Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution

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JUDICIAL INDEPENDENCE IN
ADMINISTRATIVE ADJUDICATION:
INDIANA'S ENVIRONMENTAL SOLUTION

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I. INTRODUCTION

The term “administrative law” was coined in 1893,¹ nearly a century after the creation of the first federal agencies.² An administrative agency is “a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.”³ Much is written about the growing litigiousness of society in general via traditional courtroom litigation.⁴ A wide range of disputes, how-

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¹ See, e.g., FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY (1893) (suggesting that author first used term in this treatise).

² See, e.g., KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 1.6, at 15-16 (2d ed. 1978) (noting that first major independent administrative agency was Interstate Commerce Commission created in 1887 to address issues in railroad industry).

³ Davis, supra note 2, § 1:2, at 9 (citing first edition of author's treatise).

⁴ See Roundtable, Mass Tort Litigation Fever Running High: Practitioners Say There Is No Apparent Cure to this Societal Problem, ILL. LEGAL TIMES, Jan. 1996, at 18 (claiming that among reasons for constant growth in litigation is high compensation awards and suggesting that litigation has developed into dominant vehicle for disposing of most types of disputes); see also L. Gordon Crovitz, Rule of the More Lawsuits the Better and Other American Notions, WALL ST. J., Apr. 17, 1991, at A15 (asserting that litigation has grown in America because lawyers get paid on contingency basis, judges relax filing guidelines, former litigation barriers vanished, and lawsuits are encouraged by those associated with
ever, must first be resolved through an administrative agency before a claimant may resort to judicial review. Consequently, appearing before an Administrative Law Judge (ALJ) may be a claimant's only "day in court."

The judicialization of the administrative process, a phenomenon largely taken for granted by both lawyers and the general public in contemporary America, is probably one of the most mysterious, yet significant, features of American government. Yet, the concept of agency decision making, separate from its adjudication function, is not new. In a seminal article addressing due process in administrative hearings, Judge Henry J. Friendly recognized the need for an unbiased tribunal in the administrative process when he wrote, "there is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards. . . ."

With the increased role of administrative adjudication, it is important to ensure that this method of dispute resolution carries
the same indicia of reliability and fairness found in other judicial settings. To that end, this article examines current trends involving the administrative adjudicative process with a focus on Indiana's unique attempt to assure fairness and impartiality in a complex environmental arena.

II. FEDERAL AND STATE SYSTEMS FOR ADMINISTRATIVE PROCESS

A. Administrative Adjudication Nationally

Administrative adjudication is handled in a variety of ways at the federal and state levels of government. ALJs often resolve scientifically and legally complex disputes among and between agencies, the regulated community, and the public in such diverse areas as commerce, communication, environment, health and safety, and social security. ALJs must administer these complex, diverse controversies while ensuring the public's right to due process of the law.

This adjudicatory method has faced concerns relating to an appearance of conflicts of interests.

During the 1940s and concurrent with the development and enactment of the Federal Administrative Procedure Act in 1946, there was significant concern that the adjudication function within executive agencies both Federal and State, posed an inherent conflict of interest. The conflict is that ex-

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9 See Indiana Legislative Services Agency, Indiana Administrative Orders and Procedures Study Committee Memorandum Re: Questionnaire to State Agencies that Use ALJs for Administrative Adjudication (Sept. 24, 1996) (on file with authors). There are approximately 40 agencies in Indiana, some of which are exempt from Indiana Code § 4-21.5 (1993), which utilize ALJs. Id. These include: Alcoholic Beverage Commission, Board of Animal Health, Board of Tax Commissioners, Bureau of Motor Vehicles, Civil Rights Commission, Department of Administration, Department of Correction, Department of Education, Department of Financial Institutions, Department of Insurance, Department of Labor, Department of State Revenue, Department of Transportation, Department of Workforce Development, Education Employment Relations Board, Election Commission, Family and Social Services Agency, Health Professions Bureau, Horse Racing Commission, Indiana Gaming Commission, Indiana Parole Board, Indiana State Police, Law Enforcement Training Board, Lottery Commission, Natural Resources Commission, Office of Environmental Adjudication, Professional Licensing Agency, Public Employees Retirement Fund, State Emergency Management Agency and Fire and Building Services, State Board of Accounts, State Department of Health, State Ethics Commission, State Personnel Department, Student Assistance Commission, Teachers Retirement Fund, Utility Regulatory Commission, and Workers' Compensation Board. Id.

ecutive agencies are creators and enforcers of policy to further their administrative and executive goals; and, that the combination of prosecutorial duties with adjudication functions created perceptions of bias and unfairness as well as actual conflicts of interest.\footnote{See State Practices Committee National Conference of Administrative Law Judges, Judicial Administration Division American Bar Association, Report of Committee Concerning Proposed Model Act Creating a State Central Hearing Agency 1 (Sept. 11, 1996) (on file with authors) [hereinafter State Practices]; see also Joral Corp. v. District of Columbia, 533 F.2d 1192, 1197 (1976) (declaring no per se violation of due process results when adjudicating, prosecutorial, and investigatory functions are performed by one party; rather there must be "actual personal bias or pecuniary interest").}

In response to this inherent conflict, there has been movement at both the federal and local levels to create central hearing agencies or panels where ALJs are not employed by the agencies whose cases they hear, but by a separate agency created solely to manage them.\footnote{Legislation was introduced in Congress that would create a Federal central hearing agency for all executive agencies. Senator Howell Heflin (D-AL) introduced S. 468 to the Senate on March 2, 1995. The bill was assigned to the Senate Committee on the Judiciary. No further action occurred. Congressman George Gekas (R-PA) introduced H.R. 1802 to the House of Representatives on June 8, 1995. The bill was referred to the House Committee on the Judiciary. A hearing was held on March 28, 1996, in the House Subcommittee on Commercial and Administrative Law. No further action occurred. See generally Edwin L. Felter, Jr., The Hidden Executive Branch Judiciary: Colorado's Central Panel Experience—Lessons for the Feds, 14 J. Nat’l Assoc. Admin. L. Judges, Spring 1994, at 95.}

