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## Bad Actor Statutes: An Environmental Trojan Horse?

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## Bad Actor Statutes: An Environmental Trojan Horse?

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## I. INTRODUCTION

Congress and the state legislatures have manifested their increasing concern for environmental protection over the past several years by focusing more attention on the punishment of those who violate environmental protection requirements. Rather than seeking to enforce environmental standards merely through civil penalties, lawmakers have imposed criminal penalties, including fines and even jail sentences, on those who violate environmental requirements, from plant managers all the way up the ladder to corporate officers.<sup>1</sup>

Lawmakers and agency officials have not limited their efforts to the conviction and punishment of environmental criminals, however. Many states have adopted so-called "bad actor" statutes that allow state environmental agencies to consider an applicant's past record of environmental compliance in determining whether to grant an operating permit.<sup>2</sup> By factoring a permit applicant's prior history of environmental "citizenship" into the permit approval process, these statutes<sup>3</sup> enable state officials to identify parties who have acted in flagrant violation of environmental laws, and prevent continuing

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1. See Thomas C. Green and James L. Connaughton, *Defending Charges of Environmental Crime—The Growth Industry of the 90s*, *The Champion* 14, 14-15 (April 1993).

2. Suzette Brooks, *"Bad Actor" Laws Snag Repeat Environmental Violators*, *Envir. L.* in *N.Y.* 97, 97 (Aug. 1991).

3. At least twenty-one states have enacted bad actor laws. See, for example, 7 Del. Code Ann. §§ 7901-7905 (Supp. 1994); Ga. Comp. R. & Regs. r. 391-3-4.02(6)-(10) (1993); Ind. Code Ann. §§ 13-7-10.2-1 to -8 (Burns 1990 & Supp. 1994); Kan. Stat. Ann. § 65-3407(c) & (d) (1992); Ky. Rev. Ann. Stat. § 224.40-330 (1991); Mich. Comp. Laws Ann. § 299.518(4) & (6) (West Supp. 1994); Minn. Stat. Ann. § 115.076 (West Supp. 1995); Miss. Code Ann. §§ 17-17-501 to -507 (Law. Co-op Supp. 1994); Mo. Ann. Stat. §§ 260.205(16), 260.395(16) (Vernon 1990 & Supp. 1994); N.J. Stat. Ann. §§ 13:1E-126 to -135 (West 1991 & Supp. 1994); N.M. Stat. Ann. §§ 74-4-4.2(D) & (E), 74-4-4.7 (1993); N.Y. *Envir. Conserv. Law* § 27-0913(3) (McKinney 1984); N.D. Cent. Code § 23-29-04 (Supp. 1993); Ohio Rev. Code Ann. §§ 3734.41-47 (Baldwin 1995); 27A Okla. Stat. Ann. §§ 2-7-109, 2-10-302 (West Supp. 1995); 35 Pa. Cons. Stat. Ann. § 6018.503(c) & (d) (Purdon 1993); R.I. Gen. Laws § 23-19.1-10 (Supp. 1994); S.C. Code Ann. § 44-96-300 (Law. Co-op Supp. 1993); S.D. Cod. Laws § 1-40-27 (Supp. 1994); Tenn. Code Ann. §§ 68-211-106(h), 68-212-218 (1992); Va. Code §§ 10.1-1408.1 to -1409 (1993). Note that some states list bad actor provisions for solid and hazardous waste facilities separately in their codes.

environmental degradation by denying those parties permits to operate new polluting facilities.

While the apparent policy of environmental protection behind these statutes is laudable, that policy is not the sole driving force behind all bad actor laws. For example, New Jersey's bad actor law, one of the first of its kind, and arguably a prototype relied upon by other states, explicitly states that its primary goal is to curtail the infiltration of organized crime into the state's waste industry.<sup>4</sup> In pursuit of this goal, New Jersey's law does not focus solely on an applicant's history of compliance with environmental laws in determining whether an applicant qualifies as a bad actor under the law. In fact, the law requires applicants to disclose, and provides for an investigation of, past criminal offenses entirely unrelated to environmental laws, and mandates denial of an environmental permit even if the applicant has been convicted of a crime unrelated to the environment.<sup>5</sup> Further, New Jersey's bad actor statute holds permit applicants accountable for the bad acts of individuals affiliated with the proposed facility, from key officers in the corporate structure to significant stockholders, parent companies, subsidiaries, and even persons considered to have a "beneficial interest" in the company.<sup>6</sup>

