

# Citizen Standing in Environmental Licensing Procedures: Not In My Neighborhood!

## I. INTRODUCTION

In today's highly industrialized, waste producing society, the efficient, safe treatment and disposal of wastes is critical to the public health and to environmental integrity. Modern publications are replete with accounts of the disastrous consequences of unsound waste treatment and disposal practices.<sup>1</sup>

Legislatures have created administrative agencies to administer the extensive, complex laws that govern treatment and disposal of the various kinds of waste. The United States Environmental Protection Agency is the primary federal agency.<sup>2</sup> In Indiana, these agencies include the Environmental Management Board,<sup>3</sup> Air Pollution<sup>4</sup> and Stream Pollution

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<sup>1</sup>See, e.g., S. EPSTEIN, M.D., L. BROWN, & C. POPE, *HAZARDOUS WASTE IN AMERICA* (1982). This book describes many of America's waste disposal mistakes, including the infamous Love Canal disaster which occurred in Niagara Falls, New York. *Id.* at 90-132. Indiana has not escaped the effects of unsound waste management. For example, several sites in Monroe County, Indiana, are extensively contaminated with polychlorinated biphenyls (PCBs), which are toxic chemicals and suspected carcinogens. See *Bloomington Herald-Telephone*, Dec. 6, 1984, at 1, col. 1. These chemicals were used by the Westinghouse Corporation to manufacture electrical capacitors at its Bloomington, Indiana plant from 1958 until the 1970's. *Id.*

<sup>2</sup>The EPA was created under a presidential reorganization plan that transferred to the new agency certain functions previously performed by the Secretary of Interior, Department of Interior, Secretary of Health Education and Welfare, and Department of Health Education and Welfare. Reorg. Plan. No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), *reprinted in* 5 U.S.C. app. 1132 (1982), *and in* 84 Stat. 2086 (1970).

<sup>3</sup>The Environmental Management Board was created under IND. CODE § 13-7-2-1 (1982) (repealed effective July 1, 1986). The Board's duties include: (1) evolving and keeping updated a long-term plan for protection of the environment; (2) developing and promulgating regulations to protect the environment; (3) procuring compliance with the regulations; (4) surveying and inspecting solid waste management sites, public water supplies, and actual or threatened sources of environmental pollution; and (5) encouraging and assisting local governments in developing programs and facilities for pollution control. IND. CODE § 13-7-3-1 (1982) (repealed effective July 1, 1986). Regulations promulgated by the Board include the Hazardous Waste Management Program, 320 IND. ADMIN. CODE 4.1-1-1 to 4.1-56-3, promulgated at 8 Ind. Reg. 1721 (1985), and the Solid Waste Management Program, 330 IND. ADMIN. CODE 4-1-1 to 4-9-5 (1984). The Environmental Management Board will hereinafter be referred to as the "EMB."

<sup>4</sup>The Air Pollution Control Board was created under IND. CODE § 13-1-1-3 (Supp. 1985). The Board's powers and duties include: (1) adopting and promulgating reasonable rules to maintain air quality; (2) making investigations, considering complaints, and holding hearings; and (3) entering orders or determinations to protect the air quality. IND. CODE § 13-1-1-4 (Supp. 1985). The Board has promulgated extensive regulations pursuant to its powers. See 325 IND. ADMIN. CODE 1.1-1-1 to 14-6-1 (1984 & Supp. 1985).

Control Boards,<sup>5</sup> the Department of Natural Resources,<sup>6</sup> the Natural Resources Commission,<sup>7</sup> and the Solid Waste Facility Site Approval Authority.<sup>8</sup> Collectively, these agencies are responsible for licensing the operations that may seriously harm the public health and the environment. Many of these operations involve generation, treatment, storage, or disposal of wastes and include sanitary landfills,<sup>9</sup> hazardous waste management facilities,<sup>10</sup> domestic and industrial wastewater treatment

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<sup>5</sup>The Stream Pollution Control Board is the oldest of the environmental agencies, having been established in 1943. IND. CODE § 13-1-3-1 (Supp. 1985). The Board has the power to bring any action in law or equity necessary to protect the waters of the state. IND. CODE § 13-1-3-5 (Supp. 1985). The Board also has the power to make regulations and issue orders restricting the pollution content of any material discharged into the waters of the state. IND. CODE § 13-1-3-7 (Supp. 1985). Regulations promulgated by the Board include the Wastewater Treatment Facility Permit Program. 330 IND. ADMIN. CODE 3.1-1-1 to 3.2-1-13 (1984).

The 1985 Indiana General Assembly enacted legislation that creates an environmental super-agency, the Department of Environmental Management, and redefines the duties of the Air and Stream Pollution Control Boards, and the Environmental Management Board. Pub. L. No. 143-1985. This new legislation will be discussed *infra* at text accompanying notes 194-236.

<sup>6</sup>The Department of Natural Resources is charged with enforcement of state laws relating to fisheries, forests, and game. IND. CODE § 14-3-1-1 (1982). The Department has the power to: (1) regulate forestry, IND. CODE § 14-3-1-13 (1982); (2) regulate conduct in state parks and forests, IND. CODE § 14-3-1-14 (Supp. 1985); (3) prevent pollution of lakes, *id.*; (4) regulate fishing and hunting; *id.*; and (5) regulate drainage and reclamation of lands, IND. CODE § 14-3-1-15 (1982).

<sup>7</sup>The Natural Resources Commission exists pursuant to IND. CODE § 14-3-3-3 (Supp. 1985). The Commission's primary responsibility is natural resource conservation, such as water, land, oil, gas, forest, and wildlife conservation. IND. CODE § 14-3-3-8 (1982).

<sup>8</sup>The Solid Waste Facility Site Approval Authority was created in 1981 pursuant to IND. CODE § 13-7-8.6-3 (1982). This agency will soon be called the Hazardous Waste Facility Site Approval Authority. IND. CODE § 13-7-8.6-3 (Supp. 1985) (effective July 1, 1986). The Authority's primary responsibility is to issue or deny a certificate of environmental compatibility to a hazardous waste facility that is to be located in the state. *See* IND. CODE § 13-7-8.6-5 (1982).

<sup>9</sup>A sanitary landfill is generally a level area of land that is excavated then filled with non-hazardous waste. The waste is spread thin, compacted, and covered with soil at the end of each day. The wastes disposed of at these facilities generally constitute domestic garbage.

<sup>10</sup>Management of hazardous wastes includes their treatment, storage, and disposal. Hazardous wastes are those which are so defined by the United States Environmental Protection Agency. 40 C.F.R. §§ 261.1 to 261.33 (1984). Indiana has adopted the federal hazardous waste lists. 320 IND. ADMIN. CODE 4.1-3-1 to 4.1-6-4, promulgated at 8 Ind. Reg. 1728-57 (1985). Under Indiana law, hazardous wastes are also defined as those which, due to their quantity, concentration, or physical, chemical, or infectious characteristics, may: (1) cause or contribute to an increase in mortality or increase in serious illness; or (2) pose "a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." IND. CODE § 13-7-1-2(a)(17) (1982) (repealed and reenacted at IND. CODE § 13-17-1-12) (Supp. 1985) (effective July 1, 1986). The most common hazardous waste disposal facility is a landfill.



plants,<sup>11</sup> and industries which emit air contaminants.<sup>12</sup>

Because of the tremendous impact environmental licensing decisions may have on local communities and private citizens, these entities are questioning the soundness of the decisions made by the licensing agencies. Those who question the licensing decisions are essentially saying, "Yes, we recognize that these facilities are necessary, but they don't belong in *our* neighborhood." To add legal bite to their objections, communities and citizens must first clear a major hurdle, however, by establishing their standing to participate in, and seek judicial review of, an environmental agency's decision to issue a permit or license. In Indiana, the standing issue was recently resolved in favor of the citizen objector in *Indiana Environmental Management Board v. Town of Bremen*.<sup>13</sup>

In that case, the town of Bremen, Indiana, and various individual citizens sought to prevent the Environmental Management Board's issuance of a permit for the operation of a sanitary landfill near the town.<sup>14</sup> The plaintiffs claimed the aquifer below the proposed landfill would be contaminated, and other deleterious health and environmental effects would result from the operation of the landfill.<sup>15</sup> During a public hearing, the plaintiffs protested the permit's issuance, but to no avail. When the EMB issued the permit, the plaintiffs brought suit for judicial review of that administrative agency action. The *Town of Bremen* court held that the plaintiffs had standing to sue, and that their due process rights had been violated by the agency's failure to follow the proper procedure in issuing the permit.<sup>16</sup> The court failed, however, to state how and why the plaintiffs' asserted injuries satisfied state standing requirements.

This Note will present the state statutes relevant to resolution of the citizen standing issue addressed in *Town of Bremen*.<sup>17</sup> Four facets of *Town of Bremen* will then be discussed in detail: the decision itself, the permit issuance procedure it prescribes, the court's faulty rationale, and the decision's potentially adverse impact. The 1985 legislative response to *Town*

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<sup>11</sup>Generally, wastewater treatment plants remove contaminants from domestic and industrial wastewater and discharge the treated water into streams and rivers. Domestic wastewater is more commonly known as sewage. Industrial wastewater is generated, for example, in steel manufacturing and metal plating process.

<sup>12</sup>These types of industries include steel mills, oil refineries, copper smelters, automobile manufacturing plants, and power plants.

<sup>13</sup>458 N.E.2d 672 (Ind. Ct. App. 1984), *transfer denied*, May 3, 1984.

<sup>14</sup>*Id.* at 673.

<sup>15</sup>Brief for Appellee Dale Sherk at 26-27, Brief for Appellee Town of Bremen at 2-3, *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672 (Ind. Ct. App. 1984).

<sup>16</sup>458 N.E.2d at 675.

<sup>17</sup>Cases and issues arising under the National Environmental Policy Act are not within the scope of this Note. 42 U.S.C. §§ 4321-4370a (1982). Indiana has specifically excluded the issuance of permits from its state environmental policy act's scope. See IND. CODE § 13-1-10-6 (1982).

of *Bremen* and the shortcomings of that legislation will next be examined. The conclusion of this Note will propose several remedies for the potentially adverse impact of both the *Town of Bremen* decision and the legislation recently enacted.

## II. JUDICIAL AND LEGISLATIVE REQUIREMENTS FOR STANDING

### A. Preliminary Considerations

The standing requirements set forth by the United States Supreme Court and Indiana state courts are similar. Indiana's judicial standing requirements are applicable to state administrative proceedings.<sup>18</sup> A brief review of basic standing principles is essential for an understanding of this Note's analysis of *Town of Bremen*.

The Supreme Court's standing rules derive from its interpretation of the United States Constitution's "case" or "controversy" requirement and from the Court's prudential considerations.<sup>19</sup> In general, a plaintiff has standing to bring suit and challenge an administrative agency's action if he can show an injury in fact and can show that such injury affected an interest within the zone of interests protected by the statute the agency has allegedly violated.<sup>20</sup> "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action."<sup>21</sup> The "injury in fact" requirement is most pertinent to discussion of the *Town of Bremen* decision because the court overlooked this fundamental standing requirement. In other words, the court should have required that the *Town of Bremen* plaintiffs show that the licensing of the landfill by the EMB would in fact cause them harm.

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<sup>18</sup>Indiana Alcoholic Beverage Comm'n v. McShane, 170 Ind. App. 586, 596, 354 N.E.2d 259, 266 (1976).

<sup>19</sup>U.S. CONST. art. III, § 2. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). Indiana's constitution states that "[a]ll courts shall be open; and every man for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. I, § 12. See also Donato v. Dutton, Kappes & Overman, 154 Ind. App. 17, 288 N.E.2d 795 (1972).

<sup>20</sup>Sierra Club v. Morton, 405 U.S. 727 (1972). Indiana's standing requirements are the same. See, e.g., State ex rel. State Bd. of Tax Comm'rs v. Marion Superior Court, 271 Ind. 374, 392 N.E.2d 1161 (1979) (plaintiff must show a demonstrable injury); Terre Haute Gas Corp. v. Johnson, 221 Ind. 499, 45 N.E.2d 484 (1943) (plaintiff must show he has sustained or is in immediate danger of sustaining a direct injury); Cablevision of Chicago v. Colby Cable Corp., 417 N.E.2d 348 (Ind. Ct. App. 1981) (plaintiff must show his injury to a present interest is more than a remote possibility).

<sup>21</sup>United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688-89 (1973).



### B. *The Statutes*

The *Town of Bremen* court based its decision on the Administrative Adjudication Act<sup>22</sup> and the Environmental Management Act.<sup>23</sup> Therefore, an in-depth discussion of that decision will require careful examination of the relevant provisions in these two acts.

1. *The Administrative Adjudication Act (AAA)*.—The AAA sets forth the basic procedures to which virtually all state administrative agencies must adhere.<sup>24</sup> It is a complex statute that has grown increasingly difficult to apply because it has not been substantially revised since its enactment in 1947.<sup>25</sup>

The pertinent provisions for study of the *Town of Bremen* problem concern procedures for administrative agency decisionmaking and judicial review of administrative decisions made. The overall purpose of the AAA is:

. . . to establish a uniform method of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency and to establish a uniform method of court review of all such administrative adjudication.<sup>26</sup>

A license is “any agency permit, certificate, approval, registration, charter, membership, or other form of permission.”<sup>27</sup> An administrative adjudica-

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<sup>22</sup>IND. CODE § 4-22-1-1 to -30 (1982 & Supp. 1985).

<sup>23</sup>IND. CODE § 13-7-1-1 to § 13-7-19-3 (1982 & Supp. 1985). The Environmental Management Act was substantially amended in 1985. See Pub. L. No. 143-1985, § 71-178 and 207, which sections become effective on July 1, 1986.

<sup>24</sup>Excluded agency actions are set forth in section two's definition of “administrative adjudication.” IND. CODE § 4-22-1-2 (Supp. 1985). The Department of Revenue is entirely excluded under the definition of “agency.” *Id.*

<sup>25</sup>1947 Ind. Acts 1451. The AAA was patterned after the Model State Administrative Procedure Act of 1944. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, Commissioner's Prefatory Note, 14 U.L.A. 362 (1980). The framers of the model act have twice rewritten that Act entirely, having adopted a new model act in 1961, *id.* at 371, and again in 1981. *Id.* at 73 (Supp. 1985). The drafters of the newer model acts have opined that each major revision was necessary in view of the rapidly increasing involvement of administrative law in everyday modern life. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, Commissioner's Prefatory Note, 14 U.L.A. 363 (1980) and 14 U.L.A. 75 (Supp. 1985). The Indiana legislature, nevertheless, has made no significant revision in the AAA since it was enacted almost forty years ago. This failure to update the AAA is one valid explanation for its undue complexity and ambiguity. The 1985 Indiana General Assembly did, however, create a commission whose purpose is to recodify and revise the AAA. Pub. L. No. 361-1985.

<sup>26</sup>IND. CODE § 4-22-1-1 (1982).

<sup>27</sup>IND. CODE § 4-22-1-2 (Supp. 1985). The terms “license” and “permit” will be used interchangeably in this Note.

tion is defined as "the administrative investigation, hearing, and determination of any agency of issues or cases applicable to particular persons."<sup>28</sup> If an agency's act meets this definition,<sup>29</sup> the AAA governs because section three states, "[i]n every administrative adjudication in which the rights, duties, obligations, privileges or other legal relations of any person are required or authorized by statute to be determined by any agency the same shall be made in accordance with this chapter and not otherwise."<sup>30</sup> The AAA applies to "all interested persons or parties" who desire an opportunity to settle or adjust "all claims, controversies and issues."<sup>31</sup> The AAA, however, "shall not apply to the proceedings for the issuance of licenses or permits on application, but the procedure for such license or permit . . . shall be under the provisions of the law relating to the particular agency."<sup>32</sup> Therefore, prior to the decision to issue a permit, the agency's enabling statute and regulations govern the permit application procedure and provide standards that must be met before the permit can be issued. Once the agency decides to issue a permit, however, the AAA fully applies to any further license-related proceedings.