The goal of creating central panel systems was to enhance the fairness, efficacy, and independence of the adjudicatory process.\footnote{See Duane R. Harves, Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota, 65 Judicature 257, 265 (1981).}

In the past two decades, the number of state central hearing panels has grown from eight to twenty-four.\footnote{Most importantly, perhaps, the central panel system has resulted in a more efficient, effective administrative hearing process. Costs have dropped dramatically and cases can now be both heard and decided more promptly. And, it appears that in most cases all parties are satisfied with the process and the fairness of that process even if not necessarily satisfied with the decision. Id.; see also Allen Hoberg, Administrative Hearings: State Central Panels in the 1990s, 46 Admin. L. Rev. 75, 76-77 (1994) (discussing purposes behind central panel system).} Each central panel

state has developed unique solutions to provide for fair, expeditious, and inexpensive administrative proceedings. In all of the systems, however, the presiding officer is an ALJ, organizationally attached to a central office of administrative hearings rather than to the specific state agency.\textsuperscript{15}

In an effort to ensure and fortify the independence of state ALJs through the central panel system, the State Practice and Procedure Committee of the American Bar Association Judicial Division National Conference of Administrative Law Judges prepared the Model Act Creating a State Central Hearing Agency (Act). The Act's purpose is "to facilitate and expedite removal of adjudication from the executive branch agencies, thereby separating the investigatory and prosecutory functions from the adjudicatory functions."\textsuperscript{16} The Act is being submitted to the Judicial Division Council, then to the ABA Board of Governors, and ultimately to the ABA House of Delegates. The Act also is being presented to the Commissioners on Uniform State Laws.\textsuperscript{17}

B. The Emergence of Standards and Rules for Administrative Adjudication in Indiana

In 1946, in an attempt to formalize and standardize administrative procedures employed in adjudication at that time, Indiana adopted a modified version of the Model Administrative Adjudication Act (AAA).\textsuperscript{18} Implicit in this enactment were fundamental due process safeguards such as the right to public and adjudicatory hearings.\textsuperscript{19}

\textsuperscript{15}See Administrative Orders and Procedures Study Committee Memorandum re: Questionnaire to Each State that Uses a Central Hearing Panel for Administrative Adjudication, Indiana Legislative Services Agency, Nov. 14, 1995 (on file with authors); see also L. Harold Levinson, The Central Panel System: A Framework that Separates ALJs from Administrative Agencies, 65 Judicature 236, 245 (1981) (concluding that central panel systems may balance independence and accountability successfully).
\textsuperscript{16}See State Practices, supra note 11, at 5.
\textsuperscript{17}See id. at 1, 5. A central panel was also incorporated into the 1981 revision of the Model State Administrative Procedure Act adopted by National Conference of Commissioners on Uniform State Laws. Id.
\textsuperscript{18}See Model State Admin. Adjudication Act (1946). The Indiana General Assembly enacted the Model Act pursuant to 1947 Ind. Acts, ch. 365, §§ 4, 5, S. 103-197 (Ind. 1984). Indiana's AAA was codified at Ind. Code § 4-22-1-1 to 4-22-1-30 and repealed by H. 104-1687, (Ind. 1986) (repealing 4-22-1-11) and H. 104-1339 (Ind. 1986) (repealing 4-22-1-1 to 4-22-1-10, 4-22-1-12 to 4-22-1-30).
Judicial review of an environmental adjudication was a primary impetus for the Indiana General Assembly to create a committee in 1982 to study state administrative procedures. Three years later, the General Assembly created the Administrative Adjudication Law Recodification and Revision Commission, a bipartisan group charged with reviewing administrative agency issues. A member of this Commission introduced legislation replacing the AAA and, in its stead, the General Assembly enacted the Administrative Orders and Procedures Act (AOPA).

C. Administrative Orders and Procedures Act

Article 21.5 of the AOPA is divided into six chapters: definitions, application, adjudicative proceedings, special proceedings (emergency and temporary orders), judicial review, and civil enforcement. Chapter Two of the AOPA is particularly important in that it "creates minimum procedural rights and imposes minimum pro-

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20 See Kathleen G. Lucas, Administrative Adjudication - Revised and Recodified, 20 IND. L. REV. 1, 8 (1987). The author notes that:
The Town of Breman case involved construction and operation permits for a sanitary landfill granted by the Indiana Environmental Management Board (EMB). The town and several private citizens sought to obtain judicial review of the permit issuance and to enjoinder its effectiveness pending review. The trial court eventually ordered that the EMB actions be set aside and vacated. The Indiana Court of Appeals found that the town and the citizens were entitled to pursue administrative remedies under the AAA, including the opportunity for settlement and for an adjudicatory hearing. The court further found that the AAA required the agency to notify all 'affected persons' by registered (or certified) mail or in person of its initial determination. Failure to provide the appellees with their due process rights under the AAA rendered the permits void ab initio.

21 See IND. CODE § 2-5-5-1 (1977). The General Assembly created the Natural Resources Advisory Committee in an effort to address problem areas in the AAA. Id.; see also IND. CODE § 2-5-5-1 (a) (1977)) amended by S. 104-74 (Ind. 1975). In 1985, the name was amended to the National Resources Study Committee. Id.

22 See S. 104-341 (Ind. 1985). The legislation stated that the president pro tempore of the senate would name four senators and two citizens, not members of the General Assembly to the commission, with no more than one-half of either category from the same political party. Id. The speaker of the House of Representatives, within the same guidelines, would name four representatives and two citizens to the commission. Id. The emergency commission was slated to work from mid-April 1985 until December 31, 1985, when the Act expired. Id.