New Jersey's bad actor law is clearly broader in scope than the typical bad actor laws defined above. Given the unique nature of New Jersey's problems with its waste handling industry, this distinction is unsurprising.<sup>7</sup> What is surprising is that many other state bad actor laws, if not as broad in scope as New Jersey's law, share the New Jersey law's focus on a wide range of criminal activity in identifying bad actors. If states which have patterned their bad actor laws after the broad New Jersey law do not have a similar problem with organized crime, their laws may raise significant constitutional and policy concerns.<sup>8</sup>

This Note examines the design of bad actor laws, analyzing how various states have crafted statutory requirements not only to

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4. N.J. Stat. Ann. § 13:1E-126 (West 1991).

5. Id. §§ 13:1E-127(e)(6), 13:1E-133(b) (West Supp. 1994).

6. The statute provides for denial of a permit application if any of the relevant individuals has been convicted of specific offenses. See id. §§ 13:1E-127(e)(1), 13:1E-133(b).

7. Investigations of New Jersey's waste industry from 1958 to 1970 revealed that members of organized crime groups engaged in illegal disposal practices and other violations of environmental standards in order to keep competition down and increase profits. James M. Strock and Brian A. Runkel, *Environmental Bad Actors and Federal Disqualification*, 15 Harv. Envir. L. Rev. 529, 542 (1991).

8. See Part III.

"smoke out" undesirable permit applicants and prevent them from obtaining operating permits, but also to accomplish other, and sometimes questionable, goals. Part II of this Note begins with an analysis of New Jersey's bad actor law and its policy underpinnings. Part II then goes on to discuss how other states have followed or diverged from the New Jersey model in adopting their own bad actor laws. Part III examines both actual and proposed constitutional challenges to overly broad bad actor laws and also suggests policy concerns raised by such laws. This Part ultimately posits that problematic policy goals may underlie many bad actor statutes, and questions whether current bad actor statutes are appropriately designed to accomplish the goal of increasing environmental compliance in the regulated community. Part IV of this Note explains how bad actor statutes might be drafted in order to avoid the constitutional and policy concerns described in Part III. Part V contains a model bad actor statute which incorporates the suggestions from Part IV.

## II. STATE BAD ACTOR LAWS—AN OVERVIEW

Most "bad actor" statutes focus on applicants who wish to obtain permits to operate waste treatment facilities, rather than applicants for other types of environmental permits, such as air or water pollution permits.<sup>9</sup> Commentators suggest that the waste treatment industry draws environmental bad actors since it is a highly regulated industry, thus guaranteeing market participants high profits and minimal competition.<sup>10</sup> Furthermore, most applicants for permits to treat, store, dispose, or transport waste are in the business of waste handling, whereas applicants for other types of state environmental permits generally pollute only as a by-product of another primary line of business, such as manufacturing. Thus, a holder of a waste handling permit may have more of an incentive to shirk environmental requirements since any economic benefits of doing so will more directly affect the permittee's bottom line.<sup>11</sup> These factors may explain

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9. Only two bad actor laws reviewed for purposes of this Note apply to applicants seeking other types of environmental permits. Delaware's bad actor law applies to applicants for water, air, and coastal zone permits. 7 Del. Code Ann. § 7902 (Supp. 1994). South Dakota's law applies to all environmental protection permits, as well as mining, oil, and gas permits. S.D. Cod. Laws § 1-40-27 (Supp. 1994).

10. Strock and Runkel, 15 Harv. Envir. L. Rev. at 557 (cited in note 7).

11. Telephone interview with Edward Galbraith, Missouri Department of Natural Resources (Oct. 5, 1994).

At least two states, Delaware and South Dakota, have bad actor laws which apply to all permit applicants. See note 9.

why the bulk of bad actor laws promulgated to date have been directed at the permitting of facilities that treat or handle solid or hazardous wastes.

