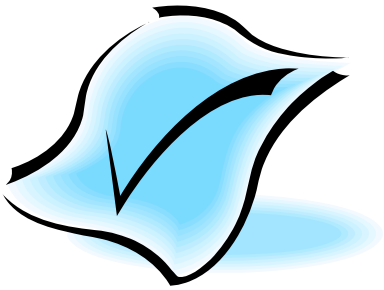
PRESENTER

LAWRENCE A. VANORE is a partner in the Indianapolis law firm of Taft Stettinius & Hollister LLP, where he represents clients in all aspects of environmental law, permitting and land use, with a particular emphasis on permit and enforcement issues involving the Clean Air Act, including Prevention of Significant Deterioration and Title V permits, and has frequently appealed such permits and defended permit appeals on behalf of business clients. He also counsels clients on compliance with the Clean Water Act, State and Federal Superfund actions and all solid and hazardous waste laws. In business transactions, Mr. Vanore works closely with the firm's mergers and acquisitions lawyers to perform environmental due diligence. In addition, he represents business clients in OSHA regulatory actions. His public law practice focuses on local zoning and planning, including the preparation of local zoning ordinances and comprehensive plans. Mr. Vanore also has assisted numerous municipalities in Indiana with annexations. His litigation practice includes defending local zoning boards and plan commissions at both the trial court and appellate levels. He is a member of the Indianapolis (member, Environment and Natural Resources Section), Indiana State (member, Environmental Law Section) and American (member, Environmental Law and Tort and Insurance Practice sections) bar associations. Mr. Vanore earned his B.A. degree from Hofstra University, and his M.P.A. degree and J.D. degree, magna cum laude, from Indiana University. He is a frequent speaker on environmental, zoning and municipal law topics.



Polling Question #1

Press star one (*1) if you require
CLE credit for this program

Press star two (*2) if you do not require
CLE credit for this program

A. Spectrum of Environmental Land Use Controls

1. Introduction

Whole, multi-day seminars are devoted to single aspects of environmental regulation, such as air or water regulation, let alone to an overview of the entire body of modern environmental law. Obviously, no attempt can be made here to describe completely environmental law, or to cover each of the relevant statutes and regulations. Rather, this paper will provide a framework for understanding the types of environmental issues that developers are likely to encounter, and will teach the questions that the developer should ask to determine whether a project is likely to raise environmental issues or require environmental permits. Once the right questions are asked, and it is determined that environmental issues do, indeed, exist, this paper will provide a head start in locating the answers. In addition, environmental issues that commonly arise in real estate transactions and developments will be discussed in some detail, including ways to develop properties despite known environmental problems.

2. The media is the message – air, water or land

Virtually all environmental regulations concern one of three environmental "media:" air, water or land. Thus, environmental laws regulate pollutants that are emitted to the air, pollutants and wastes that are discharged into water, and any kind of waste that is placed on or in the land. When contemplating a development or project the developer should begin by asking the following questions:

1. Will the construction or operation of the project result in the emission of pollutants to the air?

Construction creates dust, and the emission of such fugitive dust is regulated. This is particularly true for demolition projects, especially when the building being demolished contains asbestos or lead-based paint. The developer should also think about whether the project, upon completion, will need air permits. In some regions of the State and the country, air permits are hard to get, but air permits always must be obtained before construction begins. Further, many types of businesses require expensive air pollution controls. The developer should consider whether a project makes sense when it might be difficult for the new owner actually to operate the project.

2. Will the project result in the discharge of pollutants to water?

Again, the developer should consider the process of construction as well as the operation of the project later. Stormwater discharges from construction and demolition projects are regulated. Discharges to surface waters are regulated, as are discharges to sewers. Permits may be required for both types of discharge. If the project will involve the construction of a sewage treatment plant, or the installation of water supply wells, that too will require a permit. If the project will involve the discharge of dredged or fill material to surface waters, or will destroy wetlands, that will require yet other kinds of permits. Keep in mind that most permits need to be obtained before the project begins.

3. Will the project involve the disposal of waste to land?

Virtually any project will generate waste of one kind or another, during both construction and operation. The developer must consider how and where waste will be disposed of. Wastes and underground storage tanks placed in the ground years ago will create problems for persons seeking to develop property today, and can even create liability for present or future owners.

When people talk about a property having a clean bill of environmental health, they are thinking primarily about whether the property has buried contamination or a tank on it.

The terms "pollutant" or "contaminant" should be thought of in a very broad sense. Most people are familiar with the term "hazardous waste," but environmental law covers a lot of wastes in addition to what the layperson would consider to be hazardous. Even ordinary office trash needs to go to a landfill that has the necessary permits. Mere dirt becomes a water pollutant when discharged to wetlands or other surface waters. Special rules now apply to the disposal of waste oils, fluorescent light tubes, and even small batteries. Generally, anything that is emitted, discharged or thrown away is potentially regulated. If the waste qualifies as "hazardous," it is subject to even more stringent regulation.

If the project itself involves waste disposal (e.g., landfill, recycling facility, transfer station, land disposal of wastes or sludges), special permitting and siting rules will apply to construction and operation.

3. Sources of Environmental Law

The major environmental laws are federal: The Clean Air Act, The Clean Water Act, The Resource Conservation and Recovery Act ("RCRA," governing solid and hazardous waste), The Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund"), and the Safe Drinking Water Act (governing drinking water supply). At the federal level, these statutes are administered by the U.S. Environmental Protection Agency ("EPA").

Under each statute, however, EPA has been granted authority by Congress to delegate administrative and enforcement authority to the States. For the most part, Indiana has been delegated the authority to administer and enforce each of the major federal statutes. The Indiana

agency charged with enforcing environmental laws is the Indiana Department of Environmental Management ("IDEM"). IDEM issues permits and enforces rules that govern compliance with each of the federal acts listed above. However, EPA reserves the right to intervene directly, in a process known as "overfilling," when it believes that IDEM is not enforcing the law correctly or vigorously enough.

The State has adopted its own environmental laws, which take up an entire title of the Indiana Code, Title 13. IDEM promulgates its own environmental regulations. Generally, environmental statues are relatively broad statements of the law, while regulations spell out in detail how the law should be carried out. Thus, a statute may say that air permits will be required for certain types of discharge. The regulation will spell out the precise levels of discharge that are regulated and the detailed process of applying for and preparing a permit. Generally, one must check both the environmental statutes and the regulations. Indiana environmental regulations are codified at Titles 320 through 329 of the Indiana Administrative Code.

In addition to statutes and regulations, both EPA and IDEM issue "guidance documents" and "non-rule policy documents," which explain how the agencies like to implement and enforce environmental laws, based on their interpretation of those laws. Thus, although guidance documents do not have the force of law, they are extremely important in understanding how to stay on the right side of the law in EPA's and IDEM's mind. For developers, guidance documents describing environmental cleanups, the Brownfields program, and the Voluntary Remediation Program, are particularly important.

