



# Federal, State, or Local Agencies: Who's Making the Rules Here?

2018 Indiana Environmental  
Conference

October 22, 2018, 3:00-4:00pm

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# Federal, State, or Local Agencies **FRAMEWORK & BACKGROUND – HOME RULE**



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## Home Rule Act

- Sets out the template for local government authority.
- Passed in 1980.
- Intended to alter the system in existence that limited municipal powers to those expressly given by the General Assembly.



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## Broadening Powers

- Before the Home Rule Act, local governments had only those powers expressly granted by state statutes.
- No statute; no power.
- The Home Rule Act flipped this rule and made it so a municipality has not only its statutory powers but also a broad scope of implied powers not otherwise taken away by a statute.



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## Presumptions

- “Any doubt as to the existence of a power of a unit shall be resolved in favor of its existence.” Ind. Code § 36-1-3-3.
- The Act gives local governments “all powers expressly granted by statute” and all “powers necessarily or fairly implied in or incident to powers expressly granted.” Ind. Code § 36-1-3-4.



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## Limitations

- The Home Rule Act includes a series of exceptions identifying areas where local governments may not regulate.
- This includes:
  1. Exercising powers “expressly granted to another entity” or
  2. Regulating conduct “that is regulated by a state agency, except as expressly granted by statute.”



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## When is state preemption triggered?

- A municipality cannot “regulate conduct that is regulated by a state agency, except as expressly granted by statute.” Indiana Code § 36-1-3-8(a)(7).
- A municipality “regulates” conduct under the Home Rule Act when an ordinance purports to “license, inspect, or prohibit” that conduct. Ind. Code § 36-1-2-15.



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## Three key questions

1. Does a state agency preempt the entire field of regulation?
2. Is the local regulation “consistent” with state regulation?
3. Is there a state statute that otherwise gives the local government authority to regulate?



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## ***Examples***

1. *Town of Avon v. West Central Conservancy District*
2. *St. Francis v. Morgan County*
3. *Hopkins v. Tipton County Health Department*



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## ***Town of Avon***

- The DNR has statewide jurisdiction over aquifers.
- A town ordinance prohibited withdraws from any aquifers in its borders and within 3 miles outside it.
- No conflict: The ordinance did not directly prohibit activity allowed by the DNR.
- Specific statute: A pre-Home Rule Act statute allowed the town to control “watercourses.”



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## *St. Francis*

- Morgan County enacted an ordinance requiring local approval for new hospital construction.
- The Department of Health had a certificate of need program dictating that new hospitals must be approved by the agency.
- Court finds a direct conflict because the local program purported to override the decision of the state agency.



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## *Hopkins*

- A Tipton County ordinance established requirements for residential septic systems.
- The State Department of Health had its own permitting system and requirements.
- Conflict: There was a direct conflict in that the homeowners could not satisfy both rules.
- Preemption: The statutes indicated that the legislature intended statewide regulation.



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## Interneccine Disputes

- What if two local governments simultaneously seek to regulate the same issue?
- Tie typically goes to the first-in-time. Who got there first?
- For instance, in *Town of Merrillville v. Merrillville Conservancy Dist.*, 649 N.E.2d 645, 652 (Ind.Ct.App.1995), Merrillville could not extend sewer service to territory already served by a conservancy district.



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## Practical Concerns

- Don't assume state regulators are the end of the story. What interests do local bodies have?
- If you are going to be subject to a state permit, the regulators to take a position on preemption.
- Need to explore the sometimes arcane statutes delineating government powers.
- Build relationships. Communication ahead of time can spare heartache later.



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## Federal, State, or Local Agencies

# **OVERLAPPING FEDERAL-STATE JURISDICTION**



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## Federal-State Relationship

- U.S. EPA authorizes State of Indiana (IDEM) to implement most federal environmental statutes
  - Authority includes obligations of both statutes and regulations
  - Precise process varies according to programs
- Authorizations generally require that the state programs be at least as stringent as federal requirements



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## Federal-State Relationship

- Federal silence on whether Indiana rules can be *more stringent than* federal requirements
- Indiana’s No More Stringent Than (NSMT) Legislation – HEA 1082 (2016)
  - Veto overridden during 2017 Session



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## Federal-State Relationship

- Indiana’s No More Stringent Than (NMST) Legislation – HEA 1082 (2016)
  - Requires annual report of rules and Non-Rule Policies proposed or adopted, and operating policies that “constitutes a change in policy previously followed by [IDEM].” IC 13-14-1-11.7
  - Includes mechanism to delay the effectiveness of any proposed rule that includes an “element...that imposes a restriction or a requirement more stringent than a restriction or requirement imposed under federal law[.]” IC 13-14-9-4(c)



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## Federal-State Relationship

- Following U.S. EPA's lead in Indiana can be affected by not only agency and federal legislative actions, but also court decisions
- IC 13-14-9-8(h): "applies to that part of a rule ...that directly corresponds to and is based on a federal law, rule, or regulation that is stayed or repealed, invalidated, vacated, or otherwise nullified by a legislative, an administrative, or a judicial action described in subdivision (1), (2), or (3)..."