23 See IND. CODE § 4-22-1-1 to 4-22-1-10 and 4-22-1-12 to 4-22-1-30, repealed by H. 104-1339 (Ind. 1986) § 4-22-1-11, repealed by H. 104-1687 (Ind. 1986) (replacing former code provisions with AOPA); see also IND. CODE § 4-21.5; H. 104-1339 (Ind. 1986) (establishing committee to study efficacy of creating pool of administrative law judges and to study effect of Act on issues such as adequacy of public notice of proceedings and proposing any appropriate legislation); H. 104-1339 (Ind. 1986) (noncode sections). The AAA IND. CODE § 4-22-1 was repealed by H. 104-1339 (Ind. 1986) (effective July 1, 1987).
cedural duties." An agency may grant greater procedural rights to persons, provided that these rights do not substantially prejudice other parties and are not inconsistent with the AOPA. To afford participants broader due process protection, the General Assembly codified certain procedural safeguards provided by the Indiana Rules of Trial Procedure. Additional procedural safeguards included intervention and the prescription of criminal penalties for the ALJ and persons who aid, induce, or cause the ALJ to violate ethical requirements of the statute. Lastly, the AOPA prescribed the qualifications of an ALJ, defining and prohibiting ex parte communications, and situations requiring disqualification.

III. ADMINISTRATIVE ADJUDICATION OF ENVIRONMENTAL DISPUTES IN INDIANA: THE INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

A. Indiana's Early Responses to Heightened Environmental Concerns

With respect to the administration of environmental laws, prior to enactment of the National Environmental Policy Act of 1969, 1996| INDIANA'S ENVIRONMENTAL SOLUTION 131

25 See id. at § 4-21.5-3-35 (providing that agencies may choose to grant more procedural rights than those granted by AOPA, so long as rights granted by AOPA are not infringed and other persons are not substantially prejudiced).
26 See, e.g., IND. CODE § 4-21-5-3-2 (1993) (articulating service of process requirements); IND. CODE § 4-21.5-3-23 (1993) (allowing summary judgment motions to be granted which indicates power to decide legal questions).
27 See Lucas, supra note 20, at 11.

Prior to a hearing, mandatory intervention is recognized for persons granted an unconditional right to intervene by any other statute. Permissive intervention exists for those who demonstrate that they may be substantially prejudiced or who have a conditional right to intervene under another statute.

During a hearing, intervention may be allowed if the petitioner has a conditional right to intervene or presents a common question of law or fact. The ALJ must also determine whether allowing intervention after the hearing has begun will not impair either the interests of justice or the prompt conduct of the proceedings.

Id.
28 See IND. CODE §§ 4-21.5-3-36, 4-21.5-3-37 (1993) (stating that both aiding in violation of and violation of IND. CODE § 4-21.5-3-11, 12, or 13 is punishable as Class A misdemeanor).
29 See IND. CODE §§ 4-21.5-3-9, 4-21.5-3-10, 4-21.5-3-11, 4-21.5-3-12 (1993). At the time, ALJs were subject to Indiana's [state employee] Code of Ethics, and the attorneys' Rules of Professional Conduct. Id. Currently, ALJs are additionally subject to the Code of Judicial Conduct. Id.
30 1 INDIANA LEGISLATIVE SERVICES AGENCY, ENVIRONMENTAL REGULATION IN INDIANA SUNSET AUDIT OF THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT AND RELATED BOARDS 1-1 (1988) (on file with authors) See Robert F. Bloomquist, In Search of Accountability: The Legislative Re-Invention of Environmental Law and Policy In Indiana, 28 IND. L. REV. 913,
"Indiana was a partner in early regional attempts to address water pollution concerns." Following the creation of the United States Environmental Protection Agency (EPA) in 1970 and the enactment of comprehensive Federal environmental statutes, the Indiana Board of Health (BOH) acted as the state agency designated to receive and administer the federal funds (supplemented by state funds) provided to carry out those mandates.

945 (1995) (noting Indiana's General Assembly created state board to monitor pollution); cf. West Muncie Strawboard Co. v. Slack, 72 N.E. 879, 882 (Ind. 1904) (affirming damages award for water pollution).


31 See 42 U.S.C. §§ 4321-4370d (1994 & Supp. I 1996). The statutes establish as the "continuing policy of the Federal Government...to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Id. at §4331(a).


As concern with the condition of our physical environment has intensified, it has become increasingly clear that we need to know more about the total environment—land, water and air. It also has become increasingly clear that only by reorganizing our federal efforts can we develop that knowledge, and effectively ensure the protection, development and enhancement of the total environment itself.

The Government's environmentally-related activities have grown up piecemeal over the years. The time has come to organize them rationally and systematically.

Id. at Message from the President, July 9, 1970.


The late 1960s and early 1970s saw rapid growth in the regulatory responsibilities of the environmental programs administered by the BOH. Indiana took affirmative steps to combat several environmental concerns including banning non-biodegradable detergents in response to national concerns of eutrophication in the Great Lakes and controlling the construction and operation of confined feeding operations, resulting in the protection of soil and receiving streams from unapproved discharges of runoff, waste, and manure. The General Assembly enacted the first comprehensive environmental statute in 1972, establishing the former Indiana Environmental Management Board. The Board's function was to "... evolve and keep constantly updated a com-

35 See ENVTL. POL'Y COMM'N, Final Report, at 6 (Dec. 1984) (on file with authors). The State went from simply checking smoke discharge opacity to constructing complex air quality models, from beyond measuring fish kills to analyzing water for conventional pollutants which lead to human disease or atrophied waters, from checking dumps for blowing paper and controlling open burning, to closing open dumps, regulating the proper transportation, treatment, storage, and disposal of all domestic and industrial waste, and addressing the problems of improperly disposed chemicals. Id.; see also Myrl L. Duncan, Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland, 14 ECOLOGY L.Q. 401, 413 (1987) (chronicling growth of state and federal environmental programs in 1960s and 1970s); William B. Johnson, Annotation, Determination Whether Substance Is "Hazardous Substance" Within Meaning of § 101(14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9601 (14)), 118 A.L.R. Fed. 293, 371 (1994) (providing examples of EPA regulatory responsibility in 1970s).