*A. New Jersey's A-901 Law—A Prototype for Bad Actor Laws*

The state of New Jersey passed one of the nation's earliest and most comprehensive "bad actor" statutes in 1983.<sup>12</sup> Sections 13:1E-126 to -135 of the New Jersey Statutes Annotated,<sup>13</sup> commonly referred to as the "A-901" law, were originally passed in response to overwhelming evidence of organized crime infiltration into New Jersey's hazardous waste industry.<sup>14</sup> New Jersey's bad actor law states that its purpose is to ensure public confidence in the integrity of the state's waste industry.<sup>15</sup> More specifically, the law explains that its mission is to prevent entry into the solid or hazardous waste industry of "persons who have pursued economic gains in an occupational manner or context violative of the criminal code or civil public policies of the State."<sup>16</sup>

To this end, New Jersey's bad actor statute requires applicants for solid or hazardous waste disposal permits to submit disclosure statements containing information on many of the entities associated with the proposed waste treatment site.<sup>17</sup> Once the New Jersey Department of Environmental Protection ("NJDEP") has obtained the information, the A-901 law prohibits the Department from issuing a

12. Strock and Runkel, 15 Harv. Envir. L. Rev. at 541 (cited in note 7).

13. N.J. Stat. Ann. §§ 13:1E-126 to -135 (West 1991 & Supp. 1994).

14. Strock and Runkel, 15 Harv. Envir. L. Rev. at 542 (cited in note 7).

15. N.J. Stat. Ann. § 13:1E-126 (West 1991). This section notes that the state can hope to attain its goal of gaining public trust in the waste industry

only under a system of control and regulation that precludes the participation therein of persons with known criminal records, habits, or associations, and excludes or removes from any position of authority or responsibility any person known to be so deficient in reliability, expertise, or competence with specific reference to the solid or hazardous waste industries that his participation would create or enhance the dangers of unsound, unfair, or illegal practices, methods, and activities in the conduct of the business of these industries.

Id.

16. Id. This section clearly refers to organized crime.

17. The disclosure statement must include information on the following entities: (1) officers, directors, and partners of the applicant company; (2) "key employees"—defined as any "individual employed by the applicant, the permittee or the licensee in a supervisory capacity or empowered to make discretionary decisions" as to facility operations, N.J. Stat. Ann. § 13:1E-127(f) (West Supp. 1994); (3) all persons who hold equity in or debt liability of the company, subject to some limitations; and (4) any company involved in the solid or hazardous waste industry in which the applicant holds an equity interest. Id. § 13:1E-127(e)(1).

permit if any person listed on the disclosure statement or any person with a "beneficial interest" in the applicant's business has been convicted of a crime on a list ranging from murder to extortion to possession of illegal substances.<sup>18</sup> Among the crimes which will result in permit denial are violations of any federal or state environmental protection laws.<sup>19</sup>

New Jersey's bad actor law obviously is directed toward ferreting out organized crime's presence in the state's solid and hazardous waste industries. As discussed above, the legislature's statement of purpose in the act makes clear that the A-901 law targets entities engaged in the waste treatment industry for purposes which contravene public policy. Furthermore, the act's focus on a wide range of criminal activity in permitting decisions shows that the New Jersey legislature's concerns went beyond identifying only those applicants who have a poor record of compliance with environmental laws. Finally, the act requires the NJDEP to deny permits to applicants who may themselves be innocent of any of the crimes listed in section 13:1E-133(b) if any person required to be listed in the disclosure statement or shown to have a "beneficial interest" in the applicant's business has committed an offense listed in the act. This focus on the professional affiliations of the applicant is commensurate with a goal of preventing those involved in organized crime from obtaining permits to operate waste treatment facilities.

Investigations and prosecutions made under New Jersey's A-901 law have not only confirmed that organized crime had infiltrated the industry, but also have confirmed that solid and hazardous waste companies with poor environmental compliance records consistently violate hazardous waste laws to increase their profits.<sup>20</sup> By disqualifying permit applicants with histories of environmental violations and criminal convictions, New Jersey's bad actor statute has allowed the state to make great strides toward ridding its waste industry of a criminal presence.<sup>21</sup>

Focusing on New Jersey's bad actor law as the prototypical bad actor law is, however, somewhat problematic. Certainly, New Jersey was one of the first states to adopt what is now known as a bad actor

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18. Id. § 13:1E-133. Even though individuals "having a beneficial interest in the business of the applicant" are not required to be listed on the disclosure statement under section 13:1E-127, an applicant can still be denied a permit based on such an individual's criminal convictions. A "person having a beneficial interest" is not defined anywhere within New Jersey's bad actor statute.

