



AIR & WASTE MANAGEMENT  
ASSOCIATION  
SINCE 1907

# Indiana NEWs

**MARCH 2004**

News from the Indiana Chapter of  
the Air & Waste Management  
Association

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Thanks to our  
*Indiana NEWs sponsor:*  
*The Environmental Department*  
*of*

**BARNES & THORNBURG LLP**  
GIVE US THE PROBLEM™

*Time for Action*  
**Annual Conference only**  
**3 months away!**

Opportunities abound at the 2004 Annual Conference and Exhibition in Indianapolis, June 22-25. After the Grand Prix crowd moves on (there is a race scheduled in Indy the Sunday before), the Conference will start to gear up with exhibitors coming in on Monday to set up. The various Councils, Sections & Chapters, Tech, and Education, also will be meeting on Monday.

Tuesday starts with Jim Rogers, CEO of Cinergy, kicking off the Keynote program on "Sustainable Development." The panel of speakers with a broad range of perspectives will address the environmental, economic, and social aspects of the issue which serves as the conference theme.

Hundreds of technical sessions and panel discussions dealing with the pertinent issues of the day will be one of the major attractions in addition to 200 booths located in the exhibition hall.

Tuesday night, prior to the Grand Reception, EPA Administrator Mike Leavitt has been invited to speak. Stay tuned!

Besides food, music and networking, don't forget to peruse the Silent Auction as part of the Grand Reception. (Article on page 11.) Be sure to attend the East Central Section meeting and reception that will be held at 5:30 p.m. on June 23 (hotel location to be determined).

**April 29, 2004**  
**INAWMA Breakfast**  
**Meeting**

***Spill Prevention***  
***Control and***  
***Countermeasure Plans:***  
***Meeting the August 17,***  
***2004 Deadline***

On July 16, 2002, EPA issued a final rule amending the Oil Pollution Prevention regulation promulgated under the authority of the Clean Water Act. This rule addresses storage of oil related products and requirements for Spill Prevention Control and Countermeasure Plans (SPCC Plans). The deadlines for compliance with the rule were delayed several times. **The deadline for revising SPCC Plans to meet the revised rule is August 17, 2004.**

*(Continued on page 7)*

Please welcome  
Amanda Hennessy as the new  
Programs Co-Chair for the  
Indiana Chapter of the A&WMA.

**AWMA Golf Outing**  
**Set for May 21, 2004**

**Twin Bridges Golf Course,**  
**Danville**

**10:30 a.m.**  
**Registration Materials**  
**Inside**

## 2004-2005 Indiana Chapter Executive Board

<b><u>Chair</u></b>	Stephen B. Dixon Delphi Corporation (765) 451-6739 <a href="mailto:stephen.b.dixon@delphi.com">stephen.b.dixon@delphi.com</a>
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<b><u>Publications Chair</u></b>	James M. Hauck Baker & Daniels (317) 237-1367 <a href="mailto:james.hauck@bakerd.com">james.hauck@bakerd.com</a>

### *From the Chairman's Corner:*

This is my first opportunity as your new Indiana Chapter Chair to welcome you to an exciting year for the Chapter and for the State of Indiana. Our crown jewel will be hosting the 2004 Annual Conference and Exhibition in Indianapolis on June 22-25. I hope many members, both current and future, will be able to attend. The conference is always a week-long melting pot of learning, networking, socializing, volunteering, involvement, and hopefully, lots of fun. This year the key factor is accessibility – it's here in our own backyard! And some good news for non-members – if you attend our next Chapter program on April 29, we can save you money on your international membership fee that will then get you the member discount for the Annual Conference.

I look forward to this year and next as an opportunity to make our Chapter truly an all-INDIANA Chapter. Indianapolis has been the center of activity for a long time, but I want to get more of the State involved. I want to try to make our programs more accessible to our northern and southern members. I also want to broaden our committee memberships to represent the entire State – we already have many enthusiastic and creative people working for you, but we always appreciate new blood. If you have ideas and suggestions, please feel free to forward those to me at [Stephen.B.Dixon@delphi.com](mailto:Stephen.B.Dixon@delphi.com). Also, if you are interested in participating on any of our committees, please contact me, or any of our (your) Chapter officers and directors.

As always, check out our website ([www.inawma.com](http://www.inawma.com)) for continuing information on programs and contacts.

The Indiana Chapter of the A&WMA  
**THANKS** the Indiana Chamber of  
Commerce for the opportunity to display at  
its environmental seminars and conferences.



Please note the Chamber's upcoming events  
listed on page 17 and consider attending.



AIR & WASTE MANAGEMENT  
A S S O C I A T I O N

◆  
SINCE 1907

## Indiana Chapter, Air & Waste Management Association is proud to present

### *Spill Prevention Control and Countermeasure Plans: Meeting the August 17, 2004 Deadline*

**Thursday April 29, 2004**

**Breakfast Meeting: 8 am – 10:30 am**

Join the Indiana Chapter of A&WMA for a discussion on the revised SPCC rule! Hear an industrial and legal perspective on how your facility may be impacted. All facilities that are required to have an SPCC will need to revise their plan to meet the new rule requirements. At most facilities, certain previously unregulated oil-related activities are now covered by the rule. The first deadline for compliance is August 17, 2004. This workshop will provide members and guests with useful information on how to revise their current plan, capital improvements that may be required, and common pitfalls in interpretation of the rules.