See generally INDIANA ENV'TL. INST., INC., INDIANA ENVIRONMENTAL SOURCE BOOK pt. 1 (Draft 1996) [hereinafter IND. ENV'TL. SOURCE BOOK] (noting that mission of Indiana Environmental Institute is promoting environmental protection through mutual understanding).

36 See H. 97-1551 (Ind. 1971) (amending IND. CODE § 13-1 by adding §§ 13-1-5.5 which prohibits use, sale, or other disposal of certain detergents); see also Jennifer Woodward, International Pollution Control: The United States and Canada-The International Joint Commission, 9 N.Y.L. SCH. J. INT'L. & COMP. L. 325, 340 (1988) (noting Indiana's laws on pollution into Great Lakes region).

37 See S. 97-287 (Ind. 1971), codified at IND. CODE § 13-1-5.7 (1985) (requiring board approval prior to constructing confined feeding operations in addition to requiring board approval of waste management procedures being applied during operation); see also IND. CODE § 13-1-5.7 1(c) (1985) (defining confined feeding as "the confined feeding of animals for food, fur, or pleasure purposes in lots, pens, ponds, sheds or building where food is supplied to the animals only by means other than grazing").

38 IND. CODE § 13-7-1-1 (1972) repealed by S. 109-56 (Ind. 1996). The statute provided: The purpose of this article is to provide for evolving policies for comprehensive environmental development and control on a statewide basis; and to unify, coordinate, and implement programs to provide for the most beneficial use of the resources of the state and to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.

Id.; see also Bloomquist, supra note 30, at 921 n.21 (explaining that in 1985 environmental management boards were replaced by water pollution control board, air pollution control board, and solid waste management board).

39 See IND. CODE § 13-7-2-1 (1972) (creating department of environmental management within state government's executive branch).
prehensive, long-term program for the state for the development and control of the environment to ensure for the present and future generations the best possible air, water, and land quality."  

B. Staff Attorneys and Environmental Hearing Officers

Part of Indiana’s initial agreements with the EPA authorizing the administration of federal programs included a performance evaluation examining the quantity of programs that were developed, rules written, permits issued, enforcement actions taken, and grants administered. The BOH staffing levels always lagged behind the federal mandates, creating a serious staffing problem at the program level in conducting adjudications for permitting and enforcing cases.

1. Staff Attorneys

Staff attorneys were utilized to develop and present enforcement and permit cases as well as serve as hearing officers presiding over the cases. Even though the same staff attorney never advocated and presided over the same case, an obvious appearance problem resulted. The State Personnel Department job description simultaneously prescribed both advocacy and adjudication as responsibilities of the staff attorney position. The staff attorneys filed formal personnel grievances to rectify this “appearance” problem, but State Personnel alone could not provide an administrative remedy. Ultimately, a settlement was reached with the BOH, the Attorney General, and State Personnel that resulted in

40 Ind. Code § 13-7-3-1 (1976).
41 The earliest agreements were in the form of Memoranda of Agreement, Memoranda of Understanding, and Delegation Agreements. See EPA/Indiana Department of Environmental Management, Environmental Performance Partnership Agreement (on file with authors). The Performance Partnership Agreement represents a new partnership for protecting, enhancing, and conserving Indiana’s environment. Id. Indiana’s Performance Partnership Grant is directly linked to the Agreement’s approval by EPA. Id. Indiana is the first state to complete the agreement process by EPA’s due date. EPA signed the Agreement on November 13, 1996. Id.; see also Indiana Dept Env’t Mgmt., Fact Sheet: Indicators of the Environment (on file with authors); Cindy Clendenon, IDEM Measures Success with Indicators, Indiana Env’t, Spring 1996, at 1 (noting that IDEM utilizes environmental indicators to show significant trends, to relate changes in human welfare to changes in environmental conditions, or to represent environmental stresses, conditions, and management responses and that “relate IDEM’s corrective and preventive activities to measurable changes in environmental quality”).


the creation of two separate job descriptions: Staff Attorney and Environmental Hearings Officer.\(^{42}\)

2. Hearings Officers

Through the mid-1980s, hearings officers presided over non-adjudicatory rulemaking hearings and recommended rule language for adoption by the boards.\(^{43}\) The regulated community objected to having the same person recommend language at the draft stage and subsequently review the applicability or meaning of that rule in an adjudicatory proceeding. Thus, when the Indiana Department of Environmental Management (IDEM) was created in 1985,\(^{44}\) the statute creating the Office of Hearings specifically prohibited the hearings officers from “participat[ion] in investigation or enforcement activities, . . . the preparation of proposed rules, or in any other department activity that might compromise their independence.”\(^{45}\)

\(^{42}\) Benchmark descriptions for the Environmental Hearings Officer position were established July, 1979 by the State Personnel Board.


\(^{44}\) See ENV POL’Y COMM’N FINAL REPORT, supra note 35, at 1. An interim legislative committee, formed to evaluate Indiana’s solid and hazardous waste management program, recommended that the legislature establish an environmental policy commission that could address issues involving environmental policy. Id.