The AAA has been described as a bifurcated statute, with sections three through thirteen covering proceedings before an agency, and sections fourteen through nineteen governing judicial review of an administrative decision.<sup>33</sup> Hence, while the issue or controversy is before the agency, the Act's first part governs the agency's proceedings.<sup>34</sup> Once the agency has rendered its decision, the Act's latter part governs court review of that decision.<sup>35</sup>

Due process and the AAA require that those persons affected by an agency's decision be given notice that a decision has been made.<sup>36</sup> The AAA is unclear as to how and when this notice must be given under various circumstances.<sup>37</sup> Under the version of section twelve that was in

<sup>28</sup>IND. CODE § 4-22-1-2 (Supp. 1985). A "person" is defined as "any person, firm, association, partnership, or corporation. It shall also include municipalities and all political subdivisions of government against which any agency may make an order or determination." *Id.*

<sup>29</sup>The definition of administrative adjudication does, however, exclude several specific actions taken by particular agencies. *See* IND. CODE § 4-22-1-2 (Supp. 1985).

<sup>30</sup>IND. CODE § 4-22-1-3 (Supp. 1985).

<sup>31</sup>IND. CODE § 4-22-1-4 (1982).

<sup>32</sup>IND. CODE § 4-22-1-24 (Supp. 1985).

<sup>33</sup>*Warram v. Stanton*, 415 N.E.2d 114 (Ind. Ct. App. 1981); *Zehner v. Indiana State Alcoholic Beverage Comm'n*, 173 Ind. App. 600, 364 N.E.2d 1037 (1977).

<sup>34</sup>*Warram*, 415 N.E.2d at 116; *Zehner*, 173 Ind. App. at 604, 364 N.E.2d at 1039-40.

<sup>35</sup>*Warram*, 415 N.E.2d at 116; *Zehner*, 173 Ind. App. at 604, 364 N.E.2d at 1039-40.

<sup>36</sup>U.S. CONST. amend. XIV, § 1; IND. CODE § 4-22-1-1 (1982) (one purpose of the AAA is to provide for due notice and an opportunity to be heard); IND. CODE § 4-22-1-12 (1982) (notice of all final orders and determinations shall be given promptly to all parties) (this section was recently amended; *see infra* note 38); IND. CODE § 4-22-1-25 (Supp. 1985) (notice shall be provided to all persons affected by an agency's initial determination).

<sup>37</sup>*See infra* text accompanying notes 186-87.



effect when *Town of Bremen* was decided, “[n]otice of all final orders and determinations shall be given promptly to all parties to the hearing by the agency.”<sup>38</sup> Section fourteen further provides that the fifteen-day period during which judicial review may be initiated does not begin to run until notice of the decision or determination has been received.<sup>39</sup> While former section twelve and present section fourteen are not ambiguous as to final agency decisions, section twenty-five, a dispositive provision in *Town of Bremen*, applies to initial decisions and confuses the most diligent reader.

Section twenty-five provides:

(a) In matters where no order or determination can be made requiring a person to do or refrain from doing an act including, but not in limitation thereof, the issuance of licenses, assessment or determination of taxes or other liability, or the determination of status, any agency may notify the person or persons who will be affected by any initial determination by such agency by registered letter, return receipt requested, or in person, that as a result of an investigation made by such agency a certain determination is recommended and on the expiration of a time fixed but not less than fifteen (15) days, such determination will be made unless objections are filed within said time. . . .<sup>40</sup>

This provision indicates that a licensing proceeding is not a matter in which an order or determination can be made requiring a person to do or refrain from doing an act. This section thus appears to be internally inconsistent because, when a license is required, one must refrain from doing the act governed by the license unless a valid license has been issued. In a licensing proceeding, the agency must notify those who will be affected by its

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<sup>38</sup>IND. CODE § 4-22-1-12 (1982). This section was amended in 1984 and now no longer requires that notice of final orders and determinations be given. IND. CODE § 4-22-1-12 (Supp. 1985).

<sup>39</sup>IND. CODE § 4-22-1-14 (Supp. 1985). Thus, although IND. CODE § 4-22-1-12 no longer requires notice of final orders and determinations, section fourteen implicitly requires that such notice be given. Otherwise, the fifteen-day time period during which a petition for judicial review may be filed would never commence.

<sup>40</sup>IND. CODE § 4-22-1-25 (Supp. 1985). This section continues:

In the event no objections are so filed, or in the event that objections are specifically waived in writing, the agency may enter the recommended determination without further notice and without hearing.

(b) If objections are filed, full opportunity shall be afforded for the adjustment or settlement of such matter, controversy, or issue, and if such settlement or adjustment is made, the same shall stand as the determination without further notice or hearing. In the event no adjustment or settlement is so arrived at, then proceedings and hearings shall be had as provided in this chapter.

initial decision.<sup>41</sup> The affected persons may then object and may eventually obtain judicial review of the initial agency decision.<sup>42</sup>

Section fourteen of the AAA states the basic standing requirements to bring an action for judicial review of an agency's decision. It provides that "[a]ny party or person aggrieved by an order or determination made by any such agency shall be entitled to judicial review thereof in accordance with the provisions of this chapter. . . ."<sup>43</sup> Therefore, the standing test to bring an action for judicial review turns on the definition of a "person aggrieved" by an agency decision. Because Indiana judicial standing requirements apply in administrative proceedings,<sup>44</sup> an "aggrieved person" is necessarily a person who has suffered or will suffer an actual injury as a result of the agency's action.<sup>45</sup>

Section eighteen instructs the reviewing court that it shall not set aside the agency's decision unless the decision is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence.<sup>46</sup>

In reviewing the agency's decision, the court may not determine the cause *de novo*, but shall only consider the record filed with the court.<sup>47</sup> This record consists of a "transcript of testimony adduced" at an administrative adjudicatory hearing, "exhibits admitted" at the hearing, and "all pleadings, exceptions, motions, requests and papers filed."<sup>48</sup>

The last AAA provision pertinent to discussion of *Town of Bremen* is the "conflict of laws" section.<sup>49</sup> When *Town of Bremen* was decided, this section provided that the AAA superseded or controlled any other law, whether enacted prior to or after enactment of the AAA.<sup>50</sup> Therefore, the AAA's requirements had to be read into any procedures set forth by an agency's enabling statute.

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<sup>41</sup>The term "may" in IND. CODE § 4-22-1-25 is mandatory, not permissive. *Grether v. Indiana State Bd. of Dental Examiners*, 239 Ind. 619, 623, 159 N.E.2d 131, 133 (1959).

<sup>42</sup>IND. CODE §§ 4-22-1-25, -14, and -30 (Supp. 1985).

<sup>43</sup>IND. CODE § 4-22-1-14 (Supp. 1985).

<sup>44</sup>See *supra* note 18 and accompanying text.

<sup>45</sup>See *supra* notes 20-21 and accompanying text.

<sup>46</sup>IND. CODE § 4-22-1-18 (Supp. 1985).

<sup>47</sup>*Id.*

<sup>48</sup>IND. CODE § 4-22-1-9 (1982).

<sup>49</sup>IND. CODE § 4-22-1-30 (Supp. 1985).

<sup>50</sup>IND. CODE § 4-22-1-30 (1982). Effective February 29, 1984, this section provides that the AAA's requirements prevail over any law "passed by the general assembly in 1947,



2. *The Environmental Management Act (EMA)*.—The Indiana legislature enacted the EMA in 1972, thereby creating the Environmental Management Board, the state agency involved in *Town of Bremen*.<sup>51</sup> Chapter ten of the EMA prescribes procedures for licensing pollution control facilities.<sup>52</sup> One provision gives the public the opportunity to voice its concerns about the potential licensing of a hazardous waste or solid waste disposal facility.<sup>53</sup> More specifically, this section provides:

(b) A public hearing shall be held on the question of the issuance of an original or renewal permit for a hazardous waste disposal facility under IC 13-7-8.5, or on the question of the issuance of an original permit for a solid waste disposal facility upon:

- (1) the request of the applicant;
- (2) the filing of a petition requesting a public hearing that is signed by one hundred (100) adult individuals who:
  - (A) reside in the county where the proposed or existing facility is or is to be located; or
  - (B) own real property within one (1) mile of the site of the proposed or existing facility; or
- (3) the motion of the [agency].

The public hearing authorized by this subsection does not constitute an administrative adjudication under IC 4-22-1.<sup>54</sup>

This hearing, as expressly stated in the statute, is not the administrative adjudicatory hearing to which the AAA grants the right to judicial review.<sup>55</sup>

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regardless of whether such statute or statutes were passed before or after March 14, 1947.” IND. CODE § 4-22-1-30 (Supp. 1985). The effect of this section is now unclear. The amendment appears to eliminate the AAA’s super-act status regarding administrative procedures. Nevertheless, section three, to which the 1984 legislature made only a minor amendment, continues to provide that administrative adjudications shall be conducted in accordance with the AAA, “and not otherwise.” IND. CODE § 4-22-1-3 (Supp. 1985) (emphasis added).

<sup>51</sup>IND. CODE § 13-7-1-1 to § 13-7-19-3 (1982 & Supp. 1985) (substantially amended by Pub. L. No. 143-1985, effective July 1, 1986). Not only did the legislature create the EMB by passing the EMA but it made two pre-existing environmental agencies, the Stream and Air Pollution Control Boards, subservient in some respects to the new agency. The EMB became an environmental super-agency because it has the power to establish priorities and coordinate the functions and services of the Air and Stream Pollution Control Boards. IND. CODE § 13-7-2-9 (1982) (repealed effective July 1, 1986).

<sup>52</sup>IND. CODE § 13-7-10-1 to -5 (1982 & Supp. 1985). This chapter was substantially amended in 1985. See *infra* notes 196-208 and accompanying text for a discussion of these amendments.

<sup>53</sup>IND. CODE § 13-7-10-2 (Supp. 1985).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* At the public hearing, interested persons may informally comment on the question of permit issuance. The hearing is not an adversary proceeding. Generally, the testimony is not transcribed. See *infra* note 97 for a brief description of an adjudicatory hearing.

The public hearing is held on request, after the agency's staff has made its recommendation to the EMB that the permit should be issued.<sup>56</sup> After the public hearing, the EMB decides whether the permit should be issued. No EMA provision addresses the weight to be accorded the comments received at the public hearing, nor requires that the comments be considered at all.

Appeal from the agency's final decision to issue or deny a permit is governed by Indiana Code section 13-7-10-4, which states:

(a) If a permit is denied or if the permit is issued with terms and conditions which are objectionable to the applicant, the applicant may petition for a hearing before the board or appropriate agency within fifteen (15) days after the date of receipt of the permit or notice of a denial of permit. Such a petition which is timely and which complies with any other requirements of the board or appropriate agency shall be granted. A person aggrieved by the denial of a petition for hearing or by the denial or issuance of a permit after hearing may seek judicial review thereof pursuant to IC 13-7-17. . . .<sup>57</sup>

This provision clearly grants a permit applicant the right to judicial review if his permit application is denied or if he is issued a permit with objectionable conditions.<sup>58</sup> The reference to code chapter 13-7-17, however, raises questions in interpreting the standing requirements of section 13-7-10-4.<sup>59</sup>

Section 13-7-17-1 states that "[a]ny person aggrieved by any final order or determination of the [sic] one (1) of the boards, may proceed under

<sup>56</sup>IND. CODE § 13-7-10-2 (Supp. 1985).

<sup>57</sup>This section finishes:

For the purposes of making such an appeal, the date of denial of the petition for hearing under this section is the date of the final determination of the board or agency.

(b) At a hearing under this chapter, the petitioner has the burden of proving to the board or agency;

(1) why the permit should be issued; or

(2) why the terms and conditions of the permit are not justified or are otherwise invalid.

(c) The board or appropriate agency may designate a person to be a hearing officer. Except as provided in this section, hearings will be conducted under IC 4-22-1.

IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986). This section is essentially replaced by IND. CODE § 13-7-10-2.5 (Supp. 1985) (effective July 1, 1986). The new section is extensively discussed at *infra* notes 197-236 and accompanying text.

<sup>58</sup>IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986).

<sup>59</sup>Indiana Env'tl. Management Bd. v. Town of Bremen, 458 N.E.2d 672, 674-75 (Ind. Ct. App. 1984).



[the AAA] to obtain a judicial review.”<sup>60</sup> Thus, the aggrievement standing requirement under the EMA is the same as that under section fourteen of the AAA; a person must be *aggrieved* by the agency action before he may bring suit for judicial review of that action.<sup>61</sup>

3. *The Citizen Suit Statute.*—The “citizen suit statute”<sup>62</sup> also addresses standing in the environmental context. Although the *Town of Bremen* court did not discuss this statute, the court did rely on a case which interpreted it.<sup>63</sup> This chapter, entitled “Standing to Sue,” grants virtually everyone the right to bring suit “for the protection of the environment of the state from significant pollution, impairment or destruction.”<sup>64</sup> No such action may be brought, however, unless certain procedural prerequisites are met.<sup>65</sup> The person intending to sue must first notify the appropriate agency of that intent.<sup>66</sup> The agency must then be given an opportunity to remedy the alleged problem because the statute states:

No action shall be maintained under this chapter unless the administrative agency to whom such notice was given and having jurisdiction as set out in subsection (a) fails to investigate and conduct a hearing to determine whether or not the accused is a pollutor as defined by law or regulation. The complainant shall be joined as a party. If the agency fails to hold a hearing and make a final determination within one hundred eighty (180) days after receipt of notice by the Attorney General as provided in subsection (a), action may be maintained and such agency need not be joined as a party defendant.<sup>67</sup>

The citizen suit statute further provides that the agency must consider the pollution consequences in any administrative, licensing, or other procedure.<sup>68</sup> The agency may not authorize, approve, or permit continuance

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<sup>60</sup>IND. CODE § 13-7-17-1 (Supp. 1985). This section was amended in 1985, along with most of the environmental laws. See Pub. L. No. 143-1985 (effective July 1, 1986). Prior to July 1, 1986, IND. CODE 13-7-17-1 applies to the Air and Stream Pollution Control Boards and the Environmental Management Board. See IND. CODE §§ 13-7-17-1 and 13-7-1-2(2) (1982) (repealed effective July 1, 1986). After July 1, 1986, IND. CODE § 13-7-17-1 applies to the Air and Water Pollution Control Boards and the Solid Waste Management Board. See IND. CODE §§ 13-7-17-1 and 13-7-1-5 (Supp. 1985) (effective July 1, 1986).

<sup>61</sup>Compare IND. CODE § 13-7-17-1 (Supp. 1985) with IND. CODE § 4-22-1-14 (Supp. 1985).

<sup>62</sup>IND. CODE § 13-6-1-1 to -6 (1982 & Supp. 1985).

<sup>63</sup>State *ex rel.* Calumet Nat'l Bank v. McCord, 243 Ind. 626, 189 N.E.2d 583 (1963).

<sup>64</sup>IND. CODE § 13-6-1-1(a) (Supp. 1985).

<sup>65</sup>IND. CODE § 13-6-1-1 (Supp. 1985).

<sup>66</sup>IND. CODE § 13-6-1-1(a) (Supp. 1985).

<sup>67</sup>IND. CODE § 13-6-1-1(b) (Supp. 1985).