Finally, there are environmental permits. Permits do have the force of law. When a permit is issued, it is in effect a mini-statement of the law tailored to a particular facility or

operation. In some environmental programs, like the air program, compliance with an air permit can be presumptive evidence of compliance with the whole program (provided, of course, that the permittee revealed all relevant information in obtaining its permit.) A permit is like a contract, in that it should be negotiated with IDEM. Air, water, and waste permits are typically very detailed and should not be more burdensome than they need to be. Permit applicants always have the right to comment on, and if necessary appeal, environmental permits, and should not be reluctant to exercise these rights.

Keeping up with changes in environmental laws can be a daunting task. The Internet has simplified this task immensely. Therefore, the first place to go for news of recent changes in environmental law is IDEM's web site, www.in.gov/idem. IDEM has specified web pages for each of the major environmental areas. Thus, IDEM's Office of Air Quality administers air rules and issues air permits, the Office of Water Management does the same for the water rules, and the Office of Land Quality handles solid and hazardous waste programs, as well as environmental cleanup and development programs like Superfund and Brownfields. Note environmental rulemakings are published on the first of each month in the Indiana Register. The rulemaking process involves the publication of proposed rules on which any interested citizen may comment, before a rule is finally adopted. The ability to influence environmental rulemaking is very real, and should be taken advantage of. Indeed, IDEM actually solicits the comments of affected parties, called "stakeholders," before promulgating new rules. The rulemaking process may also be monitored on-line.

When in doubt, it is possible to call IDEM or EPA for advice. EPA operates several "hotlines," for example, which one can call to ask specific regulatory questions. One must be

wary about using these resources, however. First, the agencies will not be able to teach a seminar over the phone. Second, the regulators may wish to visit your site before you are prepared to let them do so. Third, the quality of the advice you get will only be as good as the person on the other end of the line, and the fact is that both IDEM and EPA experience frequent turnover in their lower echelons. Fourth, agencies will typically promote a very strict interpretation of its rules, whereas a more flexible approach is often possible and always desirable. Therefore, unless the question is very specific or basic and requires an immediate answer, one is better advised to stick to the books and written guidance documents, and to consult legal and engineering experts as needed.

The goal of this paper is to help developers zero in on key aspects of environmental law that will be of most interest to them. Learning how to recognize environmental issues on a piece of property will also be discussed. No attempt will be made to give a comprehensive outline of all aspects of environmental law, and the text will not be cluttered up with legal citations, except where they will be of direct benefit to the developer with environmental questions. However, the information presented here will provide a starting point for further investigation of environmental issues, as necessary.

B. Establishing the Environmental "Baseline" -- The Environmental Site Assessment or "Phase I"

1. Overview

In embarking on any project, the developer needs to understand the environmental "baseline." This simply means learning about the current condition of the property in terms of environmental problems and compliance. This will tell the developer about what liabilities already exist that are someone else's fault, what liability the developer may be taking on as result of purchasing or working on the property, and what environmental work will need to be

accomplished in order to complete the project. Even undeveloped territory may involve environmental issues. For example, if there are wetlands on the property, special permits will be required, or the project will need to be designed so as to leave the wetlands undisturbed. If the site provides a home to endangered species of animals or plants, special permits may be required. Some waterways in Indiana have been designated as particularly sensitive, and permits for development along such waterways will be more difficult to obtain. A currently vacant lot may hide underground storage tanks or old dumps from long ago, which will need to be dealt with. Therefore, any project should begin with an *environmental site assessment* in order to identify real and potential environmental concerns.

2. Environmental Assessments vs. Compliance Audits

Most people in the real estate and development business today have heard of the term "Phase I," and know that the prudent purchaser of land has a Phase I performed before buying a business or real estate. It is important to understand the limits of the Phase I and other types of environmental assessments.

The Phase I Environmental Site Assessment can be performed by most environmental consulting firms. Virtually all firms perform them pursuant to a common set of standards promulgated by the American Society of Testing Materials (ASTM). To identify a competent firm to perform a Phase I, one should contact local environmental lawyers, who have the most experience day-to-day with objective evaluation of such firms. Be sure that the consulting firm is using the most up-to-date version of the ASTM standard (1527-00).

The Phase I will *not* answer every environmental question. It does not typically involve the taking of environmental samples. Thus, the Phase I alone will not give a property a "clean bill of health." Environmental lawyers cringe when they hear clients say, "Everything is alright.

I had a Phase I done," and the project is a 50 year old industrial site! In fact, the Phase I may be just the first step in establishing an environmental baseline.

The Phase I will typically involve a historical review of site usage, interviews with employees or other persons familiar with the site and its history, a review of regulatory records to determine whether the subject site or surrounding sites are listed as cleanup sites or sites that have underground storage tanks, and a site walk-through. The site walk-through by an environmental expert will identify obvious environmental problems based upon visual evidence. For example, stressed vegetation may indicate past spills. A pipe sticking out of the ground may be a vent for an abandoned underground storage tank. Crumbling pipe insulation may indicate asbestos troubles. The storage of uncovered raw materials or equipment outside may point to storm water problems or spill issues. Note that the Phase I does *not* typically involve a review of existing permits or a determination of a business' current compliance status.

The Phase I report will always end with a set of conclusions and recommendations. The conclusions will list "recognized environmental conditions." Sometimes, the conclusions will be definite. For example, the consultant performing the walk-through may spot a discharge and, in talking to plant personnel, discover that it is not covered by a permit. Either way, the Phase I will contain recommendations for further study. If soil staining is noted during the site inspection, the Phase I will undoubtedly recommend soil sampling at that point. The Phase I may note the potential for environmentally sensitive issues such as wetlands, but further study will usually be required to determine whether regulated wetlands exist on a site, and whether a proposed development will negatively affect such wetlands. The Phase I will <u>not</u> typically involve a technical determination of the presence of asbestos or lead-based paint (although it will

identify the potential for such problems), unless an asbestos or lead-based paint survey is specifically requested.

The recommendations for further investigation will often be carried out in a Phase II. This is where sampling for spills or asbestos, or further analysis of water or air emissions, takes place. As a result, Phase II assessments are more expensive, but they reveal more about a site.

Neither the Phase I nor the Phase II tells you about the current compliance status of the site in detail. Both types of reports will provide much useful information, such as whether the subject site is on a list of potential state cleanup sites called the CERCLIS list. For an undeveloped site, the

Phase I and II reports will often be enough. For the purchase of an operating business, establishing an environmental baseline means determining the current environmental compliance and permit status of all facility operations. This requires a *compliance audit*, which involves a more meticulous review of both site and agency records, and may require more detailed testing of water discharges or air emissions to determine the need for permits. When a purchaser performs environmental due diligence, it typically performs both a Phase I and a compliance audit.