### ***Agenda***

- |                         |  |
|-------------------------|--|
| 8:00 a.m. – 8:30 a.m.   | Registration and Breakfast   |
| 8:30 a.m. – 9:10 a.m.   | <b>Industrial Perspective</b><br>Vince Parker<br>Associate Engineering Consultant<br>Eli Lilly and Company |
| 9:10 a.m. – 9:30 a.m.   | Break  |
| 9:30 a.m. – 10:10 a.m.  | <b>Critical Legal Considerations</b><br>Madonna McGrath, Esq.<br>Baker & Daniels                           |
| 10:10 a.m. – 10:30 a.m. | Discussion, Wrap-up and Questions  |

**The Indiana Chapter, Air & Waste Management Association Invites  
You to our Spring Breakfast Meeting!**

**Spill Prevention Control and Countermeasure Plans:  
Meeting the August 17, 2004 Deadline**



**Thursday April 29, 2004**

**Breakfast Meeting: 8:00 am – 10:30 am**

**Where:** **Omni Severin Hotel**  
**40 West Jackson Place, Downtown Indianapolis**  
*Parking available in Circle Center Mall Garage*  
*Omni Severin can be accessed via the skywalk from Circle Center Mall*  
*Valet parking available*

**When:** **Thursday, April 29, 2004**  
*Registration and Breakfast Program* 8:00 am - 8:30 am  
8:30 am – 10:30 am

**Program:**

**Industrial Perspective**

Vince Parker, Associate Engineering Consultant, Eli Lilly and Company

**Critical Legal Considerations**

Madonna McGrath, Esq., Baker & Daniels

**Cost:**

**\$20.00** Students and Government Employees

**\$25.00** Members

**\$40.00** Non-members

International Membership available for an additional \$100 - Special offer!!! Save \$50 on International Membership, which will save you \$150 on Annual Conference Registration.

Membership forms and payment info available at the meeting

**NAME:** \_\_\_\_\_

**COMPANY:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Phone:** \_\_\_\_\_

**E-mail address:** \_\_\_\_\_

**RETURN REGISTRATION FORMS AND PAYMENTS TO:** Kristen Belcredi  
Keramida Environmental, Inc.  
330 North College Avenue  
Indianapolis, Indiana 46202  
Phone: (317) 685-6600, Fax: (317) 685-6610  
e-mail: [kbelcredi@keramida.com](mailto:kbelcredi@keramida.com)

*Make Checks Payable to:  
Indiana Chapter, A&WMA*



**AIR & WASTE MANAGEMENT  
ASSOCIATION**

◆  
INDIANA CHAPTER

**AWMA**

**Clean Air Scramble Golf Outing**

**Florida Scramble  
May 21, 2004**

**Twin Bridges Golf Club  
1001 Cartersburg Road  
Danville, Indiana 46122  
317-745-9098**

The INDIANA CHAPTER of the Air & Waste Management Association is very pleased and excited to announce our annual golf outing. The outing will be held at **Twin Bridges Golf Club located in Danville, Indiana**. Twin Bridges was the first Indiana course to achieve Audubon International's Signature Status. In addition, the Course is located on Waste Management's Twin Bridges Recycling and Disposal Facility buffer zone. The landfill is a state of the art facility with landfill gas-to-electricity power plants located on the property.

The cost is \$70.00 per person, which includes greens fees, ½ golf cart, lunch and prizes. Hole Sponsorships are available for \$125.00 each. FUNDS collected from sponsors and players will be applied toward scholarships, environmental seminars and assistance to AWMA Student Chapters. **In addition, any contributions of prizes or gifts from your business would be greatly appreciated.** These items could either be utilized by the entire outing or for individual use.

We are looking forward to your participation.

<b>Schedule:</b>	10:30 a.m.	Registration and Practice Range
	11:00 a.m.	Lunch and Practice Range
	12:00 p.m.	Tee Off
	5:00 p.m.	Quick Awards Presentation

<b>Awards :</b>	First Place:	\$50.00 each – gift certificate
	Second Place	\$40.00 each – gift certificate
	Closest to the pin	4 Gift Certificates - \$20.00 each
	Longest Drive	2 Gift Certificates - \$20.00 each