<sup>68</sup>IND. CODE § 13-6-1-1(e) (Supp. 1985).

of any conduct "which does" pollute, impair, or destroy the environment or is "reasonably likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."<sup>69</sup> Thus, no agency may grant a permit that will, or is reasonably likely to, pollute or impair the environment *unless* there is no feasible and prudent alternative.

### III. THE *Town of Bremen* DECISION

#### A. *The Facts and Procedural History*

Indiana Waste Systems, Inc., the EMB's co-defendant, proposed to construct and operate a sanitary landfill,<sup>70</sup> Prairie View Landfill. The company submitted its application to the EMB for the construction and operation of this facility, as required by law.<sup>71</sup> Several adjoining and neighboring landowners, and the Town of Bremen (plaintiffs) vigorously opposed this proposed facility. To voice their concerns, the plaintiffs requested that a public hearing be held pursuant to Indiana Code section 13-7-10-2(b)(2).<sup>72</sup> The public hearing was held on June 23, 1981, at which plaintiffs contended, as throughout this litigation, that the landfill would damage the environment.<sup>73</sup> The citizens alleged that the landfill would cause serious and irreparable injury to their adjoining land, their environment, and their health.<sup>74</sup> The Town alleged that, because the landfill would be located atop the aquifer from which the entire Town draws its drinking water, it would almost certainly contaminate the aquifer and, consequently, their water supply.<sup>75</sup>

After the public hearing, the EMB voted to approve defendant Indiana Waste Systems' application and issue the permit.<sup>76</sup> From this administrative action, plaintiffs sought judicial review.

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<sup>69</sup>*Id.*

<sup>70</sup>*See supra* note 9.

<sup>71</sup>No person shall install, operate, conduct, or modify, without prior approval of the appropriate agency, any equipment or facility of any type which may cause or contribute to pollution or which may be designed to prevent pollution. IND. CODE § 13-7-4-1(6) (Supp. 1985). No person shall cause or allow the construction of sanitary landfill facilities without a valid construction plan permit. 330 IND. ADMIN. CODE 4-3-1 (1984). No person shall cause or allow the operation of a sanitary landfill without a valid operating permit. 330 IND. ADMIN. CODE 4-5-1 (1984).

<sup>72</sup>Brief for Appellant Indiana Waste Systems, Inc. at 3, Appeal from LaPorte Circuit Court, *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672 (Ind. Ct. App. 1984).

<sup>73</sup>*Id.*

<sup>74</sup>Brief for Appellee Dale Sherk at 26-27, *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672, 674.

<sup>75</sup>Brief for Appellee Town of Bremen at 2-3, *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672, 674.

<sup>76</sup>Brief for Appellee Dale Sherk at 4, *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672.



The Town of Bremen filed an action for judicial review in Marshall County,<sup>77</sup> while the citizen plaintiffs filed an identical action in Marion County.<sup>78</sup> The two causes were consolidated and venued to the LaPorte Circuit Court.<sup>79</sup> That court granted summary judgment for the plaintiffs and remanded the matter to the EMB.<sup>80</sup> The trial court found that the plaintiffs had standing as "aggrieved persons" under the AAA and the EMA to bring an action for judicial review, and that the EMB had failed to follow the proper procedure in issuing the permit to Indiana Waste Systems, Inc.<sup>81</sup> Specifically, the trial court found that the EMB had not erred by failing to provide plaintiffs with an opportunity for an adjudicatory hearing on the matter of the permit prior to its issuance. The court found that the EMB did err, however, in not providing the plaintiffs with an opportunity to settle or adjust their claims pursuant to code sections 4-22-1-4 and 4-22-1-25.<sup>82</sup> On remand, the EMB was instructed to provide plaintiffs the requisite opportunity for settlement and any other necessary proceedings, dependent upon the outcome of the settlement conference.<sup>83</sup> The trial court also vacated the EMB's decision to issue the permit and declared the permit void *ab initio*.<sup>84</sup> Both the EMB and Indiana Waste Systems, Inc. appealed the decision.

The plaintiffs in *Town of Bremen* then filed a mandamus action to compel the EMB to close the landfill, which had been in operation since the permit was issued.<sup>85</sup> This action was venued to the Johnson Circuit Court, which rendered judgment for the plaintiffs.<sup>86</sup> The EMB appealed the judgment in the mandamus action and this appeal was later consolidated with the appeal from the LaPorte Circuit Court decision.<sup>87</sup>

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<sup>77</sup>458 N.E.2d at 673.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.*

<sup>80</sup>*Id.*

<sup>81</sup>*Town of Bremen v. Indiana Envtl. Management Bd. and Indiana Waste Systems, Inc.*, Cause No. 44340-C (LaPorte Circuit Court April 22, 1983) (order denying defendants' motions to correct errors and remanding to EMB with amended findings of fact and memorandum decision).

<sup>82</sup>*Id.*

<sup>83</sup>The trial court further stated that "[a]s the EMB would appear to have already made its initial determination in this matter, the court would recommend that the plaintiffs be given fifteen (15) days from the date of receipt of this order in which to file their written objections to said initial determination and thereafter proceedings consistent with IC 4-22-1-25." *Town of Bremen v. Indiana Envtl. Management Bd. and Indiana Waste Systems, Inc.*, Cause No. 44340-C (LaPorte Circuit Court January 14, 1983) (initial order granting summary judgment, findings of fact and conclusions of law, and memorandum decision, at 3 of memorandum).

<sup>84</sup>(LaPorte Circuit Court April 22, 1983) (order entered upon consideration of motions to correct errors filed after prior order of January 14, 1983).

<sup>85</sup>458 N.E.2d at 673.

<sup>86</sup>*Id.* The EMB was later found in contempt for failure to close the landfill. *Id.*

<sup>87</sup>*Id.*

The Indiana Court of Appeals, Third District, identified the following issues as presented for its review:

- (1) whether the LaPorte Circuit Court erred in finding that the plaintiffs had standing to bring an action for judicial review;
- (2) whether the LaPorte Circuit Court erred in finding that the I.E.M.B. had denied the plaintiffs due process;
- (3) whether the LaPorte Circuit Court had jurisdiction to order the decision of the I.E.M.B. granting the permit as well as the permit itself to be set aside and vacated; and
- (4) whether the Johnson Circuit Court had jurisdiction to mandate the I.E.M.B. to terminate the operations of the landfill.<sup>88</sup>

The appellate court affirmed the LaPorte Circuit Court and reversed the Johnson Circuit Court.<sup>89</sup> The focus of this Note is the court's resolution of the first two issues. The remaining two issues will be discussed only when relevant to problems inherent in the permit issuance procedure prescribed by *Town of Bremen* and to potential problems created by the 1985 legislative response to *Town of Bremen*.

#### B. *The Town of Bremen Public Participation Scheme*<sup>90</sup>

The appellate court held that the Town of Bremen and the citizen plaintiffs had standing to bring an action for judicial review of the EMB's decision to issue a sanitary landfill permit to Indiana Waste Systems, Inc.<sup>91</sup> The court also imposed several procedural requirements<sup>92</sup> which, when followed to their logical end, allow citizen objectors to participate routinely in the environmental agencies' licensing decisions and later have a court review agency decisions to issue permits.

The *Town of Bremen* scheme clearly applies to sanitary landfill and hazardous waste disposal facility permits because an operative EMA provision applies to both types of facilities.<sup>93</sup> In addition, this scheme is applicable to other kinds of pollution control operations, such as air and water pollution control discharge permits.<sup>94</sup> The court's decision was based

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<sup>88</sup>*Id.* at 674.

<sup>89</sup>*Id.* at 677.

<sup>90</sup>The procedure that results from the *Town of Bremen* court's holding that citizen objectors have certain procedural rights in the permit issuance process will be referred to as the *Town of Bremen* public participation scheme, *Town of Bremen* procedure, or other similar variations.

<sup>91</sup>458 N.E.2d at 675.

<sup>92</sup>*Id.*

<sup>93</sup>IND. CODE § 13-7-10-2 (Supp. 1985).

<sup>94</sup>The Izaak Walton League of America did file a complaint for judicial review and injunction based, in part, on *Town of Bremen* and its resolution of the citizen standing issue. Indiana Division, Izaak Walton League of America, Inc. v. Indiana Air Pollution Control Bd. and General Motors Corp., No. S784 1596 (Marion County Superior Court



on statutes that apply to the Air and Stream Pollution Control Boards and the EMB.<sup>95</sup> For simplicity's sake, however, the scheme will only be presented as it relates to permits issued by the EMB.

Under the *Town of Bremen* scheme, the permit seeker first submits his application to the EMB's staff.<sup>96</sup> The staff reviews the application and makes a recommendation to the EMB that the permit either be issued or denied. If the staff recommends denial and the EMB concurs, the permit applicant may then request an adjudicatory hearing pursuant to Indiana Code section 13-7-10-4, potentially followed by judicial review of a hearing officer's adverse decision.<sup>97</sup>

If the agency staff recommends permit issuance, a public hearing may be requested pursuant to code section 13-7-10-2.<sup>98</sup> The EMB is not required to give public notice of the impending permit issuance.<sup>99</sup> The EMB

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No. 7, filed December 17, 1984). The League alleged that the Air Pollution Control Board issued an air pollution discharge permit to General Motors for a truck assembly plant without giving fifteen days notice of the potential permit issuance, without awaiting written objections, and without providing the League an opportunity to settle. *Id.*

<sup>95</sup>The court relied on IND. CODE § 13-7-17-1 and the AAA in reaching its decision. *Town of Bremen*, 458 N.E.2d 672. INDIANA CODE § 13-7-17-1 then applied to the EMB or "an agency." IND. CODE § 13-7-17-1 (1982). An "agency" meant the Air or Stream Pollution Control Boards. IND. CODE § 13-7-1-2(a)(2) (1982) (repealed effective July 1, 1986). INDIANA CODE § 13-7-17-1 was amended by Pub. L. No. 143-1985, § 177 (effective July 1, 1986). This section continues to apply to the Air and Stream (renamed "Water") Pollution Control Boards and to the EMB (renamed "Solid Waste Management Board"). See Pub. L. No. 143-1985, § 73 (codified at IND. CODE § 13-7-1-5) (Supp. 1985) (effective July 1, 1986) and Pub. L. No. 143-1985, § 177 (amending IND. CODE § 13-7-17-1) (Supp. 1985) (effective July 1, 1986). The AAA applies to all state administrative agencies that are not specifically exempted from its coverage. See IND. CODE § 4-22-1-2 (Supp. 1985) and its definition of "agency."

<sup>96</sup>The application for a sanitary landfill construction permit must be submitted sixty days prior to the proposed date for start of construction. 330 IND. ADMIN. CODE 4-3-2 (1984). The EMB staff that evaluates the application is that of the Land Pollution Control Division of the Indiana State Board of Health.

<sup>97</sup>IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986). The hearing must be conducted pursuant to the AAA. *Id.* Such hearing would entail an informal adversary proceeding at which parties can present evidence and examine witnesses. IND. CODE § 4-22-1-8 (1982). Parties may be represented by counsel, IND. CODE § 4-22-1-22 (1982), and the testimony elicited at the hearing is transcribed to form a record of the proceeding. IND. CODE § 4-22-1-9 (1982). The hearing officer must determine all issues of fact on the record. IND. CODE § 4-22-1-10 (Supp. 1985).

<sup>98</sup>IND. CODE § 13-7-10-2 (Supp. 1985); see *supra* note 55. The public hearing is, however, required only on the question of issuance of an original or renewal permit for a hazardous waste facility or on the question of issuance of an original permit for a solid waste disposal facility. IND. CODE § 13-7-10-2(b) (Supp. 1985).

<sup>99</sup>When *Town of Bremen* was decided, no statutory or regulatory requirement to give such notice existed. Now, however, the state has very stringent, explicit public notice requirements regarding permits for certain hazardous waste management facilities. See 320 IND. ADMIN. CODE 4.1-39-6, promulgated at 8 Ind. Reg. 1905-06 (1985).

does, however, give such notice by publication in a local newspaper.<sup>100</sup>

At the public hearing concerned citizens may express their objections to the permit's potential issuance.<sup>101</sup> The EMB then initially decides whether to issue the permit. Up to this point, the EMB's actions are governed by the EMA and the agency's regulations.<sup>102</sup> Once the EMB makes its initial decision, the requirements of the AAA govern any further proceedings.<sup>103</sup> If the EMB's initial decision favors issuance, code section 4-22-1-25, as interpreted in *Town of Bremen*, requires that everyone who may be affected by the permit issuance be notified by registered mail of that decision.<sup>104</sup> In a *Town of Bremen* situation, all adjoining and neighboring landowners, and everyone who draws water from the aquifer below the proposed landfill, must apparently receive notice by registered mail.<sup>105</sup>

If no objections are filed within fifteen days of receipt of notice, the permit is issued and the procedure ends.<sup>106</sup> If objections are filed, the EMB must provide the objectors an opportunity for settlement or adjustment of the controversy.<sup>107</sup> The procedure ends if the controversy is resolved at the settlement conference, unless the settlement requires denial of the permit. In that case, the applicant may request an adjudicatory hearing and follow through to judicial review.<sup>108</sup>

If the controversy is not settled at the conference, the objectors can obtain an administrative adjudicatory hearing.<sup>109</sup> The *Town of Bremen* court did not state that this hearing is available to the objectors. The last sentence of the applicable code section clearly states, however, that "[i]n the event no adjustment or settlement is so arrived at, then pro-

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<sup>100</sup>Telephone interview with Guinn P. Doyle, Hazardous Waste Branch Chief, Division of Land Pollution Control, State Board of Health (October 26, 1984). Public notice of the potential permit issuance is considered an implicit requirement of IND. CODE § 13-7-10-2(b). *Id.* Failure to give notice would contravene the apparent legislative intent that the public be given an opportunity to be heard; if the public was unaware that a permit's issuance was being considered, it could not request the public hearing. *Id.*

<sup>101</sup>IND. CODE § 13-7-10-2(b) mandates that the hearing be held when requested by the appropriate entity.

<sup>102</sup>*See supra* text accompanying notes 32-35.

<sup>103</sup>*Id.*; *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d at 675.

<sup>104</sup>458 N.E.2d at 675.

<sup>105</sup>*See Town of Bremen*, 458 N.E.2d at 674, where the court stated, "The individual plaintiffs allege that they are adjoining landowners to the landfill and the Town of Bremen alleges that the landfill is located over and upon the main aquifer which supplies all water to the town." This is the court's sole statement which hints at the reason the plaintiffs were "affected" by the EMB's permit issuance decision. The permit applicant is also an affected person under IND. CODE § 4-22-1-25 (Supp. 1985).

<sup>106</sup>IND. CODE § 4-22-1-25 (Supp. 1985).

<sup>107</sup>458 N.E.2d at 675; IND. CODE § 4-22-1-25 (Supp. 1985).

<sup>108</sup>IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986).

<sup>109</sup>IND. CODE § 4-22-1-25 (Supp. 1985); *Town of Bremen*, 458 N.E.2d at 675.



ceedings and *hearings* shall be had as provided in [the AAA]."<sup>110</sup> Judicial review is available if the hearing results in a decision adverse to the objectors' interests.<sup>111</sup> It is uncertain whether a permit will have been issued at this point. A permit may not be issued until a trial court affirms the agency's decision and all appeals are exhausted.<sup>112</sup>

Included at the end of this Note is Chart One, which more explicitly maps out the procedures required in the licensing of one facility. Contingencies not discussed in *Town of Bremen* are noted on the chart to show the complexity of the entire scheme.

### C. *The Court's Erroneous Rationale*

The *Town of Bremen* decision was based on judicial precedent and statutes. The decisions on which the court relied, however, were not relevant to the *Town of Bremen* facts and the court's interpretation of the statutes was faulty.