Because of the need to move swiftly so that the recommendations of such a commission could be reported to the legislature in a timely manner, and yet to ensure that the commission would have adequate time to receive testimony and hold public hearings, [then] Governor Orr, [by Exec. Order No. 16-83] established the Environmental Policy Commission.

Id. The Commission recommended, after a year-long study in 1984, that a new state agency be established to address environmental regulation. Id. The Commission concluded among other things that despite “many positive accomplishments, the management of the expanding, interrelated, and complex environmental programs does not meet the current needs of the State of Indiana.” Id. at 6.

The Indiana Environmental Policy Commission was established formally by the General Assembly, pursuant to S. 104-566 (Ind. 1985) (codified at IND. CODE § 2-5-4-6 repealed by H. 108-1412 (Ind. 1993). See generally Joyce M. Martin et al., Funding State Environmental Programs: Indiana’s Solution, 1 ENVTL. LAW. 435, 437 (1995) (incorporating fees for funding IDEM program).

At that time, forty percent (40%) of the Indiana State Board of Health’s employees and budget were dedicated to environmental programs; that staff became the staff of the IDEM. The IDEM was created pursuant to S. 104-566 (Ind. 1985).

\(^{45}\) S. 104-566 (Ind. 1985). In 1994, the words “Hearing Officer” were changed to “Administrative Law Judge.” H. 108-1038 (Ind. 1994).
C. Indiana Department of Environmental Management

The Office of Hearings at IDEM, although separated from the agency's legal counsel and its criminal investigation and enforcement personnel, reported directly to the Commissioner, a gubernatorial appointee. In 1989, the Hearing Officers came under the supervision of a Deputy Commissioner who served at the pleasure of the Commissioner. The ALJs, who were subject to agency efficiency ratings, discipline, and compensation status, heard cases, created the initial administrative records, and then issued Recommended Orders. The Recommended Orders would then be placed on the agenda of one of four citizen environmental boards, which would issue a Final Order for purposes of judicial review.

Since its inception, the relationship between the IDEM, the regulated community, the environmental groups and the special interests has been challenging. The state's interest in promoting industrial development by avoiding undue regulation is often incompatible with its interest in protecting both the health and welfare of its citizens and the integrity of its natural resources. In Indiana, a relatively small state, the challenge is especially problematic due to the combination of the state's geographical at-


47 The Hoosier Environmental Council was established in 1983 and has grown from a handful of individual members to an umbrella representative of 65 organizations. Other groups include the Indiana Nature Conservancy, Indiana Wildlife Federation, Citizens Action Coalition, and the Central Indiana Land Trust. The Indiana Environmental Institute, Inc., founded by Dr. William Beranek, Jr., provides technical analysis and policy research and analysis to all stakeholders. The Environmental Quality Control, Inc. provides information to businesses that assist them to operate at a profit while complying with the law.

48 See Ellen C. Siakotos, Citizen Standing in Environmental Licensing Procedures: Not in My Neighborhood!, 18 IND. L. REV. 989, 1024 (1985) (discussing legislative problems in reconciling two divergent interests); see also Timothy J. Junk, Indiana Environmental Law Update, IND. BUS., July 1, 1993, at 45 (describing Indiana's commitment to defending its environment against polluters with help of Indiana's stringent environmental laws).

49 See IND. ENVTL. SOURCE BOOK, supra note 35, at pt. I (noting that less than 10% of Indiana's total area of 36,185 square miles is developed); see also IND. DEP'T NAT. RESOURCES, 1994 STATEWIDE COMPREHENSIVE OUTDOOR RECREATION PLAN, (on file with authors) (stating total public recreation land ownership amounts to 709,646 acres).
tributes and natural resources mixed with a large industrial and commercial base and a significant agricultural component.\textsuperscript{50}

The IDEM, even though it was understaffed and underfunded to meet its mandates, was compelled to initiate additional cut-backs and layoffs to avert a state budget crisis in 1993.\textsuperscript{51} The following year, due to these funding issues, then Governor Evan Bayh announced that Indiana would return the federally delegated National Pollutant Discharge Elimination System (NPDES) and Resource Conservation and Recovery Act (RCRA) permitting programs to the EPA.\textsuperscript{52} This crisis served as a backdrop for the

\textsuperscript{50} See IND. ENVTL. SOURCE BOOK, supra note 35, at pt. I (estimating that 1994 exports of Indiana products accounted for $9.26 billion in sales); see also Don W. Miller, Jr., Indiana Ports Support New Trade Group, INDIANA PORTSIDE (1996). Indiana ranks as the 9th largest manufacturing state: 83.7 billion dollars worth of goods were produced by 9,646 manufacturing plants in 1993. \textit{Id.} Currently, Indiana is the largest steel producer, making 22 percent of all steel made in America. \textit{Id.} Indiana is also the largest producer in other categories including mobile homes, motor homes, travel trailers and campers, truck and bus bodies, radios and televisions, and refrigerators. \textit{Id.} Automobile production is significant and, along with auto-related occupations, account for almost 18 percent of all Indiana manufacturing jobs. \textit{Id.} The extraction of natural resources has also played an important part in the state's development: limestone (5%), coal (27%), sand and gravel (29%), crushed stone (39%), and gypsum (one of the nation's largest commercial deposits of gypsum is found in southwest Indiana). \textit{Id.} Oil and gas are produced in a wider range of counties than coal, but the economic impact on the state is much lower. \textit{Id.; INDIANA CHAMBER OF COMMERCE, HERE IS YOUR INDIANA GOVERNMENT, 3-4 (1995-1996)} (on file with authors) [hereinafter \textit{YOUR INDIANA GOVERNMENT}]. Indiana, known as the "Crossroads of America," carries heavy commercial traffic; it has three international ports, Burns International Harbor on Lake Michigan, Clark Maritime Center in Jeffersonville, and Southwind Maritime Center near Evansville, which, along with an Indianapolis location, have been authorized as Foreign Trade Zones by the United States Department of Commerce. \textit{Id.} Indiana is served by all eastern railroads and by some from the south and west; there are 4,400 miles of mainline track owned by 39 different railroads. \textit{Id.} Indiana has approximately 1,138 miles of completed interstate routes and 92,375 miles of highways and roads. \textit{Id.} Indiana ranks seventh in the nation in air transportation, with more than 500 airports (110 public-use) with nine major carriers. \textit{Id.; COMMISSIONER OF AGRIC., INDIANA AGRIC., 22. (1996).} The combination of cropland and pasture land constitutes 66\% of 23,158,000 available acres in Indiana. \textit{Id.} In 1994, Indiana, while 38th in land size among the 50 states, ranked 12th in the United States in cash receipts from the sale of all commodities (crops and livestock). \textit{Id.} Some of Indiana's rankings, which demonstrate profound agricultural impact include 1st in the production of popcorn and ducks; 3rd in tomatoes; 4th in soybeans; chicken, excluding broilers and total eggs produced; 5th in corn for grain and hogs; and 7th in turkeys. \textit{Id.}