**Lunch:** CATERED



1001 Cartersburg Road  
Danville, IN 46122  
Phone: 317-745-9098



**JEFF PETERS**  
PGA Professional



**TONY BRZINSKI**  
Golf Course  
Superintendent



**ROBERT LOHMANN**  
Course Architect

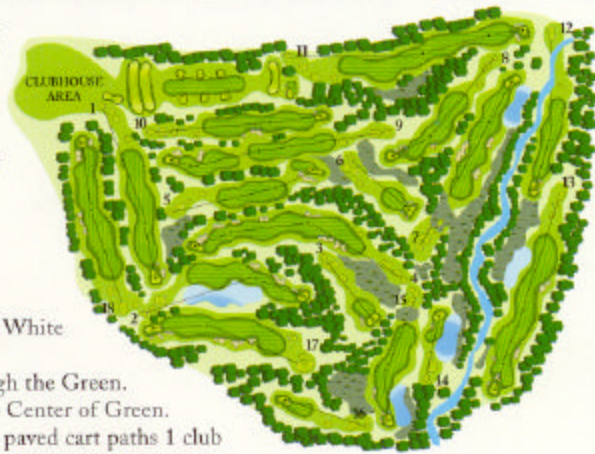
**Rules Of Golf As  
Approved By The United  
States Golf Association  
Shall Govern All Play**

**LOCAL RULES:**

- WATER HAZARDS - Yellow Stakes/Lines
- LATERAL HAZARDS - Red Stakes/Lines
- OUT OF BOUNDS - White Stakes/Fence
- GROUND UNDER REPAIR... White Lined Area
- Embedded Ball Rule through the Green.
- Yardage Plates measured to Center of Green.
- Player may drop away from paved cart paths 1 club length from nearest point of relief - no nearer hole - without penalty.

**PLEASE COOPERATE WITH:**

- Driving Carts in Designated Areas Only • Maintaining Pace of Play (4 Hours)
- Replace Divots • Repair Ball Marks



**COURSE RATINGS  
STROKE/SLOPE**

Green	74.0/130
Grey	71.6/127
Burgundy	71.6/120

Scorer: \_\_\_\_\_

Attest: \_\_\_\_\_

Date: \_\_\_\_\_

***PLEASE REGISTER BY WEDNESDAY, MAY 5, 2004***

Please make checks payable to Indiana Chapter AWMA and send with Registration Form to Mr. Harry Williams, 5502 West 15<sup>th</sup> Street, Speedway, Indiana 46224.

\$280.00 per foursome or \$70.00 each for green fee, ½ a golf cart, lunch and prizes \_\_\_\_\_

\$125.00 per hole sponsorship \_\_\_\_\_

**TOTAL ENCLOSED:** \_\_\_\_\_

Name: \_\_\_\_\_

Affiliation: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

Additional Members of Foursome: \_\_\_\_\_

**Information:** Harry Williams (317) 241-2277  
Richard Nelson (317) 745-2878

Tim Higgins (317) 685-6603

*(Continued from page 1)*

The revised rule clarifies that oil in “electrical and operational equipment,” such as transformers and hydraulics, should be included in calculating the amount of oil stored on site. This is just one reason that many facilities that currently do not have SPCC Plans could be covered under the revised rule. In other cases, there may be some instances where the new rule will actually eliminate the necessity of having a SPCC Plan due to changes in the regulations that remove certain underground storage tanks covered under other applicable regulations from the inventories triggering SPCC requirements.

The Chapter will have a breakfast meeting on April 29, 2004 to address the revised rule and deadlines for implementation of revised SPCC Plans. A registration form and more detailed information about the program is provided in this newsletter.

### ***EPA Clarifies the Scope of Part 70 Monitoring Requirements.***

*By: Guinn P. Doyle, Esq., Barnes & Thornburg LLP*

On January 22, 2004, EPA promulgated a final rule clarifying the scope of the Part 70 compliance monitoring requirements, specifically the scope of 40 C.F.R. § 70.6(c)(1) - the Part 70 “umbrella monitoring” rule. In September 2002, EPA proposed to amend 40 C.F.R. § 70.6(c) to remove the provision that the monitoring specified in the Part 70 permit include only the monitoring required under the applicable requirements. In other words, the proposed rule would have allowed state or federal permit writers to establish monitoring requirements for Part 70 permit holders on a case-by-case basis when they deemed monitoring in the applicable requirements inadequate. This would have allowed permit writers to impose “enhanced” monitoring requirements. EPA’s proposed rule flies in the face of the holding in *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), in which the Court held that EPA’s guidance interpreting the Part 70 periodic monitoring requirements did not authorize state permitting authorities to “require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.” Furthermore, the Court stated, “[n]othing on the face of the regulation or in EPA’s commentary at the time said anything about giving State authorities a roving commission to pore over existing State or federal standards, to decide which are deficient, and to use the permit system to amend, supplement, alter or expand the extent and frequency of testing already provided.” Thus, in the final rule, EPA stated that the correct interpretation of the umbrella monitoring rule was that it did not establish a separate or independent basis for the imposition of “enhanced” monitoring requirements.

#### **Part 70 Compliance Monitoring Scheme**

EPA’s Part 70 regulations require that each Part 70 permit contain all monitoring required under the applicable requirements. This includes requirements in 40 C.F.R. Part 64 as well as those promulgated under Sections 114(a)(3) and 504(b) of the Clean Air Act. Second, 40 C.F.R. § 70.6(a)(3)(B) requires that where the applicable monitoring requirements do not require periodic testing or instrumental or noninstrumental monitoring, periodic monitoring may be required; however, such monitoring must assure the use of terms, test methods, units, averaging periods, and other statistical conventions that are consistent with the applicable requirements.