The *Town of Bremen* court found *Sekerez v. Youngstown Sheet and Tube Co.* controlling.<sup>113</sup> In *Sekerez*, the plaintiff initiated an action under the environmental citizen suit statute<sup>114</sup> against a steel manufacturing company alleged to be in violation of state air pollution control standards.<sup>115</sup> Under that statute, before the citizen plaintiff can seek redress in court, he must first allow the agency one hundred eighty days to take remedial action.<sup>116</sup> The Air Pollution Control Board<sup>117</sup> conducted an investigation and issued an administrative order requiring the steel company to comply with the appropriate air pollution standards.<sup>118</sup> *Sekerez* then pursued his citizen suit in court.<sup>119</sup> The *Sekerez* court held that the plaintiff, who was apparently unsatisfied with the Board's action, should have first sought

<sup>110</sup>IND. CODE § 4-22-1-25 (Supp. 1985) (emphasis added).

<sup>111</sup>IND. CODE § 4-22-1-14 (Supp. 1985); *Town of Bremen*, 458 N.E.2d at 675.

<sup>112</sup>INDIANA CODE § 4-22-1-17 permits a person seeking judicial review to obtain a stay of an agency's action pending decision by the court. IND. CODE § 4-22-1-17 (Supp. 1985). To obtain the stay, however, a bond must be posted and the court must find that the petition for stay shows a "reasonable probability" that the agency action pending for review is "invalid or illegal." *Id.* The citizen plaintiff may alternatively seek an injunction to prevent the permit's issuance. See *infra* text accompanying notes 215-17 for the reason the wise citizen plaintiff will seek to enjoin the permit's issuance. See also *infra* notes 213-14 and accompanying text which discuss what the citizen plaintiff would have to plead to obtain an injunction.

<sup>113</sup>166 Ind. App. 563, 337 N.E.2d 521 (1975).

<sup>114</sup>IND. CODE § 13-6-1-1 to -6 (1982 & Supp. 1985). See *supra* text accompanying notes 62-69 for a discussion of this statute.

<sup>115</sup>*Sekerez*, 166 Ind. App. at 565, 337 N.E.2d at 523.

<sup>116</sup>IND. CODE § 13-6-1-1(b) (Supp. 1985). See *supra* text accompanying note 67.

<sup>117</sup>See *supra* note 4.

<sup>118</sup>166 Ind. App. at 566, 337 N.E.2d at 523.

<sup>119</sup>*Id.* at 565-67, 337 N.E.2d at 522-24.

judicial review of the order rather than proceed directly to court with his citizen suit.<sup>120</sup>

The *Town of Bremen* court relied on *Sekerez* to support the proposition that the plaintiffs' relief was limited to that prescribed by the AAA, and that it could not render a decision foreclosing that exclusive means to seek redress.<sup>121</sup> The court stated that, "[h]aving previously held that a person is required to pursue relief in such a case as this via the AAA," it would be "incongruous" to decide that plaintiffs had no standing to bring an action for judicial review under that Act.<sup>122</sup> The *Sekerez* case, however, was distinctly different from *Town of Bremen*. *Sekerez* was not "such a case as this."

*Sekerez* is not useful precedent for resolving the *Town of Bremen* standing issue for three reasons. First, the administrative actions in each case were very different. In *Sekerez*, a final order had been issued; a final order is clearly reviewable under the AAA and the EMA.<sup>123</sup> In *Town of Bremen*, no final order had been issued; rather, the EMB had merely issued a permit to a facility that had met its standards for permit issuance.<sup>124</sup> Second, the relationship between *Sekerez* and the agency action (issuance of an administrative order), was dissimilar to the relationship between the *Town of Bremen* plaintiffs and that agency action (issuance of a permit). Under the citizen suit statute, *Sekerez* explicitly had standing to bring an action for judicial review of the order because he was the complainant who initiated the Air Board's investigation and subsequent order. Indiana Code section 13-6-1-1 states, "[t]he complainant shall be joined as a party [to the agency's action]."<sup>125</sup> The *Town of Bremen* plaintiffs, however, were not parties to the administrative licensing procedure, but had merely been given the opportunity to express their concerns at the public hearing.<sup>126</sup>

Finally, *Sekerez* should not have controlled in *Town of Bremen* because the injuries asserted in each case were quite distinct. In *Sekerez*, the facility had been in operation and was actively causing the alleged measurable pollution.<sup>127</sup> In *Town of Bremen*, the facility had not yet begun

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<sup>120</sup>*Id.* at 571, 337 N.E.2d at 526.

<sup>121</sup>458 N.E.2d at 674.

<sup>122</sup>*Id.*

<sup>123</sup>See IND. CODE § 4-22-1-14 (Supp. 1985) and IND. CODE § 13-7-17-1 (Supp. 1985), which both state that any person aggrieved by an agency's final order may obtain judicial review. Although not the case in *Sekerez*, an administrative agency generally issues an order after an adjudicatory hearing has been held. See IND. CODE § 4-22-1-12 (Supp. 1985). A member or representative of the agency conducts the administrative adjudicatory hearing then proposes a recommended order to the agency. *Id.* If the agency adopts the recommended order, it becomes the agency's final order. *Id.*

<sup>124</sup>458 N.E.2d at 673.

<sup>125</sup>IND. CODE § 13-6-1-1(b) (Supp. 1985) (emphasis added).

<sup>126</sup>458 N.E.2d at 673.

<sup>127</sup>166 Ind. App. at 565, 337 N.E.2d at 523.



to operate when the objections were made; thus, no pollution of the environment had occurred, nor was damage certain to result.<sup>128</sup> There was an allegation of a present, concrete injury in *Sekerez*; the alleged injury in *Town of Bremen* would only have occurred at some point in the future, if it occurred at all. Therefore, the grant of standing to seek review of an administrative agency's action in *Sekerez* is not persuasive support for an identical result in *Town of Bremen*.

The *Town of Bremen* court relied on one other case as primary authority for its decision, *State ex rel. Calumet Nat'l Bank v. McCord*.<sup>129</sup> *McCord*, however, is also unpersuasive, and not relevant to the standing issue raised in *Town of Bremen*.

In *McCord*, the Calumet National Bank had brought an action in mandate to compel the Indiana Department of Financial Institutions to revoke a permit it had granted the Bank of Whiting to establish a branch bank in Highland, Indiana.<sup>130</sup> The Calumet National Bank had contended that the permit had been wrongfully issued.<sup>131</sup> The court held that the mandate action to compel revocation of the permit could not be maintained; the Calumet National Bank's exclusive remedy was an action for judicial review of the permit's issuance pursuant to the AAA.<sup>132</sup>

The *Town of Bremen* court cited *McCord* to support its conclusion that an agency-specific statute applies only to the initial license determination, and that the AAA prevails thereafter.<sup>133</sup> The EMA, which is the EMB's agency-specific enabling statute, and the AAA, however, use the same "aggrievement" standard to determine standing to bring an action for judicial review.<sup>134</sup> Therefore, it is of no consequence which statute is applied to determine whether a plaintiff has standing because both statutes require aggrievement.

Most importantly, the *McCord* court did not *decide* the standing issue. The sole issue on appeal was whether an action for judicial review of the branch bank license was the Calumet National Bank's exclusive remedy.<sup>135</sup> The *McCord* court held that it was.<sup>136</sup> The Calumet bank was thus barred from obtaining judicial review because the fifteen-

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<sup>128</sup>458 N.E.2d 673.

<sup>129</sup>243 Ind. 626, 189 N.E.2d 583 (1963).

<sup>130</sup>*Id.* at 628, 189 N.E.2d at 584.

<sup>131</sup>*Id.*

<sup>132</sup>*Id.* at 634-35, 189 N.E.2d at 587. The *McCord* court applied the predecessor of IND. CODE § 4-22-1-14. See 1947 Ind. Acts 1451. Any difference between IND. CODE § 4-22-1-14 (Supp. 1985) and its predecessor is inconsequential for purposes of this analysis because both require that a person be "aggrieved" before he may obtain judicial review of an agency's action. Compare IND. CODE § 4-22-1-14 (Supp. 1985) with 1947 Ind. Acts 1451.

<sup>133</sup>458 N.E.2d at 674.

<sup>134</sup>IND. CODE § 4-22-1-14 (Supp. 1985); IND. CODE § 13-7-17-1 (Supp. 1985).

<sup>135</sup>243 Ind. at 630-31, 189 N.E.2d at 585.

<sup>136</sup>*Id.* at 634-35, 189 N.E.2d at 587.

day time period during which a petition for judicial review may be filed had run.<sup>137</sup> Therefore, the *McCord* court disposed of the case without determining whether the Calumet bank would have met the aggrievement standing requirement of Indiana Code section 4-22-1-14 had a petition for judicial review been timely filed. The *McCord* court did not hold that the Calumet bank had standing to appeal the permit's issuance. Therefore, the *Town of Bremen* court failed to recognize what *McCord* did *not* decide.

The *Town of Bremen* court did not merely misconstrue precedent, but also engaged in questionable statutory interpretation. The court broadly interpreted Indiana Code section 13-7-17-1 as a "catch-all" provision of the EMA which "allows any aggrieved person to obtain judicial review of a decision by the [Indiana Environmental Management Board]." <sup>138</sup> This interpretation led the court to conclude that the adjoining and neighboring landowners and the Town of Bremen had standing to pursue an action for judicial review of the EMB's decision to issue a sanitary landfill permit to Indiana Waste Systems, Inc.<sup>139</sup> The court, however, made two errors in reaching this conclusion. First, it failed to recognize the significance of the term "aggrieved" in the code section.<sup>140</sup> Second, by interpreting this provision so broadly, the court rendered code section 13-7-10-4 meaningless.<sup>141</sup> This error is particularly disturbing because section 13-7-10-4 specifically sets forth procedures and standards for appeals from environmental agency decisions to issue or deny permits.<sup>142</sup>

Indiana Code section 13-7-17-1 states that "[a]ny person *aggrieved* by any final order or determination of the [sic] one (1) of the boards may proceed under IC 4-22-1 [the AAA] to obtain a judicial review."<sup>143</sup> According to Indiana's rules of standing, which are applicable to administrative proceedings,<sup>144</sup> an aggrieved person is not merely dissatisfied; he has sustained an injury in fact.<sup>145</sup> The court never discussed the plaintiffs' alleged injury nor its sufficiency for standing purposes.

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<sup>137</sup>*Id.* at 630-31, 189 N.E.2d at 585.

<sup>138</sup>458 N.E.2d at 674-75.

<sup>139</sup>458 N.E.2d at 675. Having decided that the suit was properly before it, the court then found that one AAA provision, IND. CODE § 4-22-1-25, granted the *Town of Bremen* plaintiffs certain due process rights in the permit issuance procedure and that they had been denied those rights. *Id.*

<sup>140</sup>IND. CODE § 13-7-17-1 (Supp. 1985).

<sup>141</sup>The presumption should be made that the legislature intended to enact an effective statute. See *State ex. rel. Boger v. Daviess Circuit Court*, 240 Ind. 198, 163 N.E.2d 250 (1959); *Perry Civil Township of Marion County v. Indianapolis Power and Light Co.*, 222 Ind. 84, 51 N.E.2d 371 (1943).

<sup>142</sup>IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986).

<sup>143</sup>IND. CODE § 13-7-17-1 (Supp. 1985).

<sup>144</sup>See *supra* text accompanying note 18.

<sup>145</sup>See *supra* notes 20-21 and accompanying text.

Indiana is one of several states whose courts have been presented with the citizen standing issue as it arises in environmental licensing proceedings. The majority of the decisions rendered



The court would have been hard-pressed to find that the plaintiffs had been injured or would be injured by the landfill. The plaintiffs' assertions that harm would result from the landfill were speculative, while the EMB's conclusion that no injury would occur was more concrete. The adjoining and neighboring landowner plaintiffs alleged that the close proximity of the landfill would cause serious and irreparable injury to their land.<sup>146</sup> The town alleged that the landfill would contaminate the aquifer from which the townspeople draw their drinking water and that such contamination would be "catastrophic."<sup>147</sup> The Indiana legislature, however, vested the responsibility to make the permit issuance decision with the EMB.<sup>148</sup> As a condition precedent to the issuance of a landfill permit by the EMB, the EMB requires that detailed information be collected by the permit applicant and submitted to the EMB's staff.<sup>149</sup> Based on the

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in other states have, however, resolved the standing issue by examining the citizen plaintiff's alleged injury and determining whether state standing requirements have been satisfied. The majority of these decisions were in favor of the citizen plaintiff. *See, e.g.*, National Wildlife Fed'n v. Cotter Corp., 665 P.2d 598 (Colo. 1983); Concerned Citizens for Calcasieu River and Old Town Bay v. Lake Charles Refining Co., 387 So.2d 1330 (La. Ct. App. 1980); Matter of Lappie, 377 A.2d 441 (Me. 1977); Matter of Int'l Paper Co., 363 A.2d 235 (Me. 1976); Citizens for Rural Preservation v. Robinett, 648 S.W.2d 117 (Mo. Ct. App. 1983); Franklin Township v. Commonwealth Dep't of Env'tl. Resources, 499 Pa. 162, 452 A.2d 718 (1982); East Greenwich Yacht Club v. Coastal Resources Management Council, 118 R.I. 559, 376 A.2d 682 (1977); and Hooks v. Texas Dep't of Water Resources, 611 S.W.2d 417 (Tex. 1981). A few courts found that the citizen plaintiff's alleged injury did not satisfy state standing requirements. *See, e.g.*, Mystic Marinelife Aquarium, Inc. v. Gill, 175 Conn. 483, 400 A.2d 726 (1978); Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, 418 So.2d 1046 (Fla. Dist. Ct. App. 1982); and Wisconsin's Env'tl. Decade, Inc. v. Wisconsin Dep't of Natural Resources, 115 Wis. 2d 381, 340 N.W.2d 722 (1983).

<sup>146</sup>Brief for Appellee Dale Sherk at 17-18, Indiana Env'tl. Management Bd. v. Town of Bremen, 458 N.E.2d 672.

<sup>147</sup>Brief for Appellee Town of Bremen at 2-3, Indiana Env'tl. Management Bd. v. Town of Bremen, 458 N.E.2d 672.

<sup>148</sup>The EMB has the authority to enact regulations containing requirements and procedures for sanitary landfill permits. IND. CODE § 13-7-10-1 (1982) (amended by Pub. L. No. 143-1985, § 147 (effective July 1, 1986)). The EMB has enacted such regulations. *See* 330 IND. ADMIN. CODE 4-1-1 to 4-9-5 (1984). Although the 1985 amendment to the EMA reorganized the EMB and renamed it the Solid Waste Management Board, the regulations previously enacted by the EMB continue in effect and are to be treated as rules of the Solid Waste Management Board. *See* Pub. L. No. 143-1985, § 209 (a non-code section).

<sup>149</sup>An application for a sanitary landfill construction permit must be accompanied by, *inter alia*: (1) a topographical map; (2) a map which depicts present land use, including locations of wells, sewers, drainage tiles, surface water, water courses, and roads; (3) plot plans drawn to scale which depict, among other things, water courses, surface water, soil boring locations, surface water runoff direction, fences, present land surface contour, storm water drainage during and after operation, areas where wastes will be deposited, and depth of waste deposits; (4) geographical drawings which show types of materials from the ground surface to and including bedrock, and depth of water table; (5) reports of soil, groundwater, and geology including analysis of soil borings taken at a depth of at least twenty feet below the lowest level of proposed excavation or to bedrock; and (6) a narrative of

information submitted, the EMB's staff, recognized as the technical experts in these matters,<sup>150</sup> had determined that the Prairie View Landfill would not damage the environment.<sup>151</sup> Thus, the plaintiffs' assertions that harm would result from the landfill's operation were speculative at best.