\textsuperscript{51} See Martin et al., supra note 43, at 445 (noting Indiana General Assembly's adoption of two year budget plan that did not include increases for IDEM funding); see also \textit{YOUR INDIANA GOVERNMENT, supra note 50, at 37.} Indiana's Constitution prohibits the enactment of laws that would "authorize any debt to be contracted, on behalf of the State . . . ." IND. CONST., art. 10, § 5. Thus, the cut-backs and lay-offs occurred to comply with the constitutional prohibition. \textit{Id.}

\textsuperscript{52} See Letter from Governor Evan Bayh of Indiana to Carol Browner, EPA Administrator (Sept. 8, 1993). The letter states in part that [T]he Indiana Department of Environmental Management (IDEM) cannot meet the staffing and administrative demands of permitting functions in both the Resource Conservation and Recovery Act (RCRA) and the National Pollutant Discharge Elimination System (NPDES) because of inadequate funding. Therefore, I have directed Kathy Prosser, the Commissioner of the IDEM, to work closely with EPA Region V to immedi-
1994 legislative session and the beginning of a more constructive dialogue between the IDEM, those it regulated, the environmentalists, and other stakeholders.

In addition to addressing the funding issues, the stakeholders discussed shifting the focus of environmental regulation from "command and control"\(^5\) to a more service-oriented and compliance-friendly approach.\(^5^4\) The General Assembly created an Environmental Quality Service Council, whose function was to assess IDEM's "improvement in the timeliness of the review and issuance of permits, improvement in the consistency of issuing permits to avoid overregulation, efficient and effective implementation of federal and state laws, effective technical assistance capability, and development."\(^5^5\)

\(^5^3\) See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE AND POLICY 796 (1992) (defining "command and control" as approach in which agencies issue specific pollution control commands to regulated communities and monitor those parties regulated to ensure compliance); see also Daniel J. Fiorino, Toward a New System of Environmental Regulation: The Case for an Industry Sector Approach, 26 ENVTL. L. 457, 463-64 (1996) (discussing federal environmental policy emphasis on "command and control" regulations); cf. S. 108-417 (Ind. 1994) (establishing new permit review time periods for many IDEM programs to provide assurance to permit applicants that IDEM would make decisions in timely fashion to meet their needs).

\(^5^4\) See H. 108-1182 (Ind. 1994). This bill established a twenty-one member Environmental Quality Service Council that serves as an oversight and advisory body to represent all of the IDEM stakeholder groups. Id. The Council was originally scheduled to sunset on December 31, 1995; however S.E.A. 138, Pub. L. No. 248-1996 continues the Council through December 31, 2000. Id.; see also INDIANA ECON. DEV. COUNCIL, INC., 1995 ECONOMIC REPORT TO THE GOVERNOR IMPROVING COMPETITIVENESS THROUGH COMPLIANCE-FRIENDLY REGULATION (report from a Cross-Sector Roundtable facilitated and reported by Lawrence J. Lad, Smart Regulation: Compliance Friendly and Consumer Fair, at 13 (1995) (on file with authors).

Getting smarter about regulation requires a shift from strictly adversarial, command and control mechanisms to the consideration of alternative mechanisms for regulation. These include self-regulatory systems, involvement of third-party associations, the use of sunset procedures and legislative review, professional certification and licensing, stakeholder regulation, and the adoption of more "common sense principles" in the regulatory process.

\(^5^5\) S. 108-417 (Ind. 1994) (West) (uncodified). See Bloomquist, supra note 30, at 939-41 (detailing establishment and purpose of Environmental Quality Service Council); Michael
The IDEM utilized a new management approach, incorporating the principles of Total Quality Management and Stephen Covey's, The Seven Habits of Highly Effective People. IDEM also restructured its offices, and established an Operational Planning Task Force to "facilitate the creation of logical, consistent and customer-driven permitting systems that [would] ensure the timely processing of new applications, eliminate backlogs, and improve external relationships."

Members of the regulated community and the environmentalists approached the General Assembly with their concerns about the appearance of partiality and conflict of interest involving the


See Steven Covey, The Seven Habits of Highly Effective People: Restoring The Character of Ethics 1 (1989). In the pre-work to his The Seven Habits of Highly Effective People workshop, Stephen R. Covey states, "We believe the best way to improve the organization is to improve yourself; the best way to empower the organization is to empower yourself. This Inside-Out approach starts with you . . ." Id. The Seven Habits of Highly Effective People provide a holistic, integrated approach to personal and interpersonal effectiveness. Id. As you learn and apply the habits, you will increase your power, influence, and unity with others." Id. The Seven Habits include: (1) be proactive; (2) begin with the end in mind; (3) put first things first; (4) think win-win; (5) seek first to understand, then to be understood; (6) synergize; (7) sharpen the saw. Id.