*(Continued on next page)*

### **EPA's Proposed Change to the Scope of Part 70 Compliance Monitoring**

In its September 2002 proposed rule, EPA proposed to amend the scope of 40 C.F.R. § 70.6(c)(1) by removing the requirement that Part 70 permits contain compliance monitoring requirements consistent with the applicable requirements. Thus, EPA's proposed rule would have allowed federal and state Part 70 permit writers to include monitoring requirements developed on a case-by-case basis. This proposal raised many serious questions, such as, would the monitoring change the underlying emission standards and limitations.

### **EPA's Final Rule on Part 70 Monitoring**

In its final rule, EPA elected not to make any changes to the existing language in 40 C.F.R. § 70.6. EPA stated that it "has determined that the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is that these provisions do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement that may be required under §§ 70.6(a)(3) and 71.6(a)(3)." Instead of allowing Part 70 permit writers to establish new monitoring requirements, EPA announced plans to improve existing monitoring requirements in three ways.

First, EPA plans to encourage states to improve possibly inadequate monitoring in certain SIP rules. It plans to address this monitoring issue in an upcoming rulemaking concerning implementation of the NAAQS for fine particulate matter. EPA indicated that these changes may include increasing the frequency of existing opacity monitoring, adding monitoring for parameters of a control device, installing continuous particulate emissions monitoring, or a combination of all three. Second, EPA plans to identify and consider improving possibly inadequate monitoring in certain federal rules or monitoring in SIP rules not addressed in connection with the fine particulate implementation guidance and rulemaking. These initiatives will be published in an advance notice of proposed rulemaking requesting comments from the regulated community. Third, EPA plans to publish a separate proposed rule to address what monitoring constitutes "periodic" monitoring under 40 C.F.R. § 70.6(a)(3)(1)(B).

### **What Does This Mean for Indiana?**

Indiana's Part 70 rules are patterned after EPA's Part 70 rules and contain requirements equivalent to the requirements in 40 C.F.R. §§ 70.6(a)(3) and 70.6(c)(1). EPA has made a clear statement that the Part 70 rules, apart from the requirement for periodic monitoring, do not authorize new or enhanced monitoring requirements inconsistent with the applicable requirements. This suggests that IDEM, implementing essentially identical rules, also is not authorized to impose monitoring in Part 70 permits that is inconsistent with or supplemental to the applicable requirements.

*Guinn P. Doyle is of counsel in the Environmental Department of Barnes & Thornburg LLP's Indianapolis Office and can be reached at (317) 231-7449 or [guinn.doyle@btlaw.com](mailto:guinn.doyle@btlaw.com).*

### ***Volunteer for the ACE***

Don't know if you can get management approval to attend the entire week? Do you want to be able to volunteer and still listen to technical presentations? If you volunteer for ½ day as a monitor in a technical session, you get the other half free to hear more sessions and/or visit the Exhibit Hall. The volunteer form is available by contacting Chrissy Taft at (317) 352-4624 or [Christina.Taft@nav-international.com](mailto:Christina.Taft@nav-international.com) or Dear Schramm at (317) 352-4790 or [dear.satayathum@nav-international.com](mailto:dear.satayathum@nav-international.com).

## ***IDEM'S INCREASED USE OF "NON-RULE POLICY DOCUMENTS" IN THE REMEDIATION ARENA CREATES CONCERNS***

*By: John M. Kyle III, Esq., Barnes & Thornburg LLP*

Over the last few years, IDEM has resorted to developing an increasing number of "Non-rule Policy Documents" ("NPDs") covering a wide range of important remediation topics including how to install a ground-water monitoring well, how to conduct a "monitored natural attenuation" (MNA) remedy for petroleum sites, and how to deal with "total petroleum hydrocarbons" (TPH). The plethora of remediation NPDs demands that the regulated community devote substantial resources to participate in and comment on these important policies, and raises concerns about IDEM's decision to use NPDs, rather than going through formal rule making, to develop important agency policies.

At the present time, IDEM has either completed, or is working on, NPDs for the following remediation issues:

1. Monitored Natural Attenuation ("MNA") remedies for petroleum contaminated sites. MNA is an increasingly important remedial approach that allows one to monitor natural processes that degrade or attenuate contamination instead of implementing costly, and often ineffective, active remedial approaches. This NPD was presented to the Solid Waste Management Board on February 17 and became effective March 18, 2004.
2. Cleanup levels and implementation guidelines for MTBE, a common gasoline additive. Based on recent toxicology data, IDEM has developed risk-based default closure levels for MTBE in soil and ground water. This NPD would also provide guidance to the regulated community on how to apply these closure levels under RISC guidance or under IDEM's 1994 UST Guidance (for "grandfathered" sites). A key concern is the potential for IDEM to "reopen" and require additional delineation and cleanup at sites which have received a "no further action" letter. This NPD is expected to be presented at the Solid Waste Management Board meeting on April 20.
3. Installation of groundwater monitoring wells. This NPD describes how IDEM wants people to install groundwater monitoring wells at remediation sites. Although some claim IDEM has merely pulled together existing rules, guidance, and past practice into a single document, others believe this NPD also seeks to impose new requirements. Some of the key issues include IDEM's use of such mandatory terms as "must" and "shall" in describing new "requirements" and the prohibition of direct-push technology for compliance and closure monitoring purposes. The Indiana Chamber of Commerce is forming a coalition of affected parties to request that IDEM withdraw this NPD. Please contact Vince Griffin at the Chamber if you are interested in participating in this coalition. This NPD is expected to be presented at the Solid Waste Management Board meeting on April 20.
4. Sampling for metals in groundwater. Historically, IDEM has demanded that facilities take unfiltered samples of ground water when sampling for metals. Many have long complained that unfiltered samples overestimate real-world risk because results are skewed high due to the presence of suspended particles in the sample even though the primary concern is metals that are dissolved in, and therefore migrating with, ground water. IDEM's proposed policy still would not allow filtered samples, but would endorse the growing practice of "low-flow" monitoring, designed to minimize the amount of suspended particles in the sample.