The court made its second statutory interpretation error by focusing on section 13-7-17-1 and refusing to recognize the relevance of section 13-7-10-4 to the standing issue presented. The *Town of Bremen* court's interpretation of section 13-7-17-1 renders section 13-7-10-4 meaningless even though it is the only statutory provision that addresses appeals from environmental permit decisions. If the legislature had truly intended that anyone could seek judicial review of any EMB action pursuant to section 13-7-17-1, the judicial review provision in section 13-7-10-4 would be superfluous.<sup>152</sup>

The EMB and Indiana Waste Systems, Inc. asserted that the controversy should have been resolved by applying section 13-7-10-4, a statutory provision that specifically pertains to appeals from permit issuances and denials.<sup>153</sup> The court acknowledged that it had been urged to apply this provision.<sup>154</sup> The court, nevertheless, refused to do so.<sup>155</sup> Instead, the court broadly interpreted section 13-7-17-1 and held that the *Town of Bremen* plaintiffs had standing to bring an action for judicial review of the permit issuance.<sup>156</sup> Section 13-7-10-4, however, was the more appropriate EMA provision for resolving the standing issue. That section provides:

(a) If a permit is denied or if the permit is issued with terms and conditions which are objectionable to the applicant, the applicant may petition for a hearing before the board or appropriate agency within fifteen (15) days after the date of receipt

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the proposed operation including procedures for dust, rodent, insect, leachate, and methane gas control. 330 IND. ADMIN. CODE 4-3-4 (1984).

<sup>150</sup>An administrative agency possesses special knowledge in the field over which it has jurisdiction. *Board of Medical Registration and Examination of Indiana v. Armington*, 242 Ind. 436, 440, 178 N.E.2d 741, 743 (1961); *Indiana Dep't of Public Welfare v. Crescent Manor, Inc.*, 416 N.E.2d 470 (Ind. Ct. App. 1981); *Capital Improvement Bd. of Managers of Marion County v. Public Service Comm'n*, 176 Ind. App. 240, 375 N.E.2d 616 (1978).

<sup>151</sup>After reviewing the application, the EMB must determine whether the site and proposed operation are compatible with the public health and environment. 330 IND. ADMIN. CODE 4-3-5 (1984). The permit must be denied unless a positive determination is made. *Id.*

<sup>152</sup>*Compare* IND. CODE § 13-7-17-1 (Supp. 1985) with IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986).

<sup>153</sup>Brief for Appellant Indiana Environmental Management Board at 14-16, Brief of Appellant Indiana Waste Systems, Inc. at 10-12, Appeal from the LaPorte Circuit Court, *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672.

<sup>154</sup>*Town of Bremen*, 458 N.E.2d at 674.

<sup>155</sup>*Id.*

<sup>156</sup>*Id.* at 674-75.



of the permit or notice of a denial of permit. Such a petition which is timely and which complies with any other requirements of the board or appropriate agency shall be granted. A person aggrieved by the denial of a petition for hearing or by the denial or issuance of a permit after hearing may seek judicial review thereof pursuant to IC 13-7-17. For the purposes of making such an appeal, the date of denial of the petition for hearing under this section is the date of the final determination of the board or agency.

(b) At a hearing under this chapter, the petitioner has the burden of proving to the board or agency:

(1) why the permit should be issued; or

(2) why the terms and conditions of the permit are not justified or are otherwise invalid.

(c) The board or appropriate agency may designate a person to be a hearing officer. Except as provided in this section, hearings shall be conducted under IC 4-22-1.<sup>157</sup>

The adjoining and neighboring landowner plaintiffs recognized that the first sentence of subsection (a) grants the permit applicant the right to an adjudicatory hearing to contest a permit denial or a permit issuance when the permit is issued with objectionable terms.<sup>158</sup> These plaintiffs further asserted, however, that subsection (a)'s third sentence allows *any* person aggrieved by the permit issuance or denial to appeal because that sentence says "person" rather than "applicant."<sup>159</sup> The EMB and Indiana Waste Systems argued that this provision allows only the permit applicant to appeal from the denial or issuance of a permit.<sup>160</sup>

Examination of the predecessor of code section 13-7-10-4 reveals that the EMB and Indiana Waste Systems were correct. The earlier provision read:

If a permit is *refused* by staff, notice of such *refusal* shall be mailed by the United States mail, postage prepaid, to the applicant at the address stated in his application, and the applicant may petition for a hearing before the board or agency at any time within fifteen (15) days after the date of mailing of the notice of refusal of the permit. The burden shall be upon the petitioner

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<sup>157</sup>IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986).

<sup>158</sup>Brief for Appellee Dale Sherk at 13, *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672.

<sup>159</sup>*Id.* at 13-14.

<sup>160</sup>Brief for Appellant Indiana Environmental Management Board at 15-16, Brief for Appellant Indiana Waste Systems, Inc. at 11-12, *Appeal from LaPorte Circuit Court, Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672.

to justify the *issuance* of the permit. The hearing may be conducted by a person designated by the board or agency to conduct such hearing, and the administrative adjudication act shall apply.<sup>161</sup>

Comparison of the previous provision with the current one clearly demonstrates that the issuance of a permit was added as grounds for judicial review. The prior statute only allowed judicial review if a permit was "refused."

Careful analysis yields a valid reason why the legislature added the issuance of a permit as grounds for appeal. A permit may be issued with terms so objectionable to the permittee that it would be tantamount to a permit denial. For example, air and water pollution control facility operation permits contain discharge limitations. These facilities may not discharge air or water containing pollutants above the permit limits. If such limits could not be achieved by the permittee, the agency action constitutes the practical equivalent of a permit denial. In all fairness, an agency should not require that a permittee accept such a condition without recourse. Thus, the legislature amended code section 13-7-10-4 to allow a permit applicant to petition for an administrative adjudicatory hearing on the matter of a permit "issued with terms and conditions which are objectionable to the applicant." Therefore, the term "issuance" in subsection (a)'s third sentence does not refer to *any* permit issuance; instead, the term "issuance" means the issuance of a permit which has terms and conditions objectionable to the *applicant*.

The present wording of section 13-7-10-4(b) further demonstrates that the legislature intended that only the applicant be entitled to appeal the issuance or denial of a permit. The petitioner for the hearing must, at the hearing, prove either that the permit should be issued or that the permit's terms and conditions are unjustified or invalid.<sup>162</sup> The legislature's addition of the latter burden of proof to the earlier version of this provision is consistent with its addition of the issuance of a permit with objectionable terms as a ground for appeal.<sup>163</sup> The citizen objector would not want to prove why the permit should be *issued*. The tenor of the second burden of proof indicates that its application is more appropriate when the petitioner seeks modification of a particular permit provision, rather than invalidation of the entire permit.<sup>164</sup> If the legislature had intended that citizen objectors be allowed to challenge the issuance of environmental permits, it could easily have added a third burden of proof — that

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<sup>161</sup>1972 Ind. Acts 555 (emphasis added).

<sup>162</sup>IND. CODE § 13-7-10-4(b) (1982) (repealed effective July 1, 1986).

<sup>163</sup>*Compare* 1972 Ind. Acts 555 *with* IND. CODE § 13-7-10-4 (1982) (repealed effective July 1, 1986).

<sup>164</sup>*See* IND. CODE § 13-7-10-4(b)(2) (1982) (repealed effective July 1, 1986).



the permit should *not* be issued.<sup>165</sup> In sum, the *Town of Bremen* court applied and misinterpreted a broad statutory provision, Indiana Code section 13-7-17-1, rather than apply and interpret code section 13-7-10-4, the only statutory provision which specifically relates to appeals from the issuance or denial of environmental permits. Had the court applied the more appropriate statute, it may have reached a different result.

The court committed a third statutory interpretation error because it did not fully apply code section 4-22-1-25. The EMB and Indiana Waste Systems had contended that the LaPorte Circuit Court erred in finding that the *Town of Bremen* plaintiffs were entitled to an adjudicatory hearing on the matter of the permit issuance.<sup>166</sup> The court disagreed with this characterization of the trial court's findings.<sup>167</sup> The appellate court found, instead, that the trial court only held that the EMB had failed to provide the plaintiffs with the proper notice and an opportunity to settle as required by this section.<sup>168</sup> The court, however, overlooked the last sentence of section 4-22-1-25 which states, "[i]n the event no adjustment or settlement is so arrived at, then proceedings and *hearings* shall be had as provided in [the AAA]."<sup>169</sup> The only hearing provided for in the AAA is an administrative adjudicatory hearing.<sup>170</sup> Therefore, the court failed to recognize that its application of this provision to the *Town of Bremen* facts entitles the *Town of Bremen* plaintiffs and all other similarly situated citizen objectors to an adjudicatory hearing on the matter of a permit's issuance and to judicial review if the decision after the hearing is adverse to the citizen objector.<sup>171</sup>

Finally, the court overlooked two remedies available to the *Town of Bremen* plaintiffs should their fears that the landfill would cause them harm be realized. First, they could bring a nuisance suit.<sup>172</sup> Second, the

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<sup>165</sup>What a statute does not say is just as important as what it does say. *Van Orman v. State*, 416 N.E.2d 1301 (Ind. Ct. App. 1981); *State ex rel Schuerman v. Ripley County Council.*, 182 Ind. App. 616, 395 N.E.2d 867 (1979).

<sup>166</sup>*Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d at 675.

<sup>167</sup>*Id.*

<sup>168</sup>*Id.*

<sup>169</sup>IND. CODE § 4-22-1-25 (Supp. 1985) (emphasis added).

<sup>170</sup>See IND. CODE §§ 4-22-1-1 to -30 (1982 & Supp. 1985).

<sup>171</sup>Any party or person aggrieved by an order issued after the hearing, or a determination made after the hearing, is entitled to bring an action for judicial review of that order or determination. IND. CODE § 4-22-1-14(a) (Supp. 1985).

<sup>172</sup>A nuisance is defined as "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property." IND. CODE § 34-1-52-1 (1982). Possession of a license to conduct an activity is no defense to an action that alleges the activity constitutes a nuisance. *Haggart v. Stehlin*, 137 Ind. 43, 35 N.E. 997 (1893); *Price v. Grose*, 78 Ind. App. 62, 133 N.E. 30 (1921). A nuisance action may be brought by any person whose property is injuriously affected or whose personal enjoyment of the property is lessened

citizen suit provision of the EMA would be available as a form of redress.<sup>173</sup>

Perhaps an underlying reason for the court's decision is the apparent lack of faith the public has in our environmental agencies and their decisions.<sup>174</sup> This is not a sufficient reason, however, for the *Town of Bremen* result.

#### D. *The Town of Bremen Decision's Impact*

Prior to *Town of Bremen*, the environmental agencies issued and denied permits under the assumption that only the permit applicants had standing to contest the agency's permit decisions.<sup>175</sup> The permit issuance procedure was thought to involve only two entities — the entity seeking the permit, the permit applicant, and the entity issuing or denying the permit, the environmental agency.<sup>176</sup> *Town of Bremen* introduces a third entity whose interests must now be considered — the citizen objector.

The *Town of Bremen* decision will have a tremendous impact on state environmental licensing procedures, and some consequences may be unintended. The greatest impact will be felt by the permit applicants and environmental agencies. Under *Town of Bremen*, the licensing procedure is extremely complex and will entail an inordinate period of time from the date of permit application to the date of ultimate permit issuance or denial.<sup>177</sup> The permit applicant must now await the outcome of each successive procedural step that must be afforded a citizen objector. At a minimum, each agency must provide citizens a public hearing on

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by the nuisance, or by the attorney of any county, city, or town in which a nuisance exists. IND. CODE § 34-1-52-2 (Supp. 1985).

<sup>173</sup>IND. CODE § 13-6-1-1 (Supp. 1985); see *supra* text accompanying notes 62-69. A citizen suit may also be instituted when injury is merely threatened. IND. CODE § 13-6-1-2 (Supp. 1985).

<sup>174</sup>The Governor created the Environmental Policy Commission to hold public hearings throughout the state and to study present environmental problems. Exec. Order No. 16-83, 7 Ind. Reg. 248-49 (1983). The Commission was charged with the duty to make recommendations regarding, *inter alia*, alternative organizational structures for managing the state's environmental programs. *Id.* at 248.

The 1985 Indiana General Assembly implied that the state's present system for environmental protection is inadequate when it stated, in its preamble to the legislation that reorganizes the primary environmental agencies, that a separate state agency devoted entirely to environmental protection is both desirable and necessary. Pub. L. No. 143-1985.

<sup>175</sup>Interview with Brenda Franklin Rodeheffer, Deputy Attorney General, Indiana Attorney General's Office (Aug. 1, 1985). Mrs. Rodeheffer was one of the EMB's attorneys in the *Town of Bremen* litigation. Throughout the course of that litigation, Mrs. Rodeheffer was chief of the Attorney General's Environmental Section, which represents every state environmental agency.

<sup>176</sup>*Id.*

<sup>177</sup>See *infra* *Town of Bremen* procedure chart (Chart One) at the end of this Note.



request,<sup>178</sup> notice of the initial permit issuance determination,<sup>179</sup> fifteen days to object to that determination,<sup>180</sup> and an opportunity to settle.<sup>181</sup> A non-settling citizen plaintiff may further pursue his procedural rights in an administrative adjudicatory hearing,<sup>182</sup> an action for judicial review of the administrative hearing result,<sup>183</sup> and an appeal from the judicial review action.<sup>184</sup>

Agency resources are currently insufficient, and the new procedure will require devotion of much time by personnel of the EMB and other presently understaffed agencies.<sup>185</sup> Agency personnel will be involved at every step in the *Town of Bremen* scheme. Agency staff will conduct the public hearing and respond to comments made, as they did prior to *Town of Bremen*. They will now also determine the identity of all who may be affected by a permit's issuance and send the required notices. Agency staff will participate in any settlement conference and will be witnesses in any administrative adjudicatory hearing held.

The agencies will have a difficult task in satisfying the notice requirement alone because the *Town of Bremen* court failed to give them any guidance in determining who is entitled to participate in a licensing proceeding. The court never discussed how and why the *Town of Bremen* plaintiffs were aggrieved by the EMB's issuance of a permit to Indiana Waste Systems. The agencies must now identify the persons who may be affected by the permit issuance and give them notice by certified mail or in person.<sup>186</sup> In *Town of Bremen*, affected persons included everyone who drew water from the aquifer below the landfill.<sup>187</sup> An aquifer, however, can involve the subsurface geology of several Indiana counties. In the case of an air pollution discharge permit, the persons affected may differ with the direction of the air currents and may include persons in other states or countries.<sup>188</sup> We all breathe air from the same atmosphere

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<sup>178</sup>IND. CODE § 13-7-10-2 (Supp. 1985).

<sup>179</sup>IND. CODE § 4-22-1-25 (Supp. 1985); *Town of Bremen*, 458 N.E.2d at 675.

<sup>180</sup>IND. CODE § 4-22-1-25 (Supp. 1985); *Town of Bremen*, 458 N.E.2d at 675.

<sup>181</sup>IND. CODE § 4-22-1-25 (Supp. 1985); *Town of Bremen*, 458 N.E.2d at 675.

<sup>182</sup>IND. CODE § 4-22-1-25 (Supp. 1985).

<sup>183</sup>IND. CODE § 4-22-1-14 (Supp. 1985); IND. CODE § 13-7-17-1 (Supp. 1985); 458 N.E.2d at 674-75.

<sup>184</sup>IND. CODE § 4-22-1-19 (1982).

<sup>185</sup>Testimony of State Board of Health management at Environmental Policy Commission hearing on August 15, 1984.