See generally IND. DEP'T ENVTL. MGMT. OPERATIONAL PLANNING TASK FORCE, ORGANIZATION AND MANAGEMENT IMPROVEMENT PLAN (June 1995) (on file with authors); see also Bloomquist, supra note 30, at 939 (discussing controversy surrounding establishment of counsel); Tom Arrandale, Reinventing the Cleanup, GOVERNING, Dec. 1996, at 36 (commenting that Commissioner Kathy Prosser was instrumental in effectuating shift).

See generally INDIANA ENVIRONMENT AND MATERIALS EXCHANGE Sept.-Oct. 1997 at 2 (on file with authors). On June 16, 1997, John M. Hamilton became IDEM's fourth Commissioner and continues the shift away from "command and control" environmental regulation: "As stewards of Indiana's air, water and land, we at IDEM are committed to helping industries meet the standards we all expect of them. Clear limits with meaningful benefits to public health are in everyone's best interest, and so is working together to meet them." Id.
Office of Hearings. The Office’s structure, under the direct supervision of upper management coupled with its physical location within the agency, had fueled questions of fairness and objectivity. In addition, because most of the members of the citizen boards were not legally trained, and the boards had the “ultimate authority” in administrative adjudications, many among the regulated community and the environmental groups believed that the complex legal issues underlying the cases were beyond the legal competence of the members of the boards; some even questioned the Board’s efficacy.

The legislature established an Environmental Rulemaking Study Committee to evaluate the existing environmental Board structure and the feasibility of replacing the existing Boards with two: one for rulemaking and policy and the other for adjudication. Although bills were introduced in both houses of the General Assembly in 1995 to establish a three attorney member administrative adjudication board, the conference committee ultimately recommended that an independent state agency, the Office of Environmental Adjudication, be established and that the Office be made the ultimate authority for all of the decisions of the IDEM Commissioner.

59 See Ind. Code § 4-21.5-1-15. “Ultimate Authority” is defined as “an individual or panel of individuals in whom final authority of an agency is vested by law or executive order.” Id. The Commission drafting the new law, “referred to the ultimate authority as that entity whose decision was ripe for judicial review.” Id.; see also Bloomquist, supra note 31, at 938 n.93 (discussing ultimate authority); Lucas, supra note 20, at 10 (same).

60 See S. 108-417 (Ind. 1994) (West) (uncodified).

61 Id. at 914-15. The committee's function was to:

[S]tudy issues concerning: (1) the organization and rulemaking procedures of: (A) the air pollution control board; (B) the solid waste management board; and (C) the water pollution control board; and (2) the feasibility of replacing the [three environmental boards] with two (2) independent boards that concern: (A) rulemaking and development of environmental policy; and (B) adjudicatory matters related to environmental law.

Id.

62 See S. 109-156 (Ind. 1995). The relevant sections are codified at Ind. Code § 4-21.5-7 (1995). In addition to creating the Office, the statute authorized rulemaking for procedural rules. Id. at § 4-21.5-7-7(2). The procedural rules, when promulgated, will be found in Title 315 of the Indiana Administrative Code.

63 See Ind. Code § 4-21.5-7-5 (1996) (stating that “[a]n environmental law judge is the ultimate authority for review of the decisions of the commissioner of environmental management.”); see also Ind. Code § 4-21.5-7-4 (1996) (permitting director of Office of Environmental Adjudication to serve as environmental law judge); Ind. Code § 4-21.5-7-3 (1996) (stating that purpose of Office of Environmental Adjudication is to review decisions of IDEM Commissioner).
D. The Office of Environmental Adjudication

In addition to establishing the Office of Environmental Adjudication, the legislature established a twelve-member Administrative Orders and Procedures Study Committee (AOPSC). The committee was created to evaluate whether the public interest would be better served by implementing a centralized pool of administrative law judges or adopting uniform procedural rules for all of the agencies. It also analyzed whether the adoption of alternative dispute resolution would facilitate administrative adjudication by conducting a survey of states having central panels to ascertain the feasibility of alternative dispute resolution. At the end of its first year, the Committee recommended that legislation be enacted to open up state administrative proceedings to mediation procedures. Thereafter, the Committee continued to meet to consider the feasibility of uniform procedural rules. The Committee sunset on December 31, 1996, and no other committee was established to address these issues.

To the uninitiated, environmental law is a legal and scientific maze. The Environmental Policy Commission, established to address "long-term environmental policy matters and undertake an ongoing evaluation of the total environment program of the state of Indiana" found that:

[i]n general, environmental regulations attempt to mitigate risks which are, at best, difficult to assess. Pollution control involves sophisticated sampling and analytical capabilities in order to measure a wide variety of chemical pollutants. Setting scientifically defensible limits is difficult; quantifying and incorporating the public’s feelings about what constitutes acceptable environmental risk compounds this difficulty. The

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64 See S. 109-156 (Ind. 1995) (declaring Committee was to determine "[w]hether the public interest and interest of litigants require that procedures for state agencies under IND. CODE § 4-21.5 (1996) be made more consistent by implementing a basic set of rules.")


66 See S. 109-241 (Ind. 1996), codified at IND. CODE § 4-21.5-3.5; see also Christine Drager, Alternative Routes to Solutions for Environmental Law, 38 RES GESTAE 35, 36-38 (1994) (discussing Indiana's utilization of alternative dispute resolution to address environmental disputes); Paje E. Felts, Legislation of Interest to Lawyers Wide—Ranging, 39 RES GESTAE 8, 9 (Apr. 1996) (analyzing legislation passed by the 109th Session of Indiana's general Assembly including IND. CODE § 4-21.5-3.5-1 (1996) providing for ADR administrative agencies).