Various audit checklists are available, including checklists published on EPA's web site. A good checklist will ask about the following:

1. Waste generation and disposal;
2. Underground storage tanks;
3. Above ground storage of petroleum or chemicals;
4. Wetlands;
5. Pesticide usage;

6. Air emissions;

7. Asbestos;

8. PCBs;

9. Water discharges;

10. Record keeping of chemical storage and usage under various environmental laws;

11. Past spills or releases of toxic or hazardous chemicals;

12. On-site septic systems and water wells;

13. Mold.

By simply reviewing these items, the developer will obtain a good feel for the kinds of environmental issues that can arise on a site. Even the amateur can use such a list to determine the likelihood of environmental problems that will require further story. While one should ultimately work with an environmental expert, even a preliminary review in the early stages of planning a project may warn one away from a project that will be more trouble than it is worth, or at least help to avoid pitfalls later on.

3. Why do an environmental audit or assessment?

For many projects, the purchaser or developer will have no choice. Lenders typically require at least a Phase I, especially where the loan upon which the deal is based will be collateralized by the real estate or the business. If the Phase I so recommends, lenders will typically require a Phase II as well.

Even if a lender is not requiring a Phase I, the real estate purchaser should strongly consider doing one. Under both the State and federal versions of Superfund, a current property owner can be held liable for environmental contamination on the property, even if he or she did

not cause the contamination. An exception to this rule is the so-called "innocent purchaser" defense, which can be invoked when the purchaser has taken steps to try to find environmental problems before buying the property. Recently, a new defense has been added to Superfund, called the "bona fide purchaser" defense, which exempts a property or business purchaser of cleanup liability in certain circumstances. These defenses to Superfund liability is discussed more fully below, but both require the purchaser to have performed at least a Phase I.

In the case of the transfer of an operating business, the purchaser should perform environmental due diligence along with other investigations into the liabilities of the business. Typically, an owner will not be responsible for the past regulatory violations of prior owners (with the significant exception of Superfund liability). However, the new owner is responsible for compliance with environmental laws from the date the deal closes. Suppose the facility needs an air permit in order to operate but does not have one. The purchaser of such a business runs a significant risk that IDEM or EPA will shut the business down. At a minimum, environmental due diligence will encourage the negotiation of appropriate indemnity provisions in the purchase agreement, and should certainly affect the selling price, especially if the purchaser is going to have to assume environmental liabilities. Such risks cannot be evaluated unless they are first identified.

Suppose the developer is not purchasing the property or business, but is merely under contract to the purchaser or owner. The developer should still be aware of the environmental issues that will likely be encountered. Employee safety is one concern. OSHA, for example, requires a detailed safety program to be implemented whenever employees are working around asbestos or suspected asbestos containing material, or are dealing with lead-based paint

4. Evaluating the environmental liabilities of a Greenfield project

Suppose the project to be developed is a Greenfield project–i.e., a project on previously undeveloped land. Even if the site has been determined to be pristine, the developer should still consider the environmental issues that the new project may create. For example, if the project will be an industrial facility, what kinds of environmental permits will it need? If it will need air permits, the developer should consider whether the project will be located in an area where air permitting is restricted because of existing dirty air conditions. Because environmental permits are issued pursuant to a public process, what kinds of public opposition will the project face? These issues will be discussed more fully below.

Certain kinds of projects are subject to special environmental land use restrictions. Hazardous and solid waste facilities are subject to certain regulatory siting restrictions having to do with the suitability of the site for long-term disposal of waste. Some air pollution control requirements are dependent upon the existing air quality of the location.

Wetlands are always a concern. Even as little as 1/10 acre of wetlands can trigger special permit requirements, if the wetlands are going to be disturbed. Many a developer has been tripped up as a result of filling in wetlands he did not know were there. While it typically takes an expert to identify and quantify wetlands, there are telltale signs the developer should look for to help determine when to call in the experts. Wetlands are discussed more fully below.

5. The audit privilege in Indiana

Business owners are often reluctant to perform a compliance audit, because of the fear that the discovery of environmental violations may be incriminating, and may be used to support an enforcement action. Indiana has established by statute a limited confidentiality privilege for qualifying environmental audits. Thus, a qualified audit is not admissible as evidence in a civil or administrative proceeding, including state enforcement actions. Ind. Code 13-28-4-1.

An environmental audit report qualifies for the privilege if it meets the following conditions:

1. The report is first issued after July 1, 1994;

2. The report is labeled "Environmental Audit Report: Privileged Document.";

3. It included an implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance;

4. The report is not asserted for a fraudulent purpose;

5. The person claiming the privilege promptly initiated efforts to achieve compliance.

Ind. Code 13-11-2-69, 13-28-4-2. Thus, the audit privilege does not require steps to achieve compliance, but the privilege will be lost in an enforcement action if compliance was not at least attempted. Therefore, the privilege can be used to come into compliance with some protection against future enforcement actions. The idea behind the privilege is to encourage business and land owners to obtain complete and accurate environmental compliance information. Note, however, that the privilege does not apply in criminal proceedings. Further, even in civil enforcement proceedings, IDEM may use information obtained independently of the privileged audit. At least, the privilege saves the owner from the burden of self-disclosure.

6. Limits of the Real Estate Disclosure Form

The Indiana Responsible Property Transfer law requires the disclosure of known environmental conditions on real estate at the time of transfer in some instances. In many real estate transactions, purchasers require such a disclosure form whether the form is legally required or not. The form is legally required only for three kinds of property: (1) property containing underground storage tanks subject to registration requirements; (2) property on the CERCLIS list, and (3) property required to file annual chemical inventory reporting forms with EPA. Many properties will not fall into any of these categories, especially if the property is undeveloped or has no current operations on it. If the form is provided, it is heavily weighted toward providing information about environmental conditions on or in the land, and tells little about the facility's regulatory compliance status. Nevertheless, the form is a good start toward gauging the seller's knowledge about the site. When the IRPTL form is required, the seller must provide a copy to IDEM, and both buyer and seller are required to ensure that a copy is filed in the County recorder's office.

If the IRPTL form reveals an environmental problem previously unknown to the buyer, the buyer may void the transaction. Further, the IRPTL statute provides for recovery of consequential damages by a person harmed by failure to comply with the IRPTL law. Such failures might include the failure to provide a required disclosure or falsification of the form. Consequential damages may well include future cleanup and compliance costs incurred by the buyer, although this has not yet been tested in court.

C. Primary permits and Other Environmental Requirements for Successful Development

1. Air Permits

Indiana's air regulations are codified at 326 Indiana Administrative Code (IAC). The Indiana rules implement the federal Clean Air Act and essentially restate federal requirements. Therefore, the focus here is on the Indiana rules.

Generally, what goes up is regulated. The first step in determining whether air permit rules apply is to determine what is emitted and in what quantities. Then, it is necessary to determine whether the pollutants emitted are regulated in those quantities.

The air program regulates two main types of pollutants: criteria pollutants and hazardous air pollutants (HAPs). The criteria pollutants are: carbon monoxide, sulfur dioxide, oxides of nitrogen, particulate matter (PM), volatile organic compounds (VOCs), and lead.