<sup>186</sup>IND. CODE § 4-22-1-25 (Supp. 1985).

<sup>187</sup>See *supra* note 105 and accompanying text.

<sup>188</sup>The Canadian government has complained loudly and often that United States sulfur dioxide air emissions, especially those from the Midwest, cause acid rain in Canada. See generally, Lucas, *Acid Rain: The Canadian Position*, 32 U. KAN. L. REV. 165 (1983); Comment, *Who'll Stop the Rain: Resolution Mechanisms for U.S.-Canadian Transboundary Pollution Disputes*, 12 DEN. J. INT'L L. & POL'Y 51 (1982).

and this relationship is no more tenuous than drinking water from an aquifer that is threatened with contamination. Thus, the notice requirement poses a serious problem for the orderly issuance of permits. Any person who believes himself affected by the permit issuance and who does not receive notice of the impending permit issuance will, under *Town of Bremen*, be able to invoke his procedural rights at any time because, under Indiana Code section 4-22-1-25, the period during which objections may be filed does not begin to run until after notice is received.

The average consumer will also not escape the effects of *Town of Bremen*. The permit applicant will be involved in each step of the lengthy process, which will inevitably increase the start-up cost for a new facility. The applicant's legal fees alone will significantly increase start-up costs because the applicant will need legal representation at each administrative and judicial proceeding available to the citizen plaintiff. The increased cost for the applicant will result in increased disposal fees, which in turn will be passed on to the consumers of the goods and services whose production generates the wastes to be disposed of at the new facility. Consumers will also indirectly pay for the extensive legal services necessary to represent the environmental agencies because the agencies' attorneys are paid with state tax revenues.<sup>189</sup>

An unintended potential result of *Town of Bremen* is that landfills and other types of environmental facilities will be located in or near communities that do not have the resources to finance the extensive, long-term legal representation required to pursue the administrative and judicial rights available to them. Thus, the poorer areas of the state might be saddled with a disproportionate share of the facilities necessary to treat and dispose of wastes generated by others.

The *Town of Bremen* public participation scheme may actually have several adverse environmental and human health consequences. First, the agencies may be compelled to spend a significant portion of their resources justifying their permit decisions throughout the *Town of Bremen* procedure. In the event that these agencies' budgets and staffing levels are not increased,<sup>190</sup> routine monitoring of compliance, and effective enforcement against noncompliance by existing facilities may suffer. Second, it is undisputed that wastes are generated every day and must be disposed of safely. The tremendous delay in the licensing of legitimate environmental facilities may encourage illegal and unsafe disposal when no legal alternative exists. Third, because the authorization of new facilities may be significantly delayed, or in some cases foreclosed, existing facilities will necessarily be used instead. There is no guarantee that the existing facilities

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<sup>189</sup>The Indiana Attorney General represents every state agency. IND. CODE § 4-6-2-1 (1982). That office is funded, for the most part, by appropriations from the state's general revenues. IND. CODE § 4-13-2-18 (Supp. 1985).

<sup>190</sup>See *supra* text accompanying note 185.



are safer than the proposed facilities.<sup>191</sup> In fact, some existing environmentally-related facilities have been "grandfathered" into the new pollution control regulatory schemes, and thus are not required to meet the new, more stringent standards.<sup>192</sup> Finally, the *Town of Bremen* procedure, if used by citizen plaintiffs to the fullest extent, may result in judicial decisions displacing the technical experts' analyses because judges will be dispensing the ultimate stamp of approval or disapproval on environmental permits.<sup>193</sup>

#### IV. THE LEGISLATIVE RESPONSE TO *Town of Bremen*

The 1985 Indiana General Assembly enacted legislation<sup>194</sup> that reorganizes the state's three primary environmental agencies.<sup>195</sup> This legislation also attempts to streamline the troublesome *Town of Bremen* permit issuance procedure.<sup>196</sup> However, the legislature may have unwittingly added a new set of problems to those created by the *Town of Bremen* decision, while leaving the existing faults unremedied.

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<sup>191</sup>The city of Indianapolis, Indiana, is now facing such a waste disposal dilemma. In December of 1984, the City proposed four possible sites for a new landfill. Indianapolis Star, Dec. 5, 1984, at 1, col. 1. The public uproar was tremendous. See, e.g., *Landfill Opponents Vow to Fight Plan*, Indianapolis Star, Jan. 11, 1985 at 9, col. 1; *Vocal Crowd at Hearing Firm in Opposition to Landfill*, Indianapolis Star, Jan. 18, 1985, at 15, col. 1; *Warren Township Takes on City at Landfill Hearing*, Indianapolis Star, Jan. 23, 1985, at 45, col. 5; *Decatur Township Residents Dispute Proposed Landfill Site*, Indianapolis Star, Jan. 24, 1985, at 1, col. 5. The City bowed to public pressure and scrapped its plan to build a new landfill in Marion County. Indianapolis Star, Feb. 12, 1985, at 1, col. 1. The City continues to use an existing landfill, which may be contaminating an underlying aquifer. Indianapolis Star, Dec. 6, 1984, at 19, col. 1. Furthermore, the landfill is almost full. *Too Much Trash Results in Early Closure of Landfill*, Indianapolis News, Apr. 10, 1985, at 1, col. 1. The City is also facing increased waste disposal costs because of the shortage of available landfill space. *State Threatens to Close Landfill, Forcing City's Trash Costs to Rise*, Indianapolis Star, June 22, 1985, at 33, col. 3.

<sup>192</sup>For example, the requirement that a certificate of environmental compatibility be obtained does not apply to hazardous waste disposal facilities proposed or in operation at the time the Solid Waste Facility Site Approval Authority was created. See IND. CODE § 13-7-8.6-5 (1982).

<sup>193</sup>See *infra* *Town of Bremen* procedure chart (Chart One) at the end of this Note.

<sup>194</sup>Pub. L. No. 143-1985.

<sup>195</sup>These primary agencies are the Air and Water (formerly Stream) Pollution Control Boards and the Solid Waste Management Board (formerly Environmental Management Board).

<sup>196</sup>See Pub. L. No. 143-1985, § 149, which adds a new provision to the EMA (codified at IND. CODE § 13-7-10-2.5 (Supp. 1985)). In the interest of reader comprehension, this section is reprinted here in its entirety:

(a) In response to an application for an original permit or a renewal permit, the commissioner:

(1) shall, if required by section 2(b) of this chapter or other law, or may, if not required by law;

(2) publish a notice requesting comments concerning the question of issuance or denial of the permit. A comment period of at least thirty (30) days must follow

The new permit issuance procedure is significantly different from the *Town of Bremen* scheme. After the public hearing,<sup>197</sup> or after a public

publication of a notice under this section. During the comment period, interested persons may submit written comments to the commissioner concerning the issuance or denial of the permit, and may request a public hearing concerning the issuance or denial of the permit. The commissioner, in response to one (1) or more written requests, may hold a public hearing in the geographical area affected by the proposed permit on the question whether to issue or deny the permit.

(b) After the comment period or, if a public hearing is held, after the public hearing, the commissioner shall issue the permit or deny the permit application. Unless the commissioner, in writing, states otherwise, the commissioner's action under this section is effective immediately. Notice of the commissioner's action shall be served upon:

- (1) the permit applicant;
- (2) each person who submitted written comments under subsection (a); and
- (3) each person who requests notice of the permit determination.

If the commissioner's action is likely to have a significant impact upon persons who are not readily identifiable, the commissioner may publish notice of the action on the permit application in a newspaper of general circulation in the county affected by the proposed permit.

(c) Within fifteen (15) days after receiving the notice provided by the commissioner under subsection (b):

- (1) the permit applicant; or
  - (2) any other person aggrieved by the commissioner's action;
- may appeal the commissioner's action to the appropriate board and request that the board hold an adjudicatory hearing concerning the action under IC 4-22-1.

(d) a written request for an adjudicatory hearing under subsection (c) must:

- (1) state the name and address of the person making the request;
- (2) identify the interest of the person making the request;
- (3) identify any persons represented by the person making the request;
- (4) state with particularity the reasons for the request;
- (5) state with particularity the issues proposed for consideration at the hearing; and
- (6) identify the permit terms and conditions which, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

(e) Within thirty (30) days after receiving a request for an adjudicatory hearing, the board, if it determines that the request was properly submitted and that it establishes a jurisdictional basis for a hearing, shall assign the matter for a hearing. Upon assigning the matter for a hearing, the board may stay the force and effect of any contested permit provision and any permit term or condition the board considers inseparable from a contested permit provision. After a final hearing under this subsection, a final order of the board on a permit application is subject to review under IC 4-22-1.

*Id.* This provision takes effect on July 1, 1986. Pub. L. No. 143-1985, § 212. Discussion of the legislative changes made in the *Town of Bremen* procedure will be primarily limited to those affecting permit issuances.

<sup>197</sup>A public hearing need not always be conducted by the agencies. Under the existing procedure, a public hearing regarding the potential issuance of a permit for a solid waste or hazardous waste disposal facility must be held when requested by certain persons. IND. CODE § 13-7-10-2(b) (Supp. 1984). See *supra* text accompanying notes 52-56 and 98-101. Under the new procedure, an interested person may request a public hearing regarding the potential issuance of any type of permit by submitting a written comment which makes



comment period,<sup>198</sup> the Commissioner<sup>199</sup> “shall issue or deny the permit application.”<sup>200</sup> Unless the Commissioner states otherwise, his decision to issue or deny the permit is “effective *immediately*.”<sup>201</sup> Thus, the permit applicant has his permit in hand *before* any citizen may make an objection.

The Commissioner must then serve notice of the permit’s issuance on the applicant, persons who submitted written comments on the question of permit issuance, and persons who requested such notice.<sup>202</sup> The Commissioner also has the discretion to publish a notice of the permit’s issuance “in a newspaper of general circulation in the county affected by the proposed permit” if his decision to issue the permit is “likely to have a significant impact upon persons who are not readily identifiable.”<sup>203</sup>

The permit applicant or “any other person aggrieved” may then appeal the permit’s issuance within fifteen days after the notice of its is-

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such a request. Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(a) (Supp. 1985)). A public hearing request made under this provision, however, does not mandate that the hearing be conducted; the permit issuance authority has the discretion to grant the request. *Id.*

<sup>198</sup>The new law also allows the permit issuance authority to institute a comment period during which written comments may be submitted on the question of permit issuance. Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(a) (Supp. 1985)). The opening of such a comment period appears to be purely discretionary. The new law states that the permit issuance authority must publish a notice requesting comments when IND. CODE § 13-7-10-2(b) so requires. *Id.* The referenced section, however, does not require that any public notice be issued. IND. CODE § 13-7-10-2(b) (Supp. 1985), *amended by* Pub. L. No. 143-1985, § 149.

<sup>199</sup>Under the reorganization law, the Commissioner of the newly-created Department of Environmental Management, as the Department’s executive and chief administrative officer, makes the ultimate decision whether to issue or deny a permit. *See* Pub. L. No. 143-1985, § 97 (codified at IND. CODE § 13-7-2-12 (Supp. 1985)), and Pub. L. No. 143-1985, § 107 (codified at IND. CODE § 13-7-3-9 (Supp. 1985)).

<sup>200</sup>Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(b) (Supp. 1985)) (emphasis added).

<sup>201</sup>*Id.* (emphasis added).

<sup>202</sup>*Id.*

<sup>203</sup>*Id.* This particular provision has several potential problems. First, at this stage in the procedure, the permit is not “proposed”; the permit has been issued and, unless the Commissioner states otherwise, is immediately effective. *See supra* text accompanying note 201. Second, the provision uses the phrase “the county affected” which implies that, if the Commissioner chooses to publish the notice, he need only do so in one county, presumably the county in which the facility will be located. A facility may, however, affect persons in more than a single county. *See supra* text accompanying notes 186-88. *See also infra* note 240 and accompanying text. Third, by defining these persons as those upon whom the permit issuance decision “is likely to have a significant impact,” the legislature has, in effect, stated that these persons are persons “aggrieved” under IND. CODE §§ 4-22-1-14 (AAA) and 13-7-17-1 (EMA). Consequently, they would be entitled to bring an action for judicial review of the permit’s issuance. *See* IND. CODE §§ 4-22-1-14 (Supp. 1985), and 13-7-17-1 (1985), *amended by* Pub. L. No. 143-1985, § 177. Nevertheless, the Commissioner is not required to give these persons notice of his decision to issue the permit, nor will the notice, if issued, necessarily reach all “aggrieved” persons because it need only be issued in one county, if it is issued at all. *See* Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(b) (Supp. 1985)).

suance is received.<sup>204</sup> The new statute thus makes clear that persons other than the permit applicant can be aggrieved by a permit's issuance. The appeal is commenced by a request for an adjudicatory hearing, which will be conducted pursuant to the AAA.<sup>205</sup> Once the matter is assigned for hearing, "the Board<sup>206</sup> may stay the force and effect of any contested permit provision and any permit term or condition the board considers inseverable from a contested permit provision."<sup>207</sup> A final order on a "permit application," issued by the board after the hearing, is subject to judicial review under the AAA.<sup>208</sup> The new permit issuance procedure is roughly diagrammed in Chart Two at the end of this Note. Contingencies not previously discussed are noted to show that the new permit issuance procedure remains at least as complex as the *Town of Bremen* scheme.

The legislature's new permit issuance procedure may create several problems in addition to those engendered by the *Town of Bremen* decision.<sup>209</sup> First, if the permittee is satisfied with the permit he receives and chooses to rely on it as initially issued, he may eventually hold a permit with modified terms that are incompatible with his actions taken in reliance on the initial permit. For example, a citizen may object to the permit and allege that a specific permit provision is too lenient, such as an air pollutant emission limitation. That emission limitation may be stayed<sup>210</sup> or the permit may remain fully effective.<sup>211</sup> If the contested per-

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<sup>204</sup>Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(c) (Supp. 1985)). Therefore, if an aggrieved person never receives the notice, the fifteen day period never begins to run. Also, if notice is received via newspaper publication, it may be difficult to determine exactly *when* it was received.

<sup>205</sup>*Id.*

<sup>206</sup>Depending on the type permit challenged, either the Air or Water Pollution Control Boards or the Solid Waste Management Board will conduct the hearing. Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(e) (Supp. 1985)).

<sup>207</sup>Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(e) (Supp. 1985)).

<sup>208</sup>*Id.* More accurately, the hearing and subsequent order will concern the decision to issue or deny the permit, not the application.

<sup>209</sup>The new legislation's departure from AAA procedure may raise an issue as to its validity. The AAA states that its procedures are to be followed, "*and not otherwise.*" See IND. CODE § 4-22-1-3 (1982) (emphasis added). Discussion of whether the legislature may provide for non-AAA procedures in legislation other than that which amends the AAA is not within the scope of this Note. See also *supra* note 50 and accompanying text.

<sup>210</sup>See *supra* text accompanying notes 206-07. The effect of that stay is unclear; either the permittee could not discharge *any* of the pollutant regulated by the contested provision, or he could not discharge that pollutant in excess of the level the citizen objector finds appropriate. See Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(d) (Supp. 1985)), which requires that the request for an adjudicatory hearing, *inter alia*, "identify the permit terms and conditions which, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of [the appropriate type]."

<sup>211</sup>The board has the discretion to stay any condition, as evidenced by the legislature's use of the word "may." Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(e) (Supp. 1985)).



mit condition is not stayed, the permittee may choose to construct his facility before the appeal has been resolved. If he does so, and the citizen ultimately prevails, the permittee may find himself in the unfortunate position of having to comply with a more stringent emission limitation than his facility was designed and constructed to achieve.