19. Id. § 13:1E-133(b)(19).

20. Strock and Runkel, 15 Harv. Envir. L. Rev. at 554-55 (cited in note 7).

21. Id. at 553-55.

law, and many states have looked to the New Jersey statute as a model in drafting their own bad actor laws. However, as noted in the Introduction, New Jersey's law is clearly something more than a regular bad actor statute. New Jersey's law is, in fact, a comprehensive, considered approach to attacking a longstanding problem unique to the state: infiltration of organized crime into the waste disposal and treatment industry. Nonetheless, many states, despite the absence of an identifiable organized crime problem in their own waste industry, have followed New Jersey's broad approach in drafting their bad actor laws. At least sixteen of the twenty-one state laws surveyed for this Note authorize state officials to deny environmental operating permits based on criminal convictions entirely unrelated to either waste disposal or the environment.<sup>22</sup> Why should a state environmental agency be concerned with a permit applicant's conviction for alteration of motor vehicle identification numbers<sup>23</sup> or unlawful possession of explosives<sup>24</sup>—crimes specifically listed in some bad actor laws as mandating denial of a permit to operate a waste disposal or treatment facility? In the case of New Jersey's bad actor law, the answer to that question is obvious: state officials were attacking the historical problem of organized crime involvement in the waste disposal business.<sup>25</sup> It could be that other

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22. See Ga. Comp. R. & Regs. r. 391-3-4.02(6)-(10) (1993); Ind. Code Ann. § 13-7-10.2-4(a)(3) & (4) (Burns 1990); Kan. Stat. Ann. § 65-3407(d) (1992); Ky. Rev. Ann. Stat. § 224.40-330(c) (1991); Miss. Code Ann. § 17-17-505(1)(c) (Law. Co-op Supp. 1994); Mo. Ann. Stat. § 260.205(16) (Vernon Supp. 1994); N.J. Stat. Ann. § 13:1E-133(b) (West Supp. 1994); N.M. Stat. Ann. § 74-4-4.2(D)(3) (1993); N.Y. Envir. Conserv. Law § 27-0913(3)(d) (McKinney 1984); N.D. Cent. Code § 23-29-04(14) (Supp. 1993); Ohio Rev. Code Ann. § 3734.44(B) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(2) (Supp. 1994); S.C. Code Ann. § 44-96-300(B)(4) (Law. Co-op Supp. 1993); S.D. Cod. Laws § 1-40-27(1)(b) (Supp. 1994); Tenn. Code Ann. § 68-212-218 (1992); Va. Code § 10.1-1409(8) (1993).

Pennsylvania does not explicitly allow permit denials for criminal convictions, but allows permit denial based on a standard which could include criminal convictions. 35 Pa. Cons. Stat. Ann. § 6018.503(c) (Purdon 1993) (allowing the department to deny a permit if it "finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act"). Minnesota's bad actor law allows the agency to consider "any criminal convictions of the permit applicant . . . that bear on the likelihood that the permit applicant will operate the facility in conformance with the requirements of [state environmental protection laws]. . ." Minn. Stat. Ann. § 115.076, subd. 1(4) (West Supp. 1995).

23. N.J. Stat. Ann. § 13:1E-133(b)(13) (West Supp. 1994); Ohio Rev. Code Ann. § 3734.44(B)(13) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(2)(m) (Supp. 1994).

24. N.J. Stat. Ann. § 13:1E-133(b)(15) (West Supp. 1994); Ohio Rev. Code Ann. § 3734.44(B)(15) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(2)(o) (Supp. 1994).

25. See N.J. Stat. Ann. § 13:1E-126 (West 1991). See also *Trade Waste Management Association, Inc. v. Hughey*, 780 F.2d 221, 230, 238, 239 (3d Cir. 1985) (discussing New Jersey's compelling state interest in keeping the waste disposal business free from the influence of organized crime).



states, impressed with New Jersey's success in "cleaning up" the hazardous waste industry in its own backyard, decided that bad actor statutes were a good idea and simply copied New Jersey's provision rather than draft laws more appropriate for their own problems.<sup>26</sup> Or perhaps state legislatures actually believe that convictions for crimes unrelated to the environment are a good indicator that a permit applicant is more likely to ignore environmental requirements. This Note, however, argues that the broad nexus between criminal convictions and permit qualifications exhibited in many bad actor statutes may also be a response to states' desires to: (1) restrict the flow of out-of-state trash into their states; and (2) inject more flexibility into the permitting process in order to address citizens' concerns about the siting of waste facilities in their communities. This Note suggests that bad actor statutes designed to further such policies may exhibit constitutional and policy problems.