VOCs are the broadest category, and are regulated because they react with sunlight to form ground-level ozone. Many industrial solvents, including alcohols, are VOCs. Painting and spraying operations, fuel storage, and solvent cleaning are all prime emitters of VOCs.

PM is also a broad category. Any dust emission is potentially regulated. Most regulation of industrial processes is limited to PM smaller than ten microns (PM-10), because these particles are respirable. However, Indiana rules also impose restrictions on emissions of fugitive dust, which means dust that leaves a facility's boundaries, regardless of particle size. Thus, construction projects are often required to limit their dust emissions.

The Clean Air Act identifies 189 regulated hazardous air pollutants. Most HAPs are common industrial chemicals or metals.

Permits are not required for all air emissions. Permit requirements are based upon the amount of regulated pollutants emitted, usually expressed in tons per year. The emission level is determined by the potential to emit meaning the facility's emissions assuming operations at full

capacity, 24 hours per day, 365 days per year, all without controls. Thus, facilities with actual emissions far below permit thresholds may nevertheless require burdensome air permits.

Generally, the following facilities are exempt from air permit requirements: facilities having a potential to emit of less than ten tons per year (TPY) of VOCs, less than 25 TPY of carbon monoxide, less than 10 TPY of nitrogen oxides or sulfur dioxide, less than 0.2 TPY of lead, and less than 5 TPY of PM-10. Such sources should still apply to IDEM for a letter of exemption.

Certain sources require a registration to operate. The registration is like a fishing license–i.e., it allows the source to operate but imposes no restrictions so long as emissions do not exceed the licensed levels. Generally, the following sources require registrations: sources with a potential to emit of less than 100 TPY of carbon monoxide, less than 5 TPY of lead, less than 10 TPY of a single HAP, less than 25 TPY of any combination of HAPs, less than 25 TPY of any other regulated pollutant.

Any source with a potential to emit above the registration thresholds is required to obtain a permit. A permit will typically include conditions on emission testing and record keeping, and will require the implementation of controls or place limits on production, or both, to maintain emissions at permitted levels.

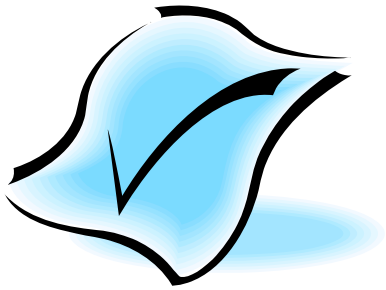
There are different levels of permitting depending upon the level of potential emissions. The higher the potential to emit, the greater the level of regulation in the permit. Thus, the largest sources will be required to use more stringent control technologies, particularly if they are located in areas in which the air quality does not meet national standards for the pollutants they emit. The specific types of permits and the obligations they may impose will also vary depending upon the type of operation seeking a permit. Both the EPA and IDEM have

promulgated special rules for specific types of industries which impose yet more emission control requirements. The limitations on emissions will be incorporated into the source's permit.

The specific types of permits and the nature of their requirements are beyond the scope of this paper. The best introductory source of this information is IDEM's *On-Line Permitting Guide*, available on the IDEM web site. This guide provides basic environmental permitting information for water and waste as well as air permits.

What is important to recognize in the project planning stage, or in the process of acquiring a business, is when air permits *may* be required. Any facility that emits or may emit air pollutants should employ the services of an air consultant to measure emission amounts. The consultants can also assist with the preparation of air permit applications. Keep in mind that most manufacturing concerns that use solvents, process or machine metals, paint or burn large quantities of petroleum fuels or natural gas will typically require at least a registration for their air emissions. The threshold for air registrations--typically ten tons per year for most pollutants--is not hard to reach. Although ten tons per year sounds like a lot, the fact is that this threshold is quickly reached. Therefore, the developer should make no assumptions about air emissions without competent technical or legal advice.

Finally, note that there are actually two levels of air permitting for each facility: construction and operation. Any time a permit or registrations is required, it must be obtained before construction begins. Upon a demonstration that construction has been carried out in accordance with the permit, IDEM will issue an operation permit. *It is illegal to build or operate an air emissions source without first having obtained the requisite air permits.* Thus, air issues, and indeed all environmental permit issues, must be considered at the design phase of a construction project, or the due diligence phase of an acquisition.



Polling Question #2

What is most important to your client in negotiation?

Press star one (*1) for “get all your client desires”

Press star two (*2) for “leaves nothing on the table”

Press star three (*3) for “gives away the minimum”

Press star four (*4) for “other”

Suppose a facility is found to be operating without the necessary permits? Generally, IDEM will allow the facility to continue to operate so long as it takes steps to obtain the necessary permitting as quickly as possible. However, IDEM will bring an enforcement action in most cases, even if the fine is not collected until after the permit has been obtained. Statutory penalties for operating without a necessary air permit (or for violating any air rule) can run up to $27,500 per violation per day. While IDEM has rarely imposed anywhere near the maximum allowable penalties, IDEM has recently become very strict about assessing economic benefit penalties, especially for air violations.

Permits take time to get. By statute, IDEM is required to process permit applications within specified time frames, ranging from 60 days for a registration up to 270 days for operating permits issued to the largest sources. These timing issues need to be built into project planning.

For these reasons, the air permit aspects of any business purchase must be carefully considered before the deal is done.

2. Other air issues

a. Fugitive dust

As pointed out above, not all air regulations involve permits. The most important air issue for development projects arises from the fugitive dust rule, 326 IAC 6-4. "Fugitive dust" is any PM from soil that escapes beyond the property line of any project. Construction and demolition projects are required to take "every reasonable precaution" to minimize fugitive dust. Otherwise, the project is subject to IDEM enforcement actions.

b. Open burning

The State air rules also restrict open burning. 326 IAC 4-1. Often, open burning is carried out to get rid of debris at construction and demolition sites. IDEM will approve certain

types of open burning in advance, but such approvals are typically limited to the burning of clean wood, or of natural vegetative growth from the clearing of land for development. In no event is the burning of old building waste from demolition or construction debris allowed. Even where IDEM permits open burning, local ordinances may prohibit it. Most IDEM air enforcement actions involve violations of the open burning rules, probably because violations are so easy to spot.

c. Asbestos and lead-based paint

Construction and demolition projects involving asbestos are strictly regulated. Any time a developer or contractor intends to renovate or demolish a building that contains asbestos, the asbestos rules at 326 IAC 14-10 are triggered. If specified amounts of asbestos containing material are going to be disturbed or removed, the owner *and the operator* (which typically means the contractor) of the project are obligated to notify IDEM *before* the project commences. Upon receipt of IDEM's approval, only a specially state-licensed asbestos contractor may be used to remove or encapsulate the asbestos. Special safeguards must be employed to prevent asbestos fibers from escaping into the air, which can involve anything from keeping the material wet to working inside a plastic bubble. Similar rules apply to the renovation and demolition of buildings containing lead-based paint. 326 IAC 23-1. Finally, OSHA imposes special requirements to protect workers who may encounter asbestos and lead-based paint.

d. Other air rules

These are by no means the only air rules a developer needs to think about. Certain types of hazardous air pollutants and industries are regulated by special rules which require strict controls. What this generally means for the developer is that the type of operation contemplated may trigger special air requirements, which should be installed along with the production

machinery. These considerations need to form part of the assessments of the risks and liabilities associated with any project.