Second, if the permittee is not satisfied with the permit he is initially issued and the offensive provisions are not stayed, he no longer has the option to appeal the permit's objectionable terms before the permit becomes fully effective; the permit is effective immediately upon issuance. Therefore, the new permit procedure cuts both ways. Citizen objectors *and* permittees must wait until after the permit is fully effective before they may appeal the issuance of objectionable permits.

Third, the legislature's new permit issuance procedure may present the courts with a choice between two inequitable results. A worst case example will illustrate the dilemma. The Commissioner issues construction and operation permits for air pollution control equipment which will be part of a new automobile manufacturing plant. The permits are effective immediately. Citizens object and allege that the plant will degrade the air quality, especially in view of the location the manufacturer selected. The Air Pollution Control Board does not stay any permit conditions. The manufacturer builds the plant before the appeal procedure reaches finality. Eighteen months after the permits are issued, the adjudicatory hearing officer's decision upholds the permits' issuance. Another year later, the trial court must render a decision in the action for judicial review. The manufacturer has spent X million dollars and employs Y thousand workers in an economically depressed area. If the judge decides the permit should never have been issued, he must fashion a remedy. Does he order the plant closed? Or will he allow the plant to continue to operate because economic and political considerations outweigh the citizens' rights? Where do the equities lie in this situation?

This hypothetical situation demonstrates a fourth problem the new procedure may create. If economic considerations prevail and the court does not order that the polluting activity cease, the permittee has in effect "coerced" the court into making a mockery of the citizen's right to appeal the permit issuance by constructing the facility while the citizen prosecutes his appeal. Another worst case example will further demonstrate this point.

The Commissioner issues a sanitary landfill permit. The permit is effective immediately. Citizens object to the landfill's location and allege that it will contaminate the underlying aquifer from which they draw their drinking water. The Solid Waste Management Board stays no permit provision. The permittee constructs the landfill and receives wastes for three years while the citizens pursue their appeal. After the adjudicatory hearing, the hearing officer upholds the permit's issuance. On judicial review, the court holds that the permit should never have been issued because the citizens' evidence clearly establishes that the site is unsuitable for a

landfill. But the damage has been done; groundwater samples from the aquifer indicate significant contamination. The citizens have won the battle but lost the war. In both worst case scenarios, the citizens' rights are nullified because the permittee has a fully effective permit before and during the appeal's prosecution.<sup>212</sup>

A fifth problem may ensue from the new procedure. Because the new procedure may effectively eliminate the citizens' rights, the prudent citizen objector may bypass it entirely, and immediately before the permit's issuance seek a court-issued injunction enjoining the permit's issuance, or immediately after the permit's issuance seek a court order that stays the entire permit. He could allege that he has no adequate remedy at law, that he will be irreparably harmed if the permit is issued or remains effective,<sup>213</sup> and that it would be futile for him to exhaust his administrative remedies.<sup>214</sup> Therefore, an injunction may be issued under facts similar to these hypotheticals.

The *Town of Bremen* decision encourages the citizen to sue for an injunction before the permit is issued. The plaintiffs in that suit prevailed at the trial court level in a mandamus action brought to compel the EMB to close the Prairie View Landfill after the LaPorte Circuit Court declared its permit void.<sup>215</sup> On appeal, the EMB and Indiana Waste Systems argued that the trial court had no authority to mandate that the EMB close the landfill.<sup>216</sup> In deciding the mandamus issue, the appellate court held that "a court cannot compel the exercise of a discretionary act in any particular manner" and that the revocation of a permit is a discretionary act.<sup>217</sup> Therefore, if the Commissioner issues a permit which a court later holds should never have been issued, that court has no authority to order the Commissioner or any board to revoke the permit. If the administrative authority refuses to revoke the permit, the citizen is without a remedy. Thus, a citizen plaintiff would be wise to attempt to prevent such a situation from arising by suing for an injunction enjoining the permit's issuance.

The legislature's new permit issuance scheme, in addition to creating new problems, fails to remedy several existing deficiencies in the *Town of Bremen* procedure. First, the notice defects are uncured. The statutes

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<sup>212</sup>The AAA states that its purpose is to, *inter alia*, provide an opportunity to be heard. IND. CODE § 4-22-1-1 (1982). The new procedure may make this opportunity a hollow one.

<sup>213</sup>An injunction will be issued when there is no adequate remedy at law and irreparable injury will be done. *See, e.g.,* Rees v. Panhandle E. Pipe Line Co., 176 Ind. App. 597, 377 N.E.2d 640 (1978).

<sup>214</sup>Generally, courts have no jurisdiction to grant relief until all administrative remedies are exhausted. *Northside Sanitary Landfill v. Indiana Env'tl. Management Bd.*, 458 N.E.2d 277 (Ind. Ct. App. 1984) (citations omitted). Compliance with this rule is not required, however, when compliance would be futile, or would result in irreparable harm. *Id.*

<sup>215</sup>458 N.E.2d at 673, 676.

<sup>216</sup>*Id.* at 676-77.

<sup>217</sup>*Id.* at 676-77.



underlying the *Town of Bremen* scheme, the EMA and the AAA, do not require that an environmental agency notify the public that it is considering whether to issue a particular permit;<sup>218</sup> notice is only required upon the agency's initial issuance of the permit.<sup>219</sup> The new statutory procedure also contains no provision that requires the environmental agencies to give public notice of the potential permit issuance.<sup>220</sup> This deficiency is especially troublesome and may create additional problems because the requirement that a person be notified of the permit's issuance<sup>221</sup> greatly depends on that person's prior knowledge that the permit was being considered for issuance.<sup>222</sup> Furthermore, the statutory procedure for notifying other affected persons of the permit's issuance may not reach the targeted persons.<sup>223</sup> Thus, an aggrieved person could be unaware of both the potential and actual issuance of the permit. An aggrieved person who is unaware that he is aggrieved cannot assert his rights.

These unremedied notice deficiencies bring about the second problem in the *Town of Bremen* procedure which the legislature failed to address. The fifteen-day period during which an adjudicatory hearing request may be made does not begin to run until the notice has been *received*.<sup>224</sup> Thus, any aggrieved person who never receives notice that the permit was issued can appeal at any time because only receipt of the notice causes the fifteen-day period to start running.<sup>225</sup> A person aggrieved by a permit's issuance remains aggrieved even though he does not receive notice of its issuance.

Third, the permit applicant may have gained very little by receiving his permit before any appeal may begin. The cautious permittee may decide that construction and operation of his facility prior to a final resolution of the dispute is too risky.<sup>226</sup> Furthermore, a cautious Commissioner may decide to delay the effective date of the permit when a permit's issuance is likely to be appealed.<sup>227</sup> Also, the boards may stay any contested permit provision and any other permit terms that are not severable from the contested provision.<sup>228</sup> If the permit's very issuance is challenged, as in

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<sup>218</sup>See *supra* notes 99-100 and accompanying text.

<sup>219</sup>See *supra* text accompanying note 104 and *Town of Bremen* permit procedure chart (Chart One) at the end of this Note.

<sup>220</sup>See *supra* note 198; Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(a) (Supp. 1985)).

<sup>221</sup>See *supra* text accompanying note 202.

<sup>222</sup>*Id.* A person will not submit written comments on the question of permit issuance unless he knows it may be issued. Also, a person will not request notice of the permit's issuance unless he had prior knowledge that it may be issued.

<sup>223</sup>See *supra* note 203 and accompanying text.

<sup>224</sup>See *supra* note 204 and accompanying text.

<sup>225</sup>See *supra* text at page 1016.

<sup>226</sup>See *supra* notes 210-11 and accompanying text and *supra* text at page 1021.

<sup>227</sup>See *supra* text accompanying note 201; Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(e) (Supp. 1985)).

<sup>228</sup>See *supra* text accompanying notes 206-07; Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(e) (Supp. 1985)).

an objection to the facility's intended location, a board may consider all the permit terms inseverable and stay the entire permit. Thus, the new procedure may have the permittee playing a waiting game, just as he must do in the *Town of Bremen* scheme.<sup>229</sup>

Fourth, when the permit's effective date is delayed, as it is when the Commissioner makes the permit effective on a date later than the date of issuance or when a board stays the entire permit, illegal waste disposal is fostered if no legal disposal method is available.<sup>230</sup> Furthermore, while the appeal is pursued, existing, possibly substandard facilities must remain in use when state-of-the-art facilities are not available.<sup>231</sup>

Fifth, the new procedure is no shorter than the *Town of Bremen* scheme; the *Town of Bremen* procedure has merely been rearranged. Thus, the new procedure may continue to drain the environmental agencies' resources<sup>232</sup> and the citizens' budgets.<sup>233</sup>

Sixth, the new legislation uses the term "person aggrieved"<sup>234</sup> yet fails to define its scope. Thus, the environmental agencies and the courts remain unguided by the legislature as to who has standing to appeal a permit's issuance.<sup>235</sup>

Finally, if the citizens fully exercise their rights under the new procedure, a judge remains the ultimate authority on permit issuances. Thus, judicial decisions may continue to displace the analysis of the technical experts.<sup>236</sup>

The legislature should be commended for its quick action. A little less haste, however, may have produced a more thoughtful solution to the *Town of Bremen* problem. Another reason for this inadequate law may be that the legislature was trying to reconcile two often incompatible interests: the state's interest in promoting industrial development without subjecting that development to undue regulation, and the state's interest in protecting the health and welfare of its citizens and the integrity of its natural resources. The new permit issuance procedure is, nevertheless, as unworkable as the *Town of Bremen* scheme, if not more so.

#### V. POSSIBLE REMEDIES IN THE AFTERMATH OF *Town of Bremen* AND THE 1985 LEGISLATION

Indiana has judicial and legislative options available which, if exercised, would lay to rest the procedural nightmare created by *Town of*

<sup>229</sup>See *supra* text accompanying notes 189-92 for a discussion of the costs of delay.

<sup>230</sup>See *supra* text at page 1016.

<sup>231</sup>See *supra* and notes 191-92 and accompanying text.

<sup>232</sup>See *supra* notes 185 and 190, and accompanying text.

<sup>233</sup>See *supra* text accompanying notes 189-90 for possible consequences of citizens' budgetary constraints.

<sup>234</sup>See *supra* text accompanying note 204.

<sup>235</sup>See *supra* text accompanying notes 186-88.

<sup>236</sup>See *supra* note 193 and accompanying text.



*Bremen* and the recent legislative response to that decision. If action is taken soon, the drastic and perhaps unintended consequences of this decision and the new legislative procedure may not come to fruition.

The state could choose to allow the broad grant of citizen standing under *Town of Bremen* to remain intact. The state should, however, fine tune the procedure by implementing a mechanism which joins all objectors in one action at a specific time. The *Town of Bremen* and new legislative procedures allow any person "affected" or "aggrieved" by the permit issuance to halt the orderly permit process if he fails to receive notice by certified mail of the agency's decision to issue the permit.<sup>237</sup> This blockade in the permit procedure contravenes the stated purpose of the AAA.<sup>238</sup>

If broad citizen standing remains, a registry is needed under which all potential affected persons would be required to submit their names and addresses to the agency for notice purposes. This registry should permanently close the class of potential affected persons and thereby preclude the possibility that one stray "affected person" could challenge a permit's validity after the facility has begun to operate. Such a registry mechanism must rigorously require that notice of the potential permit issuance be given by the agency in a manner reasonably calculated to reach all potential affected persons. Otherwise, closure of the class under a registry mechanism will violate the statutory due process rights of those affected persons who do not receive notice.<sup>239</sup>

Although this is not a "remedy," many problems created by *Town of Bremen* would be resolved if the class of persons granted standing under that decision were narrowed judicially. *Town of Bremen* is an appellate decision. An ideal fact situation could cause the Indiana Supreme Court to take a hard look at the *Town of Bremen* court's reasoning. An exemplary case would be an action for judicial review of an air pollution discharge permit for a coal-fired power plant. This suit could be brought by residents in every state that has previously alleged that Indiana's air pollution emissions cause acid rainfall within its borders, and by the Canadian Prime Minister in *parens patriae* for causing acid rainfall in Canada.<sup>240</sup> This action would demonstrate that the scope of citizen standing granted

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<sup>237</sup>See *Town of Bremen*, 458 N.E.2d 672 (Ind. Ct. App. 1984); *supra* text accompanying and immediately following notes 186-88; and *supra* notes 224-25 and accompanying text.

<sup>238</sup>See *supra* text accompanying note 26.

<sup>239</sup>See *Town of Bremen*, 458 N.E.2d 672.

<sup>240</sup>Similar facts have been presented in *New York v. Ruckelshaus*, No. 84-0853 (D.D.C. filed March 20, 1984). The plaintiffs in that suit include the states of New York, Maine, Vermont, Rhode Island, Connecticut, and Massachusetts. Other plaintiffs include four national environmental organizations. The complaint alleges that the United States Environmental Protection Agency has violated its mandatory duty to require that sulfur dioxide air emissions be reduced in the midwestern states. The complaint further alleges that excessive sulfur dioxide air emissions cause acid rainfall in each of the plaintiff states and in Canada. *Id.*

under *Town of Bremen* should be restricted. It would present a wide range and large number of plaintiffs and thus demonstrate the difficult task an agency has in providing notice of the permit issuance to every conceivable affected person.

Indiana could choose to limit citizen grievances to actions brought under the citizen suit statute.<sup>241</sup> The *Town of Bremen* court did not address the EMB's and Indiana Waste Systems' argument that this provision was the proper mechanism by which the *Town of Bremen* plaintiffs should have asserted their rights.<sup>242</sup> Because the court failed to mention this remedy, it is not likely that the citizen suit statute would be judicially declared the citizen plaintiffs' exclusive remedy. The legislature could, however, make such a declaration. By doing so, a more sensible procedure would displace the *Town of Bremen* and newly-enacted schemes. Under code section 13-6-1-1, the agencies must be given the opportunity to address the alleged problems cited by a citizen complainant.<sup>243</sup> The agencies, as the technical experts, should be afforded the opportunity to explain their permit decisions. The citizen suit provision also requires that the complainant be joined as a party to the agency's investigation and hearing on the complaint.<sup>244</sup> Joinder of the complainant to the agency action allows citizens the right to judicial review of an adverse determination<sup>245</sup> without employing the *Town of Bremen* scheme's circuitous route to the same end. An action maintained under this statute also requires that the petitioner make a *prima facie* showing that the respondent's conduct has polluted the environment or is reasonably likely to pollute it.<sup>246</sup> This re-

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<sup>241</sup>See *supra* text accompanying notes 62-69. Indiana citizens are either unaware of this statute or, alternatively, are choosing not to use it because they find unpalatable the one hundred eighty-day waiting period to maintain an action in court. See IND. CODE § 13-6-1-1(b) (1982). To date, there have been only three reported decisions involving suits brought under the citizen suit statute and each was initiated by the same plaintiff. *Sekerez v. U.S. Reduction Co.*, 168 Ind. App. 526, 344 N.E.2d 102 (1976), *Sekerez v. Youngstown Sheet & Tube Co.*, 166 Ind. App. 563, 337 N.E.2d 521 (1975), *Sekerez v. U.S. Steel Corp.*, 316 N.E.2d 413 (Ind. Ct. App. 1974).

<sup>242</sup>Brief for Appellant EMB at 20-22, Brief for Appellant Indiana Waste Systems, Inc. at 16, Appeal from LaPorte Circuit Court, *Town of Bremen*, 458 N.E.2d 672.

<sup>243</sup>IND. CODE § 13-6-1-1(b) (Supp. 1985).

<sup>244</sup>*Id.*

<sup>245</sup>IND. CODE § 13-6-1-1(c) (Supp. 1985).