67 IND. CODE § 2-5-4-6(b) (1996).
assessment of exposure involves computer modeling and a detailed understanding of geohydrology, meteorology and toxicology. Determining appropriate pollution control technologies and evaluating the performance of these technologies require advanced industrial and environmental expertise.68

Part of the challenge facing the new Office involves promoting understanding of the administrative adjudication system and assisting the public through that maze69 so that public faith is restored in the environmental adjudication process. Becoming “user friendly” is critical when so many of the cases are brought by citizens pro se. Since the process is so legally and technically complex, it is important that citizens have access to information that will assist them in their adjudicative review.70

The Office, one of the state’s smallest agencies with four employees,71 has its physical location separate from the IDEM. The Office remains within the Executive branch, reporting to the Governor, who appoints any successor to the director.72 Since its inception, over 350 new cases have been docketed.73 The Office has jurisdiction to hear cases in approximately sixty different subject areas74 and, therefore, it is critical that the ALJs remain profes-

68 ENVTL. POL’Y COMM’N, supra note 35, at 7.
71 See IND. CODE § 4-21.5-7-4 (1986). The positions include the Director/Chief Administrative Law Judge, an Environmental Law Judge, an Administrative Assistant, and a Legal Assistant. Id.
72 See S. 109-156 (Ind. 1995) (stating Governor in case of vacancy shall appoint new director based upon list of three nominees from four-member panel).
73 From July, 1986 (the date the Office’s precursor, the IDEM’s Office of Hearings was established), to July, 1995, approximately 1,300 adjudications had been docketed. The majority of cases involved the review of permits.
74 The Office has subject matter jurisdiction over confidentiality claims; enforcement; excess liability fund claim denials; and fee assessments. The types of permits issued include: Air (open burning variances, fugitive dust, construction, Title V, operation, emission limits, New Source Performance Standards, and asbestos accreditation certification, and revocation); Emergency Response (responsible party property transfer, spills, underground storage tanks); Hazardous Waste (waste classification, remedial action plans, incineration, and operator certification/revocation); Solid Waste (construction, operating permits, landfill, transfer station, disposal/special waste, good character disclosures, capacity/closure design, and operator certification/revocation); Water (wetland dredge and fill, NPDES-general, industrial, municipal, grant change order/denials, operator (wastewater) certification/revocation, septage waste licensure/revocation, sewer ban/land ban, variances, confined feeding approvals/denials, land application (wastewater/sludge), and construction (wastewater)); and Public Water Supply (operator certification/revocation, construction).
sionally competent and current with developments in judicial administra-
tion and environmental law.\textsuperscript{75}

The office has become "user friendly," by contracting with the State Internet Commission, Access Indiana Information Network, to provide on-line electronic access for all of the Office's non-confidential, public data records.\textsuperscript{76} The Office has also upgraded its Information Technology system to enhance case management practices and facilitate the delivery of data files to Access Indiana. While this project is in its preliminary stages, the Office is in the process of designing and installing a Local Area Network (LAN) and a case tracking system. The LAN will incorporate an imaging/scanning capability and permit the digital storage of the Office's public data records. Upon completion, selected portions of these records will be electronically accessible to the public on-site. It is anticipated that files will be searchable by referencing filing dates, case numbers, parties' names, facility names, cities or counties, program sources, types of cases (permit, enforcement, fund claim), type of permits, scheduling calendars, dates of closure, dispositions, and statutes or rules involved. Moreover, Final Orders, both those of the Judges and those disposing of cases on judicial review, will be available on Access Indiana.

The Office is establishing the means to analyze its performance and to identify the efficiency of its use of resources and it is anticipated that the results will be available on Access Indiana. Through the addition of the technology and the means to provide

\textsuperscript{75} Founded as an activity of the American Bar Association in 1963, The National Judicial College, located on the campus of the University of Nevada, Reno, since 1965, provides the preeminent forum for the achievement of justice through quality judicial education and collegial dialogue. Both of the Office's ALJs have received continuing education training and have been asked to participate as facilitators for administrative law courses. With respect to technical training, both ALJs attend up-date conferences provided by a variety of organizations.

feedback, the Office will be able to restore the public's faith in the environmental adjudication process.

CONCLUSION

The movement toward greater judicial independence in administrative adjudication and the implementation of compliance-friendly agency regulation are national trends that have dramatically merged in the environmental arena in Indiana. Adversarial posturing is giving way to proactive, broad-based, participatory dialogue.

Addressing the complex issues that surround economic development and quality of life is a shared responsibility. Customer-oriented policy alternatives in rule promulgation, permitting, and enforcement are being examined and employed to create an effective, efficient, and fair regulatory climate which affords both market competition and environmental safekeeping. Permittees that have a clear vision of the public's expectations, through elected and appointed officials, are better able to comply with the laws and fulfill their part of the social contract. Cities, towns, and counties who are afforded the necessary fiscal flexibility to finance environmental infrastructure will be better prepared to correct deficiencies, protect the public health and welfare and respond to the demands placed upon them by a growing global economy. Finally, an independent forum for environmental adjudication enhances the perception of a fair, efficient, and effective dispute resolution within the regulatory arena and carries out its mission to safeguard the environment for all citizens.\footnote{The Mission Statement of the Office is as follows: The Office of Environmental Adjudication is entrusted by the citizens of the State with providing an impartial statewide forum in which petitioning parties who believe they may be adversely affected by the permitting, enforcement and other determinations of the Commissioner of the Indiana Department of Environmental Management may be timely heard and their objections fairly considered. As ultimate authority in the administrative review of these regulatory decisions the Office must ensure compliance with statutory mandates, provide its services in a fiscally responsible manner and safeguard the best interests of the public.}