3. Water permits

Generally, any discharge of industrial process or industrial cooling water will require a permit, whether or not the discharge is to sewers or to surface waters. Discharges of sanitary wastes to a septic system are generally not regulated by IDEM, but are regulated by local health departments and sewer authorities. IDEM gets into the act when industrial wastes are discharged along with the sanitary wastes, or when sanitary wastes are discharged directly into surface waters or onto the ground.

IDEM's water rules are codified at Title 327 of the IAC. All discharges of industrial wastewaters and wastes to state waters require a permit called a National Pollutant Discharge Elimination System (NPDES) permit. The definition of state waters is extremely broad. Even discharges to a ditch that is dry most of the time will require a permit if that ditch has even the potential to empty into a stream, pond or lake. The definition of "pollutant" is also broad. Just about anything discharged to water by a man-made activity through a "point source," including sand or dirt, is a pollutant for this purpose. A point source is simply any conveyance created by man that carries pollutants into waters, deliberately or inadvertently, and includes anything from a pipe to an erosion gully created by a man-made activity (as opposed to natural erosion).

It is important to note that the obligation to obtain an NPDES permit, unlike air permits, is not based on a quantity trigger. *Any* discharge of pollutants is prohibited unless it is allowed by a permit. There will certainly be cases where the NPDES permit does not require treatment prior to discharge, but this is for IDEM to decide in the permit process. At a minimum, the NPDES permit will impose monitoring and reporting requirements. As with air permits, the NPDES

permit must be obtained before the project commences, and IDEM will pursue enforcement actions against violators.

Most industries discharge to city sewers. Permits are often required for discharges of industrial wastes to sewers, which are typically issued by the local sewer authority. Treatment prior to discharge may also be required. While most regulation of industrial discharges to sewers is left to the local authorities, IDEM and EPA will step in when they feel that the locals are not doing their job. IDEM also issues permits for the construction of new industrial wastewater treatment plants, whether the discharge is to sewers or pursuant to an NPDES permit.

The other key areas of water permitting most important to developers are for wetlands and storm water runoff. Wetlands issues are discussed below.

Storm water permits are required for both industrial and construction activity. 327 IAC 15-5 & 15-6. Storm water discharges associated with construction activity will be of most interest to developers. Any person disturbing the soil over an area of 5 or more acres as a result of construction activity will require a storm water runoff permit from IDEM. The purpose of this program is to reduce sediment discharges into surface waters. Some of the things a developer must do to comply with storm water rules are:

1. File an erosion control plan with the local County Soil and Water Conservation District.
2. File a Notice of Intent with IDEM prior to commencing work, which describes the project, the number of acres involved, and an estimated timetable for land-disturbing activities.
3. Publish a notice of the planned construction activity in a local newspaper.

4. Be sure that personnel responsible for installing and maintaining erosion control measures are trained in erosion control practices.

5. Comply with requirements outlined in the permit, which will principally involve erosion control measures.

327 IAC 15.5. Again, the permit must be received before land disturbing activities commence.

IDEM has decided that the development of a residential or commercial subdivision constitutes a single construction project. This means that the developer continues to be responsible for implementing the erosion control plan as long as construction within the subdivision continues. If different builders are working on the project, the developer needs to police them all, for as long as it takes.

Storm water permits for runoff associated with industrial activity must be obtained by operating businesses where storm water discharges are related to manufacturing or processing activities, or raw materials storage at an industrial plant. Certain industrial categories are automatically subject to storm water permitting, because their operations are inherently outside to some extent (e.g., mining, power plants, scrap yards, waste handling, etc.). Other types of industries are exempt provided they can show that no industrial activities are exposed to storm water. 326 IAC 15-6-4. Any industrial operation needs to check the storm water rules to determine whether a permit is required. Permit conditions will include periodic sampling of storm water discharges and the development of a storm water pollution protection plan (which basically means a plan to keep polluting activities out of the rain as much as possible).

Some types of projects require a special type of permit called a Section 401 Water Quality Certification before they can begin. The reference is to a section of the federal Clean Water Act, which requires IDEM approval of any project which has the potential to place fill

materials into, or to dredge in, waters of the United States, including wetlands. Generally, a Section 401 certification is needed for any project that will require a wetlands permit. However Section 401 is broader, and is triggered by any project on or along a stream or other water body. The applicant must show that the project will not violate the state's water quality standards, which are set forth at 327 IAC 2.

4. Other water issues

While permits are required for any activity that involves discharges of pollutants to waters, spills give rise to their own regulatory consequences. Indiana has a "spill rule" at 327 IAC 2-6.1, which requires the reporting and cleanup of certain spills. Any spills that damage waters of the state, occur near a private drinking water well or a designated high quality state resource water, spills of petroleum that cause a water sheen, and spills of hazardous chemicals into waters or onto soils beyond a facility's boundaries must generally be reported to IDEM as soon as possible, but in no event more than 2 hours after discovery. The person who owns or operates the facility from which the spill occurs must take immediate steps to contain the spill and must conduct a "spill response," meaning that free material must be removed or neutralized. IDEM, upon reviewing the spill report, may require further and ongoing cleanup. 327 IAC 2-6.1-7.

The above is not an exhaustive list of all types of spills that need to be reported. Generally, any chemical or petroleum spill, or a spill of anything that has the potential to damage aquatic life, must be reported. For this purpose, state waters are defined to include groundwater. This means that spills to soil are by no means exempt, although certain small spills to soil are exempted. The term "spill" is not limited to a sudden, big event, but includes things like leaking and seepage. Thus, if a landowner notices seepage from a creek bank he owns, which causes a

visible sheen on the water, IDEM would expect a spill report. Any unplanned discharge of pollutants should send the project owner and developer to the spill rule to determine whether a spill report is required. It usually is.

a. Wellhead protection

The wellhead protection program is a statewide program designed to protect public water supply systems. The program was mandated by the federal Safe Drinking Water Act, and requires states to define wellhead protection areas within the vicinity of every public well and well field. Indiana's rule is at 327 IAC 8-4.1. The rule requires local public water suppliers to establish wellhead protection areas, subject to state approval. The state rule sets forth minimum requirements for the local programs, which must establish, among other things, special management and monitoring requirements for all "potential sources of contaminants" located in the wellhead protection area. Such requirements apply in addition to other State and federal water pollution requirements. The size of the wellhead protection zone is defined by the local water system using hydrogeologic computer models.