*(Continued on next page)*

5. Total Petroleum Hydrocarbons (TPH). Historically, petroleum-contaminated sites only had to sample for TPH. The new RISC program changed that focus by requiring analysis for specific constituents; for example, when dealing with gasoline, parties are to sample for the primary constituents involved - *i.e.*, BTEX (benzene, toluene, ethylbenzene and xylene). However, there are literally hundreds of constituents that fall under the broad “umbrella” of the term TPH that may or may not pose a risk to human health or the environment under various scenarios. IDEM’s evolving TPH NPD is designed to address these constituents and will create important new “requirements” for the regulated community. This NPD is still in the drafting stage and it is unclear when it will be released for public comment.

**Concerns about the NPD process.**

NPDs are *guidance* documents. They do *not* state binding legal requirements. “Law” is created by the legislature passing statutes that the Governor signs, and by administrative agencies promulgating *regulations* through the formal rulemaking process. The rulemaking process includes several important procedural safeguards that allow the public the opportunity to participate in the development of new rules including publishing a proposed rule in the Indiana Register; providing a formal opportunity for public comment; requiring that IDEM carefully consider and respond to comments; requiring that IDEM evaluate the economic impact of the proposed rule; allowing the public the opportunity to present comments to the appropriate “board” (*i.e.*, the Air Board, the Water Board, or the Waste Board); and formal, final approval of the rule by the board.

Although recent statutory changes have imposed a number of important procedural safeguards on the development of NPDs (*see e.g.*, IND. CODE § 13-14-1-11.5), those safeguards are not nearly as protective as the safeguards that apply to rulemaking. For example, IDEM only has to “present” the NPD to the appropriate board; the board does not have to approve or adopt the NPD, and some argue it has no authority to do so. And although IDEM must now provide the public with an opportunity to comment on NPDs, the procedural safeguards and case law governing IDEM’s duty to consider public comment do not legally apply to NPDs. There is also no legal requirement for IDEM independently to evaluate the economic impact of NPDs. The decision to proceed with an NPD instead of a rule may well save IDEM time and effort, but it substantially changes the regulated community’s legal rights and protections.

An equally if not potentially more serious problem with NPDs is that they are only supposed to be guidance. They do not state legally binding requirements. Nevertheless, once an NPD is finalized, far too many IDEM staff members view the documents as setting forth “requirements” that must be performed. The result is the development of *de facto* requirements without complying with all the safeguards attendant to rulemaking.

This development requires diligence and attention by the regulated community. First and foremost, the public actively needs to participate in the development of these NPDs. Second, the regulated community must constantly remind IDEM that an NPD is only policy that is not legally binding, and that IDEM must be flexible and allow people to vary from these policies when it makes good sense to do so.

(Barnes & Thornburg LLP is hosting a Breakfast Seminar Series titled “Making ‘RISC’ Work for You” that addresses issues associated with Indiana’s Risk-Integrated System of Closure (“RISC”), including the new IDEM NPDs affecting the RISC program that are discussed above. Please refer to Mark Your Calendar on page 17 for more information.)

*John M. Kyle III is a partner in the Environmental Department of Barnes & Thornburg LLP’s Indianapolis Office and can be reached at (317) 231-7284 or [john.kyle@btlaw.com](mailto:john.kyle@btlaw.com).*

## ***Court in Duke Energy Rules on Important PSD Issues***

*By: Laurence A. McHugh, Esq., Barnes & Thornburg LLP*

The U.S. District Court for the Middle District of North Carolina has issued a decision impacting two major issues involved in U.S. EPA's enforcement initiative against the utility industry. *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003). EPA claims that utilities made numerous modifications at their units that should have been subject to preconstruction new source review ("PSD"). The utilities have argued that the changes were exempt from PSD because they consisted of "routine maintenance, repair or replacement" ("RMRR").