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## Federal-State Relationship

Summary of IC 13-14-9-8(h):

- (1) – rules that are repealed or nullified are void as of the effective date of the legislative or administrative action nullifying them.
- (2) – rules that are invalidated, vacated, or nullified by a judicial decree of a state or federal court whose decisions have force and effect in Indiana cannot be enforced – unless the judicial action is reversed.
- (3) – rules that are stayed pending a judicial or administrative order *may* not be enforced during the stay.



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## Federal-State Relationship

- Who's enforcing the rules here?
  - January 22, 2018 Memorandum from U.S. EPA's Susan Bodine regarding cooperative federalism
    - State agencies have primacy in enforcing requirements that derive from federal requirements
  - Citizen suits permitted under both federal and Indiana law to enforce these environmental requirements
  - What role does guidance play in enforcing requirements?



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## Federal-State Relationship

- Who's enforcing the rules here? (continued)
  - Clean Air Act example: Once in, always in
    - U.S. EPA Guidance (Jan. 25, 2018) rescinded original U.S. EPA guidance on the topic (May 16, 1995)
    - IDEM incorporation of updated guidance
      - Compliance & Technical Assistance Page: <https://www.in.gov/idem/ctap/2332.htm>
      - Potential permit revisions
    - Case challenging U.S. EPA's reversal pending: *California Communities Against Toxics, et. Al. v. EPA et al.* (D.C. Cir.), but IDEM still processing permit revisions



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## Examples of Multi-Jurisdictional Regulations

- What issues are currently being debated between federal, state, and local regulatory agencies?
  - Storm water general permit for construction – Storm water Pollution Prevention Plan requirements
    - HB 1096 (2018) – died in the Senate
    - Indiana General Permit rulemaking (LSA # 18-238)
    - Federal Construction General Permit (2017)
      - Fact Sheet guidance on implementation



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## Examples of Multi-Jurisdictional Regulations

- What issues are currently being debated between federal, state, and local regulatory agencies? (continued)
  - Perfluoroalkyl or polyfluoroalkyl substances (PFAS)
  - Greenhouse gas regulation
  - Vehicle emissions



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# Federal, State, or Local Agencies

## BEST PRACTICES



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## Best Practices - Overview

- **Stay current:** Companies must track/navigate federal, state *and* local authorities
- **Maintain relationships with regulators**
- **Team effort:** Technical experts, plant personnel, legal, government affairs must work closely together
- **Examples:**
  - CCR Rule (utility industry)
  - Storm Water Permitting



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## Coal Combustion Residuals (CCR) Rule

- “Self-implementing” – minimum criteria
- Facilities must notify state agency of completion of certain activities
- Facilities must post to publicly-available website
- Enforcement through citizen suits



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## Coal Combustion Residuals (CCR) Rule

- **2016:** President signed the Water Infrastructure Improvements for the Nation (WIIN) Act
- Authority for EPA-approved state CCR programs operating “in lieu of” federal CCR Rule
- Must be “at least as protective” as the CCR Rule
- IDEM currently working on permit program/ submission to EPA (timeline?)
  - EPA has 180 days to approve/disapprove
- IDEM has EPA-approved SWMP - “not in lieu” but allows state to grant compliance schedules



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## Storm Water Permitting

- 327 IAC 15-5
- IDEM administers Rule 5 in cooperation with local Soil and Water Conservation Districts (SWCDs)
- IDEM has designated Municipal Separate Storm Sewer Districts (MS4s) (327 IAC 15-13)
  - If project within MS4, content/submittal may vary by local ordinance
  - Local ordinance required to be as strict as 15-5



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## Storm Water Permitting

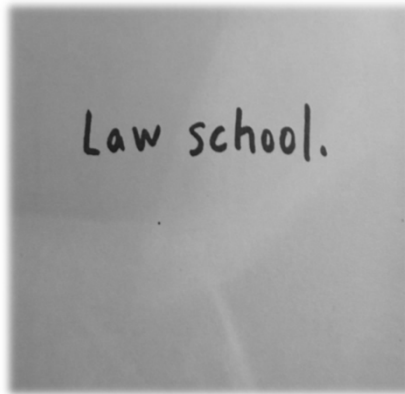
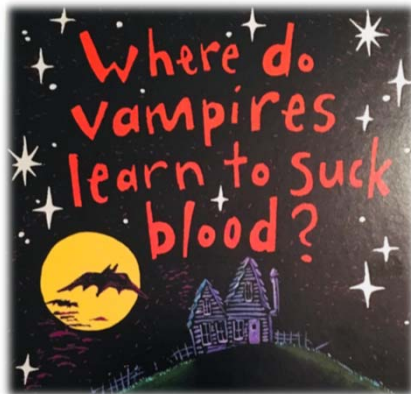
- City of Indianapolis is a Phase I MS4
  - Authority to regulate storm water run-off control from construction sites
- Marion County SWCD has opportunity to comment on construction plans
  - Copy of approved plan submitted to Marion County SWCD
  - Marion County SWCD conducts erosion site inspections for City
- City receives permit fee separate from Rule 5
- Project site owners must submit NOI letter and other documentation to IDEM



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## Questions?



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