The development of wellhead protection programs is a public process, but chances are the program will already be in place by the time a developer starts working on a project. The wellhead protection requirements typically involve extra safeguards against groundwater contamination, beyond what other regulatory programs already require. Certain types of projects, like new USTs at filling stations, may be forbidden in the wellhead protection area. The developer must therefore determine whether the project is in a wellhead protection area, and must obtain a copy of the local plan.

5. Hazardous waste permits

Permits are required for facilities that treat, store or dispose of "hazardous waste." State hazardous waste regulations incorporate by reference the federal hazardous waste rules, so that the federal hazardous waste rules will be referenced here.

Wastes are defined as "hazardous" in one of two ways. First, a waste is hazardous if it exhibits one of four hazardous characteristics in tests established by the EPA: ignitability, corrosivity, reactivity or toxicity. 40 CFR 261, Subpart C. Second, a waste may be hazardous because it is one of several hundred materials that appear on an EPA list. 40 CFR 261, Subpart D. Generally, a waste that exhibits a hazardous characteristic will also show up on one of the lists. However, the generator of any waste is responsible for determining whether the waste is hazardous. Whenever there is doubt, appropriate consultants must be hired to identify and determine whether the wastes are hazardous.

As stated above, hazardous waste permits are required for facilities that treat, store or dispose of hazardous waste. A developer will not typically operate a waste treatment, storage or disposal facility (TSDF), at least not knowingly. For one thing, there is an important exemption for facilities that generate waste but only store it on site for a limited time, pending pickup by a licensed transporter for proper disposal. Second, no one wants to be a hazardous waste permit holder if he or she can help it. The requirements are numerous and burdensome. Permit applications typically run to several hundred pages. TSDF operations are subject to detailed management and operating requirements, which can continue for up to thirty years after the TSDF closes. Today, few businesses deliberately choose to be a TSDF, unless the TSDF is in the hazardous waste business and can charge fees that make the business profitable.

A more likely scenario occurs when a business inadvertently becomes a TSDF, because it has stored hazardous waste on-site for too long. Most businesses generate at least some

hazardous waste, even developers. For example, many waste paints, adhesives and solvents qualify as hazardous. Site preparation may uncover old buried drums or wastes that need to be disposed of. A generator is allowed to store wastes for only 90 or 180 days without a permit, in most cases, depending upon how much hazardous waste they generate monthly. If storage exceeds the regulatory time limit, IDEM will bring an enforcement action for not having a TSDF permit. IDEM will not actually require the issuance of a permit if the generator has properly disposed of the waste and has no intention of becoming a TSDF in the future. nevertheless, the generator will wind up paying a fine for violating the storage requirements. Like other environmental penalties, fines for violations of hazardous waste rules can range up to $25,000 per violation per day.

What this means for the developer is that it must, like any other business, identify its waste streams and make sure that they are being handled and disposed of correctly. These issues are discussed in the next section.

6. Other waste issues

a. Handling and disposing of hazardous waste

Even non-TSDFs are subject to numerous requirements for the wastes they generate. These requirements are set forth at 40 CFR, Part 264, and generally fall into one of five categories. First, most generators of hazardous waste must obtain an EPA ID number by filing a Notification of Hazardous Waste Activity with EPA.

Second, the generator must be sure not to accumulate hazardous waste beyond certain time limits. If you generate between 220 and 2,200 pounds of hazardous waste per month, you may not accumulate more than about 13,000 pounds of waste on-site for more than 180 days

without a permit. If you generate more than 2,200 pounds per month, you cannot store waste for more than 90 days before shipping it off-site, unless you have a permit.

Third, you must store your waste in containers, typically drums, each of which is clearly labeled as hazardous waste and shows the date that the waste was generated and put in storage. Wastes must be stored in closed containers, except when adding or removing wastes. Storage areas and containers must be inspected weekly and must be maintained in good condition.

Fourth, you must dispose of waste properly. It is your responsibility to make sure that all hazardous waste goes to a properly licensed TSDF, accompanied by a hazardous waste manifest, and hauled by a licensed hazardous waste transporter. Once you put the waste in the hands of the licensed transporter, your worries are not over, because you may incur Superfund liability if the wastes are improperly handled after that.

Fifth, you are responsible for accidents at your own facility. You must maintain a hazardous waste storage area equipped with systems capable of communicating an emergency to all facility personnel, fire control devices, spill cleanup and personal protective equipment. Your personnel must be trained in the proper handling of hazardous wastes, including how to respond to spills.

Note that there are special regulations for certain types of waste, which a developer may encounter, especially if it is involved in demolition or renovation. These wastes are: used oil, lead acid and other types of batteries, scrap metal that is being recycled, recalled pesticides, and mercury containing thermostats.

b. Underground storage tanks (USTs)

Developers will most likely encounter USTs that have been abandoned. The good news is that, for the most part, abandoned USTs are the responsibility of the last person who operated

them. One does not necessarily own a UST for purposes of incurring environmental responsibility by virtue of owning the property on which the UST is located, if the UST went out of use before November 8, 1984. Ind. Code 13-11-2-15(a). Further, Indiana law provides a cause of action to recover UST cleanup costs against any person who owned the UST at the time a release of contaminants occurred. Ind. Code 13-23-13-8(b).

For purposes of this paper, it is assumed that the developer does not wish to operate USTs. However, if the developer is installing USTs for someone else, be aware that the state has established special certification requirements for UST workers, Ind. Code 13-23-3-1, as well as standards that USTs must meet. Ind. Code 13-23-5-1.

UST removal is subject to numerous technical standards, to determine that any leaks from the UST are properly cleaned up. Removal and cleanup contractors must adhere to their own certification requirements.

c. Facility Siting

The state no longer has a specific siting process for hazardous waste facilities. However, both solid and hazardous waste facilities are subject to certain location restrictions, depending upon the geologic suitability of the site for development. For example, new landfills may not be sited in Karst terrain. Setbacks from drinking water wells, water bodies and the like also apply. These locational restrictions are found in IDEM's regulations.

D. Wetlands

a. Federal regulations

Wetlands regulations and permits are administered by the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. Section 404 authorizes the Corps to issue permits for the discharge of dredged or fill material into "navigable waters." The term

"navigable waters" has been broadly defined to include all "waters of the United States," which includes wetlands.

Wetlands generally include any areas that are saturated often enough to support vegetation typically associated with aquatic or saturated soil conditions. It usually takes an expert to identify wetlands. They will look for plants and soils typical to swamps, marshes and bogs. The lay developer should be alert to the possibility of wetlands on any site, especially if you see cattails.

Wetlands do not have to be large to be regulated. In fact, the Corps will step in whenever a wetland as small as 1/10 acre is disturbed. Recently, the Supreme Court has ruled that certain isolated wetlands cannot be regulated by the Corps, because they have no connection to the surface waters of the United States. Thus, it may be possible to avoid federal wetlands regulation if one can show that a wetlands is not connected to other waters.