The court first addressed the question of whether a particular project must be "routine" with regard to the specific unit or to the industry at large. The court found EPA's argument that only the individual facility's experience should be considered to be totally inconsistent with the legislative history of the PSD provisions of the Clean Air Act and EPA's prior interpretation of the RMRR exemption as established in an earlier case against Wisconsin Electric Power ("WEPCO"). It ruled that the term "modification" must be interpreted under PSD the same as it was under the New Source Performance Standards ("NSPS") and that RMRR must therefore be applied to cover projects that are routine for a source category. The court also ruled that the burden of proof was on EPA to prove that the project did not qualify for the RMRR exemption. The *Duke Energy* ruling conflicts with prior rulings by the Southern District of Indiana in the *SIGECO* case (*U.S. v. S. Ind. Gas and Elec. Co.*, 245 F. Supp. 2d 994 (S.D. Ind. 2003)) and the Southern District of Ohio in the *Ohio Edison* case (*U.S. v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003)).

The second major issue involved the application of the federal five-year statute of limitations to EPA's demand for penalties. In rejecting what is considered the majority rule, the court ruled that because a PSD permit not only governs construction, but also plays a continuing role in regulating operations via the BACT determination and other emission limitations, that failure to obtain a PSD permit is a continuing violation which tolls the running of the statute of limitations.

In addition, the court addressed the issue of how to quantify the emissions increase which would result from a modification, holding that in predicting post-project emissions in tons per year, "the hours and conditions of operation must be held constant," and that an emissions increase can therefore result only from "an increase in the hourly rate of emissions." The court rejected EPA's argument that "increased utilization" must be considered. However it is questionable whether this part of the decision has any precedent in other cases because the court noted that the projects were not subject to, or covered by, the so-call "WEPCO Rule" under which "projected capacity utilization" may clearly be considered.

*Laurence A. McHugh is a partner in the Environmental Department of Barnes & Thornburg LLP's South Bend Office and can be reached at (574) 237-1191 or [larry.mchugh@btlaw.com](mailto:larry.mchugh@btlaw.com).*

A SILENT AUCTION will be held during the Air & Waste Management Association's Annual Conference and Exhibition in Indianapolis on June 22, 2004. Proceeds will benefit the Association's Scholarship Endowment Trust Fund. We will be contacting many organizations to seek donations for the Silent Auction. If you are interested in making such a donation, please contact Harry Williams at (317) 241-2277 for further information. The Scholarship Fund has made 66 awards for over \$243,000 since its inception in 1983.

***This Land Is Your Land, This Land Is My Land***  
***Contiguous Property Owners Must Meet EPA Guidance to be***  
***Protected From Liability***

*By: ICE MILLER, Kristina M. Tridico, Attorney at Law*

**Background of the Brownfields Amendments**

The Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments"), enacted in January 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to provide important liability limitations for certain landowners.<sup>i</sup> However, to take advantage of the liability limitations, property owners must understand the statutory criteria and follow the precautions contained in the Brownfields Amendments.

Generally, under CERCLA, a contiguous property owner whose land has been contaminated by adjacent contaminated lands can be held liable for the contamination at his property. The new contiguous property owner provision, CERCLA § 107(q), provides CERCLA liability protection to landowners who own property that is or may be contaminated, but is not the original source of the hazardous substance contamination. Congress intended this provision to protect landowners "that are essentially victims of pollution incidents caused by their neighbor's actions."<sup>iii</sup>

**Contiguous Property Owner Criteria**

Under the Brownfields Amendments a contiguous property owner may be relieved from liability by meeting the following contiguous property owner conditions:<sup>iii</sup> (1) he did not cause, contribute or consent to the release; (2) he is not potentially liable for response costs because he is affiliated with a person who is liable for the release or is not an owner as a result of a reorganization of a business entity that was potentially liable (successor in interest); (3) he takes reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance release on or from property he owns; (4) he provides full cooperation, assistance and access to those authorized to conduct response actions or natural resource restoration; (5) he is in compliance with land use restrictions and does not impede a response action; (6) he complies with subpoenas and requests for information; (7) he provides all required notices of release; and (8) he conducts "all appropriate inquiry" and does not know, or have reason to know, about the release in the contiguous property at the time of the purchase.<sup>iv</sup> These steps protect contiguous and innocent landowners and prospective purchasers from Superfund liability as long as they can complete the requirements.

However, for a contiguous landowner to be protected from Superfund liability, landowners whose property is contaminated by a release from a neighboring site must prove that they did not cause the pollution and also take steps to stop continuing releases,<sup>v</sup> according to the guidance that the Environmental Protection Agency ("EPA") released January 13, 2004 ("Discretion Guidance").<sup>vi</sup> The Discretion Guidance focuses on these two additional elements of Section 107(q): (1) the landowner did not cause, contribute or consent to the release or threatened release; and (2) the landowner's property is contiguous to, or otherwise similarly situated with respect to, the property from which there is a threat of a release. These requirements distinguish a contiguous property owner from a prospective purchaser. For instance, owners of contiguous sites cannot own the property that contains the source of the contamination. In addition, under the liability provisions of the Brownfields Amendments the prospective purchaser may buy a site with knowledge that it is polluted, but contiguous property owners must purchase a site without knowledge or reason to know that it is contaminated. If the landowner bears some responsibility for the release, he cannot meet the statutory criteria of Section 107(q).

