

**ALERT**

## **ENVIRONMENTAL**

May 2009

# **Key Environmental Issues Addressed in Newly Enacted HEA 1162**

The Indiana General Assembly unanimously enacted House Enrolled Act (HEA) 1162 on April 29, 2009. The new Act, which will be presented to the Governor for his consideration in the near future, addresses several important environmental issues, including (1) land remediation; (2) antidegradation and total maximum daily loads; and (3) local approvals for projects requiring environmental permits. This document summarizes the provisions of the Act concerning each of these issues. A complete copy of the Act can be found at the following Web site:

[http://www.btlaw.com/files/HB%201162%20conference%20committee%20report%20\(4-29-09\).pdf](http://www.btlaw.com/files/HB%201162%20conference%20committee%20report%20(4-29-09).pdf)

### **Remediation Provisions:**

The remediation provisions in HEA 1162 resolve a number of issues that have arisen in the implementation of Indiana's risk-based environmental remediation programs to make those programs more effective, to better protect human health and the environment, and to foster economic development, including Brownfields redevelopment.

**SECTION 2:** Defines "Environmental Restrictive Ordinance" (ERO) as an ordinance that limits, regulates or prohibits groundwater withdrawal, human consumption and any other use (this provision complements SECTION 18 below, which requires IDEM to recognize EROs in risk-based remediation proposals).

**SECTIONS 4, 6 and 7:** Facilitate redevelopment of sites contaminated by petroleum by extending bona fide prospective purchaser (BFPP) and contiguous landowner protections to petroleum-contaminated sites (currently only apply to "hazardous substances," which does not include petroleum). Among other things, these changes would allow the Indiana Brownfields Program to issue a comfort letter to an eligible purchaser of a petroleum-contaminated brownfield site to inform the purchaser of the steps it needs to take to maintain its status as a non-labile party under state law.

**SECTION 8:** Amends the definition of "Restrictive Covenant" (ERC) to require inclusion of additional information in ERCs adopted after June 30, 2009 – to grant IDEM access to the property; to require notice of the existence of the ERC during property transfers; and to identify the location of the

IDEM files related to the property. These additions complement the provisions in SECTIONS 10 and 11 (see below) limiting IDEM's authority to review and approve ERCs.

**SECTION 9:** Strengthens the state's statutory commitment to the risk-based principles of the Voluntary Remediation Program (VRP) statute (IC 13-25-5-8.5 as amended by SECTION 18 below) by extending those principles to all remediation programs, including RCRA (IC 13-22), USTs (IC 13-23), petroleum cleanups (IC 13-24), and state cleanup (IC 13-25-4). Makes it clear that these clarifications apply to sites that are already entered in a remediation program, as well as those that enter a program in the future.

**SECTIONS 10 and 11:** Define IDEM's authority to review ERCs. After June 30, 2009, IDEM will no longer have legal authority to review and approve the entire ERC document, but will be limited to reviewing and approving the activities and land use restrictions included in the ERC.

**SECTION 18:** Makes several important changes to the risk-based objectives in the VRP statute (IC 13-25-5-8.5), including:

- Provides that the risk-based objectives of the program extend to the statutory requirement to characterize the nature and extent of contamination.
- Provides that IDEM shall allow site-specific risk assessments to include remedial measures, ERCs and EROs that manage risk and control completed or potential exposure pathways.
- Requires IDEM to consider and give effect to ERCs and EROs in evaluating risk-based remediation proposals.

Makes it clear that these clarifications apply to sites that are already entered in the VRP, as well as those that enter the VRP in the future.

**SECTION 19:** Makes clarifying amendment to VRP Covenant not to Sue reopener (clerical only), and clarifies that IDEM can include conditions that must be performed or maintained after issuance of Covenants not to Sue and Certificates of Completion (also known as "conditions subsequent").

**SECTIONS 21 through 26:** Improve local government's ability to create environmental restrictive ordinances that serve as institutional controls, so IDEM will recognize EROs in evaluating remediation proposals. Requires that a local government must provide advance notice to IDEM before considering repeal or amendment of an ERO, so that IDEM may determine how such action might affect a remediation that relies on the ERO.

**SECTION 27:** Tasks the Environmental Quality Service Council (EQSC) to study and develop recommendations concerning the advisability of establishing an Institutional Control Registry Program and Environmental Trust Fund. The remediation bill as introduced would have created a statewide registry of ERCs and EROs in Indiana, and a user-fee-funded program to monitor and ensure compliance with ERCs recorded in deed records that restrict certain activities and land uses as part of a risk-based clean-up. During session, concerns were raised about which state agency (Indiana Finance Authority or IDEM) should manage this program, and the elements necessary to make the program successful. Therefore, these provisions were removed from the bill and replaced with an obligation for EQSC to study the issue this summer.

## **Total Maximum Daily Load and Antidegradation Provisions:**

HEA 1162 establishes policy and provides important direction to IDEM in the establishment of Total Maximum Daily Loads (TMDLs) for impaired waters, and in the development of antidegradation rules for surface waters.

**SECTION 14:** Ensures that due process is afforded regarding IDEM's decisions about which pollutants are impairing surface waters. Provides that when IDEM develops the Section 303(d) list of impaired waters, it must make every reasonable effort to identify the pollutants for which a particular waterbody is impaired. States that if IDEM is not able to identify the pollutants on the impaired waters list, it shall do so before developing a TMDL for the waterbody. Establishes notice and comment requirements for interested parties to participate in the decision-making process.

**SECTION 15:** Makes several important additions to the state's policy concerning antidegradation, which is a review process required by federal law to afford an additional level of protection to surface waters that possess quality that is better than water quality standards.

- Requires IDEM to complete an antidegradation review of all NPDES general permit rules. Once that antidegradation review is conducted, activities that are authorized under a general permit are not required to undergo additional antidegradation review. This process will ensure that activities eligible for general permits will not face unnecessary permitting delays.
- Provides that antidegradation review involves two demonstrations: (1) an alternatives analysis; and (2) social and economic factors indicating the importance of the proposed discharge.
- Establishes a comprehensive list of social and economic factors that IDEM must consider in the antidegradation review process.
- Provides that in determining whether a proposed discharge is necessary to accommodate important social or economic development, IDEM must give substantial weight to any applicable determinations by other state or local governments.
- States that the 11 waters that are presently designated "Exceptional Use Waters" will become "Outstanding State Resource Waters" on June 1, 2009. The "Exceptional Use Waters" designation ceases to exist on June 1, 2009.

**SECTION 16:** Provides that IDEM must conduct the antidegradation review for the project within the same timeframe as it has to issue the NPDES permit, except that IDEM may extend the period for cause by no more than 90 days.

**SECTION 17:** In this section concerning the Outstanding State Resource Water Improvement Fund, adds a requirement that IDEM provide an annual report to EQSC about use of money in the fund to implement overall improvement projects.

**SECTIONS 1, 3, 5, 13 and 28:** Make conforming amendments to various definitions and other provisions concerning antidegradation.

## **Local Government Provisions:**

**SECTION 12:** Provides that if IDEM has issued an environmental permit to a project, that project cannot commence unless local approvals have been obtained. Clarifies that the local requirements that apply are those that are in existence at the time the application for the IDEM permit is filed.

**SECTION 20:** Provides that regional districts for water, sewage and solid waste may adopt ordinances to disburse money, and that the fiscal officer of the board may pay certain expenses without prior approval of the entire board.

### **Contact Us**

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