As stated above, wetlands regulation is triggered if fill material is discharged to the wetlands. Generally, if the wetlands are filled in or dug up, the Corps will require a permit first. The permit application is subject to public notice and comment requirements. A state Section 401 water quality certification must also be obtained.

It may be difficult to obtain a Section 404 permit. The Corps is allowed to deny the permit when it feels that alternatives to filling in the wetlands are available, or if alternative sites are available (even if not owned by the applicant). Also, the project must not result in significant degradation of waters of the United States.

If the permit is issued, the applicant will be required to "mitigate adverse impacts." This means that adverse effects must be minimized by working around the wetlands as much as possible. If the wetlands must be destroyed, the applicant must mitigate by creating at least

twice as many wetlands someplace else. From a practical perspective, the worst aspect of wetlands permitting for the developer is that it usually takes from 8 to 12 months to get a permit. Therefore, wetlands aspects of a project should be among the first things considered in planning. Public opposition to wetlands permitting is often spirited, even in urban areas. Therefore, developers should always identify potential wetlands, and should try to avoid them as much as possible. If you choose to ignore wetlands regulations, be aware that fines are heavy. On the other hand, you will be hero if you can turn a wetlands into an asset to the overall project.

b. State wetlands regulation

i. IDEM's expanded NPDES announcement.

In response to SWANCC, IDEM announced that any filling or dredging of isolated wetlands would require an NPDES permit. IDEM asserted that it was merely enforcing authority which it already had under state law. As a consequence, beginning in the Spring of 2001, for the first time, anyone impacting isolated wetlands was required to obtain an NPDES permit. Despite several developments discussed below, which suggest that IDEM lacks this authority, IDEM continues to assert that an NPDES permit is required to fill isolated wetlands.

ii. The amended water quality rule

Also in the Spring of 2001, IDEM amended the water quality rule which had been pending before the Water Pollution Control Board since 1999. In response to criticism that it was attempting to push through a comprehensive wetland permitting program without adequate public notice and comment, IDEM argued that the proposed rule had been pending since 1999. The proposed rule did, indeed, include a comprehensive and far reaching isolated wetland permitting program. It also included permitting requirements for private ponds and other activities along shore lines that could impact water quality. Various industry groups and local government groups objected that the rule vastly increased IDEM's jurisdiction and amounted to a land use program—similar to local zoning. As a consequence, local government was especially opposed to the potential intrusion on its jurisdiction and authority. In fact, over 70 county officials asked the governor to impose a moratorium on the proposed rule for 12 months.

iii. Twin Eagles

While IDEM was seeking to impose its new NPDES requirement and pass its proposed new wetland rule/program, a developer in Allen County was attempting to proceed with a development which included isolated wetlands and private ponds. Notwithstanding, the SWANCC decision, IDEM insisted that the developer of Twin Eagles obtain an NPDES permit to develop its property. The situation evolved into litigation in the Marion County Environmental Court. Twin Eagles sought a declaratory judgment from the court establishing that IDEM's NPDES policy constituted an invalid rulemaking and that IDEM lacked all authority to regulate isolated wetlands and private ponds. Twin Eagles argued that IDEM's authority was based solely on the Clean Water Act, and if the federal government lacked authority over isolated wetlands, then surely IDEM did as well.

iv. State legislature

While Twin Eagles was pending, and IDEM was continuing to assert jurisdiction over isolated wetlands, IDEM was also attempting to get the Water Pollution Control Board to pass its wetlands program. Several members of the Indiana House of Representatives believed that an issue as important as state policy on isolated wetlands should be determined by the legislature and not by IDEM or the water board. As a result, legislation was introduced to prohibit IDEM and the water board from promulgating or enforcing any wetland rule or program until after the legislature could establish state policy. Notwithstanding, the House bill which passed early in 2002, the water board with full knowledge, preliminarily passed IDEM's proposed wetland rule/program. When the water board acted, it was also with full knowledge that the Environmental Court in Twin Eagles had ruled that IDEM's NPDES/wetland program was void as an unpromulgated rule and that IDEM lacked any authority over isolated wetlands. Not surprisingly, the Indiana Senate was unimpressed by IDEM and the water board's attempt to establish state policy, as a result, the Senate also passed the House bill, effectively barring IDEM and the water board from regulating isolated wetlands and private ponds until the legislature can address the issue in the 2003 session.

E. Superfund Liability.

1. Introduction

An entire seminar can be dedicated to Superfund liability. Its importance to developers cannot be overstated, because one can incur Superfund liability merely by being the owner or operator of a contaminated site, however briefly, whether or not one caused the contamination. The Superfund law is found at 42 U.S.C. 9601. The State has its own "mini-Superfund" law at

Ind. Code 13-25-4, which incorporates the federal statute's liability provisions. Further, the State can bring Superfund cleanup actions under the federal law directly. Therefore, the federal law is the focus of this discussion.

2. Hazardous Substances

Superfund sets up a program to require the cleanup of hazardous substance releases, no matter when they occurred. A "hazardous substance" is any hazardous waste, plus any chemical listed at 40 CFR 302.4. The list is long, and includes ordinary items like ammonia cleaner. Generally, if it is a chemical, it is probably a hazardous substance. Petroleum, however, is excluded from the definition.

3. How is Superfund liability imposed?

Either the State or federal government may allow liable parties to conduct cleanup themselves in a negotiated settlement, it may issue an order or seek an injunction requiring cleanup, or it may clean up itself and sue liable parties to recover costs. Note, too, that responsible parties may sue one another to recover cleanup costs, whether or not such costs were incurred as a result of government action. This is especially important where a developer winds up with a contaminated site and incurs cleanup costs, because it can sue any other liable party, including past owners, to recover.

4. Who is liable?

First, liability only accrues if there has been a release or threatened release of hazardous substances that has caused response costs to be incurred, either by the government or a private party. If these conditions are met, the following persons can be liable:

1. Present owners and operators of places where hazardous substances have been, are being, or may be released;

2. Past owners and operators at the time hazardous substances were released or dispose of;

3. Persons who arranged for the treatment oar disposal of hazardous substances at the site;

4. Persons who transported hazardous substances to the site.

Note that liability extends to owners and operators. Thus, a lessee who operates a facility can be liable along with the owner. Operator liability can extend to shareholders, directors and officers of a company, where they participated in the management of the facility. Superfund liability also extends to successor and parent companies. Developers may readily fall into the operator category, if their operations disturb or dispose of hazardous substances.

5. Secured Creditor exemption and Lender Liability exclusion

The Superfund definition of "owner or operator" excludes persons who, without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest in the facility. In addition, lenders who need to take possession of a facility at a foreclosure may be exempt provided they wind up operations at the earliest practicable and commercially reasonable time. On the other hand, lenders who actively participate in decision making regarding environmental compliance or the handing and disposal of hazardous substances will likely incur Superfund liability.

Thus, each case of Superfund liability, especially where operator liability is concerned, is highly fact sensitive. It should be noted that EPA just hates to let people off Superfund's hook, particularly where deep pockets are involved.