<sup>246</sup>IND. CODE § 13-6-1-2 (Supp. 1985). When no applicable rule has been violated, the petitioner must also show that no feasible and prudent alternative exists for the allegedly harmful conduct. *Id.* This may be difficult to establish in some cases because landfills are currently among the most cost-effective methods for waste disposal. See S. EPSTEIN, M.D., L. BROWN, & C. POPE, *HAZARDOUS WASTE IN AMERICA* 549 (1982).

Citizens in Connecticut, Michigan, and Minnesota have effectively asserted the environmental rights granted them by state statutes similar in concept to Indiana's citizen suit statute, IND. CODE §§ 13-6-1-1 to -6 (1982 & Supp. 1985). See Connecticut Environmental Protection Act, CONN. GEN. STAT. ANN. §§ 22a-14 to -20 (West 1985), *applied in Manchester Env'tl. Coalition v. Stockton*, 184 Conn. 51, 441 A.2d 68 (1981); Michigan Environmen-



quirement will eliminate the need to determine whether a person may be "affected" because only those citizens who step forward with their objections will be involved, and will preclude decisions similar to *Town of Bremen* in which the court did not assess the likelihood of pollution. The legislature should require that the agencies give public notice of the potential permit issuance in a manner calculated to reach all persons who might be affected. The legislature should, however, delete the requirement that all potential affected persons be notified by registered mail after the permit is actually issued. This proposed notice mechanism would put the burden on the citizens to determine whether the permit has been issued. This burden is not unreasonable, however, and is warranted because the requirement that all potentially affected persons receive registered mail notice after the permit is issued subjects the permit applicant to unreasonable uncertainty in determining whether the permit he holds is no longer challengeable.

Alternatively, the legislature could enact provisions for a workable, streamlined permit issuance procedure requiring citizen intervention in an orderly fashion, should the legislature choose to allow the same class of persons to have standing as under *Town of Bremen*. A statutory mechanism could be enacted by which the presently available public hearing could be transformed into an adjudicatory hearing upon compliance with specific criteria.<sup>247</sup> The agency would be required to determine whether the criteria are met. Once that determination was made, the agency, permit applicant, and any concerned citizens would have the issue decided in a single administrative proceeding, with full rights to judicial review for both the applicant and citizens. Provision should also be made for expedited judicial review of the agency's decision that the statutory criteria were not satisfied. If the citizens did not prevail, the procedure would end and the permit would be issued. If the citizens were successful on this judicial review, however, the court would only remand the matter to the agency with in-

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tal Protection Act, MICH. COMP. LAWS §§ 691.1201 to .1207 (Supp. 1985), *applied in* West Mich. Env'tl. Action Council, Inc. v. Natural Resources Comm'n, 405 Mich. 741, 275 N.W.2d 538 (1979); and Minnesota Environmental Rights Act, MINN. STAT. §§ 116 B.01 to B.13 (Supp. 1984), *applied in* People for Env'tl. Enlightenment and Responsibility, Inc. v. Minnesota Env'tl. Quality Council., 266 N.W.2d 858 (Minn. 1978).

<sup>247</sup>Wisconsin has such a procedure. *See* WIS. STAT. § 227.064(1)(a)-(d) (1982), *applied in* Town of Two Rivers v. State, 105 Wis. 2d 721, 315 N.W.2d 377 (1981). Under that statute, persons have a right to transform a public hearing into an adjudicatory hearing if:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

*Id.*

structions to conduct the adjudicatory hearing. Chart Three set forth at the end of this Note roughly demonstrates the mechanics of this proposed procedure. If the determination after the adjudicatory hearing is adverse to the citizens, a court, on judicial review, would then have an adequate factual record upon which to base its decision. The court in *Town of Bremen* had no adjudicatory hearing record to review because no such hearing was conducted.

Alternatively, the legislature could enact explicit standing requirements for instituting a judicial review action as an aggrieved person under the AAA. The 1981 Model State Administrative Act contains such a provision:

(a) The following persons have standing to obtain judicial review of final or non-final agency action:

(1) a person to whom the agency action is specifically directed;

(2) a person who was a party to the agency proceedings that led to the agency action;

(3) if the challenged agency action is a rule, a person subject to that rule;

(4) a person eligible for standing under another provision of law; or

(5) a person otherwise aggrieved or adversely affected by the agency action. For purposes of this paragraph, no person has standing as one otherwise aggrieved or adversely affected unless:

(i) the agency action has prejudiced or is likely to prejudice that person;

(ii) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(iii) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.<sup>248</sup>

All three elements of subsection (5) must be met to obtain standing. The determinative element in a *Town of Bremen* situation would be item (i) — whether the agency action has prejudiced or is likely to prejudice the citizen. The drafters of the Act have recognized that the scope of subsection (5) “will ultimately be established by judicial interpretation.”<sup>249</sup> Indiana may choose to enact another standard, such as “injury in fact.” Regardless of the standard enacted, however, every court would be re-

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<sup>248</sup>MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 5-106, 14 U.L.A. 156 (Supp. 1985).

<sup>249</sup>MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 5-106, Commissioner's Comment, 14 U.L.A. 157 (Supp. 1985).



quired to examine the prejudice or injury alleged before reviewing the challenged agency action. Thus, once the standard is judicially interpreted, the agencies would have guidance in determining which persons may be "aggrieved" by its permit decisions. The *Town of Bremen* decision and the newly-enacted legislative procedure give no such guidance.

The State of Indiana has several routes by which it can repair the damage inflicted by the *Town of Bremen* decision and cure the new procedure's shortcomings. Regardless of the method chosen, a well-considered remedy should be instituted soon. Otherwise, administrative chaos will prevail.

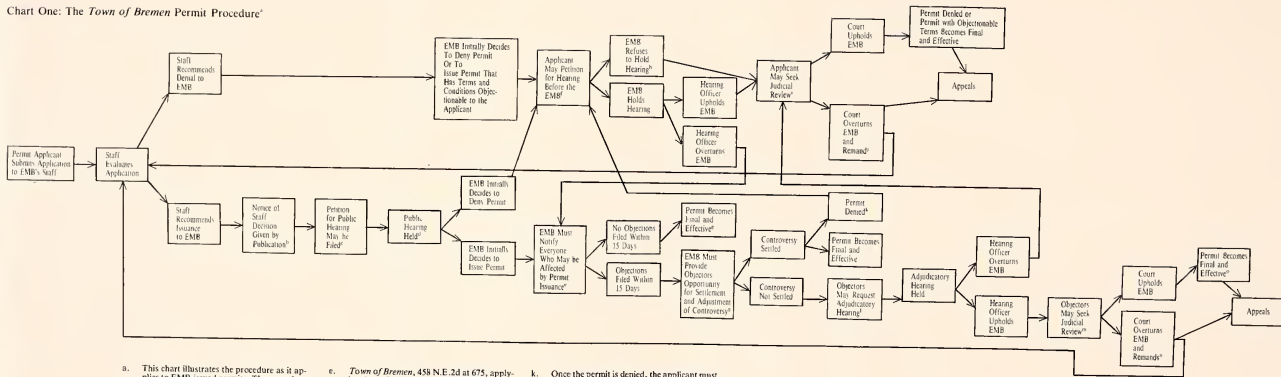
## VI. CONCLUSION

The *Town of Bremen* decision greatly expanded citizens' rights to participate in the licensing of environmentally-related permits. This expansion was not warranted under Indiana's AAA or EMA, however, nor by decisional law. The state must now choose a clear direction and enact efficient procedures to assert the citizen rights granted. The current *Town of Bremen* procedure is too lengthy, too complex, and too expensive to all concerned. The Indiana legislature's recently enacted permit issuance procedure will not solve the existing problems; on the contrary, the new procedure may actually give rise to additional difficulties. The simplest solution may entail a legislative statement that the citizen suit statute is the exclusive remedy available to citizen plaintiffs.<sup>250</sup> Thus, the troublesome "aggrievement" standing test prescribed under the EMA, the AAA, and the unworkable *Town of Bremen* permit issuance scheme would be bypassed without requiring formulation of yet another procedure. The citizen suit mechanism is an orderly and fair method by which citizens may effectively assert their rights in licensing decisions.

ELLEN C. SIAKOTOS

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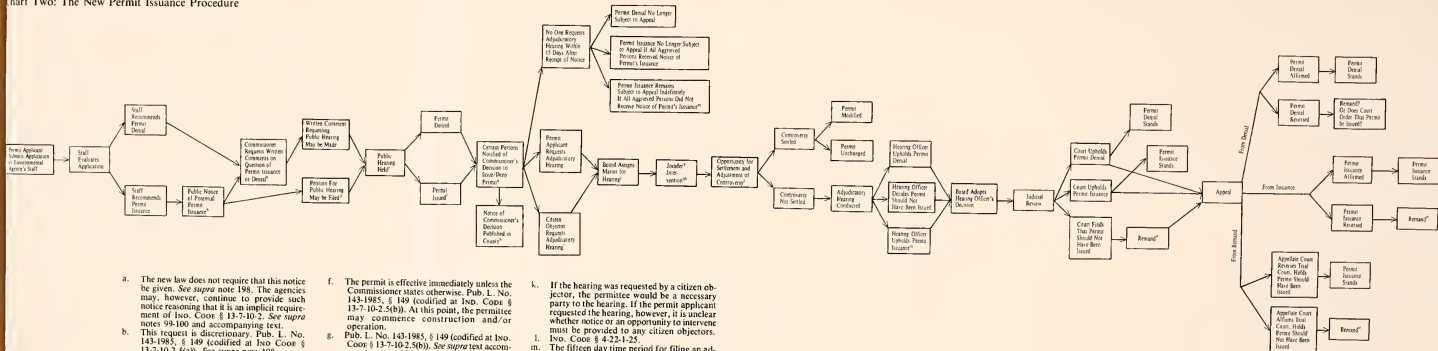
<sup>250</sup>For further discussion of this solution, see *supra* text accompanying notes 241-46.

Chart One: The *Town of Bremen* Permit Procedure<sup>a</sup>

- a. This chart illustrates the procedure as it applies to EMB-issued permits. The procedure also applies, however, to Air and Stream Pollution Control Board-issued permits except to the extent that *Ind. Code* § 13-7-10-2 imposes additional procedural requirements on the EMB. See *supra* notes 93-95 and accompanying text.
- b. This notice is not explicitly required but is considered an implicit requirement under *Ind. Code* § 13-7-10-2. See *supra* notes 99-100 and accompanying text.
- c. *Ind. Code* § 13-7-10-2(b).
- d. This hearing is mandatory if requested. *Id.*
- e. *Town of Bremen*, 458 N.E.2d at 675, applying *Ind. Code* §§ 13-7-17-1, 4-22-1-25.
- f. *Ind. Code* § 13-7-10-4.
- g. *Ind. Code* § 4-22-1-25.
- h. *Ind. Code* § 13-7-10-4(a).
- i. *Ind. Code* §§ 13-7-10-4, 4-22-1-14.
- j. The court may remand but may not issue or deny the permit. See *Town of Bremen*, 458 N.E.2d at 675-77; see also *Ind. Code* § 4-22-1-18 which states that the court may "remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed."
- k. Once the permit is denied, the applicant must be afforded his rights to an adjudicatory hearing and judicial review under *Ind. Code* § 13-7-10-4 and the AAA.
- l. Although not explicitly required by *Town of Bremen*, this step necessarily follows under *Ind. Code* § 4-22-1-25.
- m. *Id.*, *Ind. Code* § 4-22-1-14.
- n. See *supra* note j.
- o. In showing that the permit becomes effective at this late stage, this chart assumes that the permit does not become effective after the administrative hearing. See *supra* note 112 and accompanying text explaining why this assumption was made.



Chart Two: The New Permit Issuance Procedure

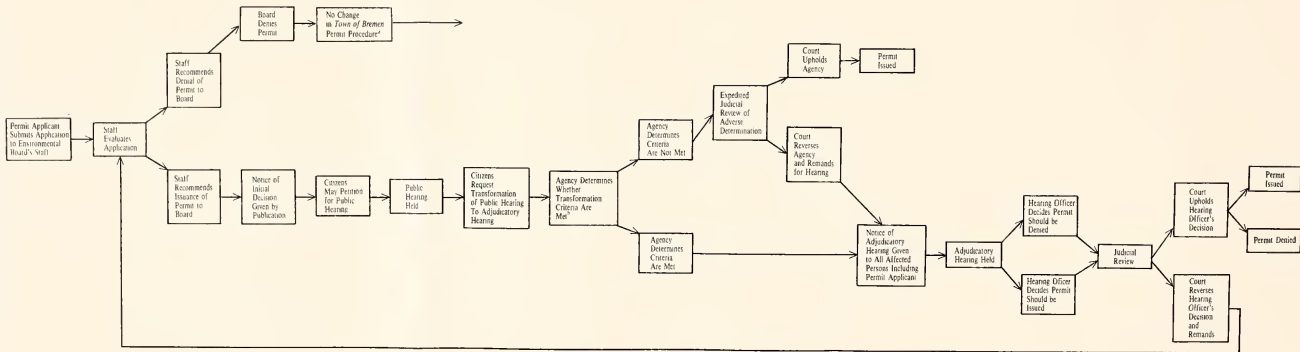


- a. The new law does not require that this notice be given. See *supra* note 198. The agencies may, however, continue to provide such notice reasoning that it is an implicit requirement of Iso. Code § 13-7-10-2. See *supra* notes 99-100 and accompanying text.
- b. This request is discretionary. Pub. L. No. 143-1985, § 149 (codified at Iso Code § 13-7-10-2.5(a)). See *supra* note 198.
- c. Pub. L. No. 143-1985, § 149 (codified at Iso. Code § 13-7-10-2.5(a)).
- d. Iso. Code § 13-7-10-2(b), amended by Pub. L. No. 143-1985, § 148.
- e. The hearing requested via written comment need not be held. Pub. L. No. 143-1985, § 149 (codified at Iso. Code § 13-7-10-2.5(a)). The hearing requested by petition must be held. Iso. Code § 13-7-10-2(b), amended by Pub. L. No. 143-1985, § 148. See also *supra* note 197.

- f. The permit is effective immediately unless the Commissioner states otherwise. Pub. L. No. 143-1985, § 149 (codified at Iso. Code § 13-7-10-2.5(b)). At this point, the permittee may commence construction and/or operation.
- g. Pub. L. No. 143-1985, § 149 (codified at Iso. Code § 13-7-10-2.5(b)). See *supra* text accompanying note 202.
- h. Pub. L. No. 143-1985 (codified at Iso. Code § 13-7-10-2.5(b)). See *supra* note 203 and accompanying text.
- i. A citizen objector may request the hearing if he is a "person aggrieved." Pub. L. No. 143-1985, § 149 (codified at Iso. Code § 13-7-10-2.5(c)).
- j. At this point, the board may stay the force and effect of any contested permit provision. Pub. L. No. 143-1985, § 149 (codified at Iso. Code § 13-7-10-2.5(c)).

- k. If the hearing was requested by a citizen objector, the permittee would be a necessary party to the hearing. If the permit applicant requested the hearing, however, it is unclear whether notice or an opportunity to intervene must be provided to any citizen objectors.
- l. Iso. Code § 4-22-1-25.
- m. The fifteen day time period for filing an adjudicatory hearing request does not begin to run until notice of the permit's issuance is received. See Pub. L. No. 143-1985, § 149 (codified at Iso. Code § 13-7-10-2.5(c)) and *supra* text accompanying notes 224-25.
- n. The court cannot order that the permit be revoked. *Town of Bremen*, 458 N.E.2d at 675-77; IND. CODE § 4-22-1-18.
- o. *Id.*
- p. *Id.*

Chart Three: A Possible Remedy—The Hearing Transformation Procedure



a. See *supra* Chart One.

b. See *supra* note 247 and accompanying text.