*(Continued on next page)*

The EPA "recognizes that there may be multiple, discrete (*i.e.*, not commingled) releases on a landowner's property, some of which originated on the landowner's property, and others the landowner did not cause or contribute to as they migrated from another property not owned or operated by the landowner. In such cases, although the landowner may not meet the criteria of a contiguous property owner, EPA may exercise its enforcement discretion and not pursue the landowner with respect to the release(s) that migrated from the other property."<sup>vii</sup>

### **"Contiguous" and "Otherwise Similarly Situated With Respect To"**

The Discretion Guidance indicates that "contiguous" has a clear definition,<sup>viii</sup> but notes that neither the statute nor the legislative history defines the phrase "otherwise similarly situated with respect to." EPA's reading of this phrase would allow protection of landowners even if the property is not located immediately next door. EPA will utilize a fact-specific analysis including reviewing whether the landowner's property has been impacted by a release from a contaminated property at a distance in the same or a similar way that it would have been impacted by a release from a contaminated property adjoining the landowner's property. The EPA is relying on previous guidance issued by the agency in 1995 regarding enforcement actions against owners of property that has been impacted by contaminated groundwater migrating from a neighboring source facility, even if that source facility is some distance away.

### **Current and Former Landowners**

The EPA also addresses the application of Section 107(q) to current and former landowners. While recognizing that the liability protection of the Section clearly applies to current owners of property who meet the criteria of that Section, EPA, in exercising its enforcement discretion, may treat former landowners as protected parties, as long as those parties met the statutory criteria of Section 107(q) while they owned the property.

The EPA reminds landowners that the Discretion Guidance is not a regulation and imposes no legal obligations. The Discretion Guidance is intended only as guidance and EPA reserves the right to modify it at any time, and to apply the guidance only to the extent appropriate based on the facts.

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<sup>i</sup> PL 107-118, 2002 HR 2869.

<sup>ii</sup> S. Rep. No. 107-2, at 10 (2001).

<sup>iii</sup> See CERCLA §§ 107(q)(1)(A)(i)-(viii).

<sup>iv</sup> Many of the statutory criteria for a contiguous property owner are discussed in the Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability, Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, U.S. EPA, March 6, 2003 [www.epa.gov/enforcement/superfund](http://www.epa.gov/enforcement/superfund) (click on the topics link "Superfund Cleanup policy and guidance."

<sup>v</sup> Environmental Due Diligence Report, Vol. 13, No. 2, ISSN 1540-6350 (Feb. 19, 2004)

<sup>vi</sup> <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf> (Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners).

<sup>vii</sup> Discretion Guidance, at 5.

<sup>viii</sup> Id. "Black's law Dictionary defines "contiguous" as: "(1) [t]ouching at a point or along a boundary; adjoining. Texas and Oklahoma are contiguous; (2) near in time or sequence; successive. Contiguous thunder and lightning." Black's Law Dictionary 315 (7<sup>th</sup> ed. 1999)."

## ***CITES TO HOLD 33rd ANNUAL ENVIRONMENTAL SYMPOSIUM***

The **Central Indiana Technical and Environmental Societies (CITES)** is pleased to announce their 33rd Annual Environmental Symposium. The Symposium will be held Thursday, April 22, 2004 at The Garrison at the Fort Golf Resort and Conference Center at Fort Harrison State Park, located on the northeast side of Indianapolis, Indiana. CITES presents its annual symposium for the purpose of informing and assisting technical and managerial people in seeking solutions to environmental challenges.

The CITES program committee continually seeks to select timely topics that reflect the ever changing and expanding environmental laws and regulations. Some of the topics for this year include: *IDEM Regulatory Review, a Discussion of NPDES Chlorine Effluent Limits, Insurance Dollars for Cleanups, New Source Review Litigation, Compliance Certification and Title V Permits, PM<sub>2.5</sub>/O<sub>3</sub> Standards Implementation, and IDEM staff presenting their Small Business Environmental Guide.* Continuing a long tradition, Bill Berenak, Jr. of the Indiana Environmental Institute will provide an overview of the hottest environmental issues at that moment. Patrick Bennett of the IMA will provide an up to the minute report on environmental legislative issues.

Please contact the Registration Chairperson, Anne Heighway, at (317) 276-2446 or [aheighway@lilly.com](mailto:aheighway@lilly.com) for a copy of the brochure. Additional contacts are Dear Schramm at (317) 352-4790 or Sue Shadley at (317) 637-0700.

## ***Organizational Membership***

Does your company have several employees active in A&WMA? Would others like to have the opportunity to belong and at the same time save the company money? A&WMA has recently launched a new Organizational Membership. For a fee of \$365.00 a year for the organization (one address), employees at the same address can each join as full members for a \$55.00 annual fee. For more information check out the website at [www.awma.org](http://www.awma.org).