6. Intermediate owner without knowledge

If one acquires title to property after hazardous wastes have been disposed on the property and then, without knowledge of the release, transfers title to another, the intermediate owner is not liable. One must be able to make a good showing of not having knowledge.

7. The innocent landowner defense

A person who acquires contaminated land can avoid Superfund liability if the transfer occurs after the release and the purchaser did not know, and did not have reason to know, of the release of any hazardous substances. Thus, to invoke this defense, one must first show that the release was caused by somebody else before the transfer.

The second requirement, that one did not know or have reason to know of the release, is tough. You must prove that you undertook appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice so as to minimize potential liability. Factors to be considered include any special experience or competence of the purchaser, the purchase price compared to market value, any reasonably ascertainable information about the property, the obviousness of the contamination, and the ability to detect contamination by appropriate investigation.

The buyer, lender, lessee or developer should therefore perform at least a Phase I prior to closing. If the Phase I appears to be clean, the innocent purchaser defense is enhanced. On the other hand, if evidence of hazardous waste is uncovered, the defense if lost, and proceeding with the project becomes a tougher call.

8. The Bona Fide Purchase (BFPP) Defense

The BFPP defense was added to the federal Superfund law in December 2001. This defense should have a significant positive impact on property transfers. Previously, a prospective purchaser could rely only upon the innocent purchaser defense. The biggest problem

with that defense was that it did not apply if the buyer actually found contamination prior to the purchase.

The BFPP defense goes a long way toward fixing the problems with the innocent purchaser defense. It provides that, if a buyer performs the same due diligence required by the innocent purchaser defense (i.e., a Phase I in accordance with ASTM standards), the buyer is not liable even if contamination is discovered, provided certain additional conditions are complied with. These conditions are:

a. Any legally required reporting of contamination, such as compliance with any applicable spill rule, must be complied with.

b. The buyer must exercise appropriate care with respect to hazardous substances at the facility, by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit any exposure to previously released hazardous substances.

c. The buyer must fully cooperate and provide access to any persons performing remedial work at the facility.

d. The buyer must comply with any institutional controls which are in place on the property.

e. The buyer must comply with any information requests or subpoenas regarding contamination at the property.

f. The buyer must not be affiliated in any way with the seller or any party potentially liable for contamination at the property.

9. How can I avoid Superfund liability?

As stated above, any project should involve at least a Phase I. Also, one should contact IDEM to determine whether any site is on the state CERCLIS list. These are sites where releases of hazardous substances are known to have occurred. Such sites need to be investigated further.

If a release of hazardous substances is known to have occurred at a site, a prospective developer or purchaser should determine whether the seller or owner is willing to indemnify against Superfund liability. The right of private parties to contractually transfer or release Superfund liability has been upheld by the courts.

F. Reuse of Environmentally Impaired Property -- Brownfields and Voluntary Remediation

The terms "brownfields' refers to contaminated sites that can be redeveloped to get them back in circulation. After what has been said above about Superfund liability, it would not be irrational to stay away from such sites entirely, because any involvement could easily result in serious liability. However, the abandonment of brownfields accelerates the development of pristine land, adds to urban blight, and does nothing to get old environmental problems taken care of. While the state and federal governments do not mandate the reuse of brownfields or directly restrict Greenfield development, it will be harder to get permits for brand new facilities that can impact wetlands or wildlife.

For these reasons, EPA has encouraged the states to develop programs that provide real incentives for putting old, contaminated sites back in business. IDEM has responded by establishing its own Brownfields problem.

The cornerstone of the program is the Voluntary Remediation Program (VRP), established by statute at Ind. Code 13-25-5. VRP allows site owners and operators to voluntarily enter into agreements with IDEM to clean up contaminated sites. When the cleanup is

successfully completed, the State will issue a Certificate of Completion, which shows that the site is clean, and a Covenant Not to Sue for further remediation or any past environmental violations on the property. This covenant runs with the land.

Any site owner or operator, or a prospective owner or operator, who wishes to clean up a site contaminated with hazardous substances or petroleum, is eligible. The application may be rejected if an enforcement action is already pending, or if IDEM is obligated to take enforcement action as a condition of a federal grant. The application will also be rejected if site conditions pose an imminent and substantial endangerment to human health or the environment.

If the site and the applicant are eligible, IDEM enters into a voluntary remediation agreement with the applicant. IDEM will require adherence to certain standards of investigation and cleanup, and the applicant will need to reimburse IDEM for its oversight costs throughout the project. All work plans are subject to IDEM approval. However, in a cleanup under Superfund or an enforcement action, IDEM will also oversee the project, and the defendant will still have to pay IDEM's costs in the end in most cases, but in an adversarial atmosphere. thus, VRP cleanup is likely to be cheaper than enforcement Most important, IDEM will not impose fines in a VRP cleanup.

Public participation is a key component of the VRP program. The remediation Work Plan is subject to public notice and comment. IDEM wills et cleanup criteria for the project, but in the past has been very flexible in setting reasonable cleanup goals.

The real advantage of the VRP is the ability to work with IDEM cooperatively and without the threat of enforcement. Further, the provision for a Certificate of Completion and Covenant Not to Sue gives future owners reasonable assurances that they are obtaining a clean site.

When does a brownfields cleanup make economic sense" Environmental cleanup is not cheap. However, cleanup pursuant to enforcement or a Superfund actions even more expensive. If a company is stuck owning a contaminated piece of property, it is going to have to face cleanup liability sooner or later, or the property will never sell. At a minimum, VRP offers an opportunity for the site owner to cut its losses and at least recoup something by selling the property.

Municipalities are often stuck with abandoned contaminated properties. Not only are such properties eyesores, they may be dangerous. The VRP may provide an incentive for the municipality to partner with developers and investors to get a property cleaned up and put to a beneficial, and even profitable use. Even if the project requires some public money, that money may be well spent if the benefits are great enough. The State offers grants for the initial investigation of brownfields projects, and low interest loans for the actual cleanup. Thus, a municipality may be about to get started with State money, and then work a deal with a future developer whereby the loan used for cleanup is paid off.

IDEM has completed over 80 brownfields projects throughout the State. In many cases, a site owner who would have had to clean up anyway has used the VRP program to cut costs and to cut its losses by selling the property afterward. numerous projects, however, have resulted in the development of new, successful businesses on old contaminated sites.

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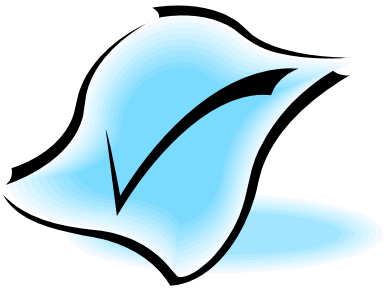

Polling Question #3

Press star one (*1) if today's teleconference met your needs

Press star two (*2) if today's teleconference did not meet your needs

THANK YOU

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