## *New Members/Anniversaries*

### **Please welcome the new International A&WMA members who joined the Indiana chapter in 2003:**

Gupta Anurag, Eli Lilly & Co.  
Samuel Bruntz, Alcoa - Warrick  
Kimberley Davin, IDEM  
Quentin Flory, Ball State University  
Janet Fox, City of Indianapolis / Indiana Greening the Government  
Jeffrey Hege, City of Indianapolis/OES  
Jon Kessen, United Water  
Christopher Kinsey, Compliance Environmental  
Thomas Linder  
Jon Mangles, Eli Lilly & Co.  
Michael McFall, Guide Corporation  
Richard Nelson, Waste Management  
Janna Stathyelich, ERM  
David Tarnowski, Robert Bosch Corporation  
Mark Werthman, Daimler Chrysler

### **Please congratulate the members celebrating membership anniversaries in 2004:**

#### ***25 years***

Keith Baugues, Keramida Environmental  
Patricia Paulus

#### ***15 years***

Martin Thomas, Rose Hulman Institute of Technology

#### ***10 years***

Todd Bigelow, Batesville Casket Company  
Jim Owens, Eli Lilly & Co.  
Rad Scott, Eli Lilly & Co.  
John Wingard

#### ***5 years***

Joanne Alexandrovich, Vanderburgh County Health Dept.  
Pamela Block, Air Quality Services  
Brian Callahan, ERM  
Kevin Carnes, Eli Lilly & Co.  
Richard Lambert, Eli Lilly & Co.  
Chad Salisbury, Eli Lilly & Co.  
Margaret Weinzapfel, Toyota

This is from the A&WMA headquarters membership database. If there was a mistake and we left you off, we're sorry! Please let Bryan Sheets, Membership Chair know, and we will acknowledge you in the next newsletter.

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Measurement Methods and  
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April 20 - 22, 2004  
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**Managing Hazardous  
Wastes in the 21<sup>st</sup> Century:  
Planning for the Changing  
Context**

April 25-27, 2004  
Dorval/Montreal, Quebec,  
Canada

**Hazardous Waste  
Combustors**

May 11-12, 2004  
San Antonio, TX

**Air Quality Modeling: New  
Methods for a New Reality**

May 17-19, 2004  
Toronto, Ontario, Canada

**Regional and Global  
Perspectives on Haze:  
Causes, Consequences and  
Controversies -Visibility  
Specialty Conference**

October 25-29, 2004  
Asheville, NC

**NSR 2004**

**Reform School:  
Understanding the  
Changing World of New  
Source Review**

September 16-17, 2004  
Albuquerque, NM

**Reform School:  
Understanding the  
Changing World of New  
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October 7-8, 2004  
Orlando, FL

*For further information on the  
Specialty Conferences or  
Workshops, visit the A&WMA's  
homepage at*

<http://www.awma.org/events/>

**Mark Your Calendar**

**CITES (Central Indiana Technical and Environmental Societies)**

Annual Environmental Symposium April 22, 2004 - Indianapolis, IN  
Brochures with registration available through Anne Heighway  
[aheighway@lilly.com](mailto:aheighway@lilly.com) or (317) 276-2446

**Earth Day Festival**

11 a.m. - 5 p.m. - April 24, 2004 -  
American Legion Mall - Indianapolis, IN  
[www.earthdayindiana.org](http://www.earthdayindiana.org) (volunteers needed!!)

**Making "RISC" Work for You**

Breakfast Seminar Series - Barnes & Thornburg LLP Conference Center

**Session 2 - April 15, 2004**

RISC Improvements Create New Opportunities for Your Site  
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**Session 3 - June 18, 2004**

Plume Stability and Monitored Natural Attenuation ("MNA")

**Session 4 - August 20, 2004**

How to Sample for Success

For more information or to register contact Dottie Mills at (317) 231-7306 or e-mail  
her at [dmills@btlaw.com](mailto:dmills@btlaw.com).

**Midwestern States Risk Assessment Symposium - August 25-27, 2004**

Hyatt Regency - Indianapolis

For more information contact Brian Wolff at (317) 233-5565 or  
[bwolff@dem.state.in.us](mailto:bwolff@dem.state.in.us)

**Indiana Chamber of Commerce Conferences**

**Project Management I: People, Process and Planning - March 29-30, 2004**

Indiana Chamber Office - Indianapolis

**Mediation by the Numbers: Adding to your Bottom Line - April 13, 2004**

Indiana Chamber Office - Indianapolis

**10<sup>th</sup> Annual Employment Law Seminar - April 14, 2004**

Hyatt Regency - Indianapolis

**Indiana Tax Conference 2004 - April 28 -29, 2004**

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**ADA Compliance Pre-Conference Workshop - May 4, 2004**

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**Indiana Safety & Health Conference & Expo - May 24-25, 2004**

Westin - Indianapolis

**Occupational Spanish for the HR Professional - June 1-2, 2004**

Indiana Chamber Office - Indianapolis

**40<sup>th</sup> Annual HR Conference & Expo - June 3, 2004**

Westin - Indianapolis

**Supervising & Managing People Workshop - June 22-23, 2004**

Indiana Chamber Office - Indianapolis

**Health Care Cost Containment Seminar - June 23, 2004**

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***For more information on conferences and events, visit the Indiana  
Chamber's homepage at [www.indianachamber.com](http://www.indianachamber.com)***



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