### *B. Bad Actor Laws Across the Country*

Since the passage of New Jersey's bad actor law, numerous other states have enacted similar laws.<sup>27</sup> Each of these laws is distinct, but all allow state departments of environmental protection to deny operating permits to applicants based on a history of environmental or criminal violations.<sup>28</sup> However, unlike New Jersey's law,

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26. Interviews with various state officials familiar with the bad actor laws in their states revealed that many states borrowed from other existing bad actor statutes in fashioning their own. Roy Furrh, a senior attorney with the Mississippi Department of Environmental Quality explained that Mississippi relied heavily on New Jersey's law in drafting its own. Telephone interview with Roy Furrh, Mississippi Department of Environmental Quality (Oct. 5, 1994). Edward Galbraith, an environmental specialist in the permits section of the Missouri Department of Natural Resources, noted that bad actor laws were the "hot thing" three to four years ago and that "every state legislature was adopting them." Telephone interview with Edward Galbraith (cited in note 11). Theresa Gearing, manager of compliance and enforcement for the Solid Waste Division of the Tennessee Department of Environment and Conservation, noted that Ohio's law is often called the "mother statute" because "everyone came after and copied it." Telephone interview with Theresa Gearing, Tennessee Department of Environment and Conservation (Oct. 5, 1994). Ohio's bad actor law is practically identical to New Jersey's law in many respects. See notes 23-24.

27. See note 3.

28. States rely on these laws to deny permits, as evidenced by the claims of unsuccessful permit applicants in New Jersey, Indiana, and Kentucky who challenged the constitutionality of the bad actor laws in their respective states. See Part III.A.1. See also note 94.

Conversations with various state environmental officials further confirm that bad actor laws are a viable part of the permitting process in many states. In Ohio, denials are "rare," but do occur from time to time. Telephone interview with Mark Navarre, legal section of Ohio Environmental Protection Agency (Oct. 12, 1994). Ohio's bad actor law is implemented by an Environmental Crimes Background Unit, which prepares a report for each permit applicant. The report details the applicant's environmental compliance history and also describes the status of the applicant with respect to the potentially disqualifying factors (for example, crimi-

few other bad actor laws contain language indicating what goals the state wishes to achieve by preventing "bad actors" from entering the waste industry. Most states that require applicants to disclose prior histories of criminal or environmental violations simply lump these disclosure requirements in with other general and technical permitting requirements.<sup>29</sup> Among the few states that affirmatively state the goals of their bad actor provisions are Delaware and Oklahoma.<sup>30</sup> The purpose sections of these two laws show that bad actor laws, while similar in structure, can be adopted for very different purposes. On the one hand, Delaware's law aims to "identify applicants with histories of environmental violations, or criminal activities and/or associations,"<sup>31</sup> which suggests that its goals are in line with New Jersey's bad actor law. On the other hand, Oklahoma's law exists to "protect the public health and safety and the environment of this state," which suggests that its purpose is to focus only on environmental violations.<sup>32</sup>

Focusing on the Delaware and Oklahoma laws provides a useful perspective for understanding the two major varieties of bad actor laws. Delaware's law represents the broad-based statutes—those laws that focus on a broad array of criminal behavior in determining whether a permit applicant will be disqualified from operating in the state. However, one must use caution in considering Delaware's law as truly representative of this category of statutes, since Delaware's

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nal convictions) listed in the bad actor law. This report then goes to the Director of the Ohio Environmental Protection Agency, who makes a final decision whether to issue the permit. *Id.*

Edward Galbraith of the Missouri Department of Natural Resources noted that Missouri follows pre-set procedures to enforce the state's "habitual violator" law for hazardous waste permit applicants, and while the state has never denied a permit based solely on an applicant's habitual violations, at least one applicant would have been denied, but withdrew the application for "business reasons." Telephone interview with Edward Galbraith (cited in note 11).

Roy Furrh, senior attorney with the Mississippi Department of Environmental Quality, explained that while the state had never denied a permit based on its bad actor law, the procedures followed by Mississippi under the law had discouraged more than one applicant with a poor compliance record from submitting a permit application. Telephone interview with Roy Furrh (cited in note 26).

29. See, for example, Kan. Stat. Ann. § 65-3407 (1992); Mich. Comp. Laws Ann. § 299.518 (West Supp. 1994); Mo. Ann. Stat. §§ 260.205, 260.395 (Vernon 1990 & Supp. 1994); N.M. Stat. Ann. § 74-4-4.2 (1993); N.Y. Envir. Conserv. Law § 27-0913 (McKinney 1984); N.D. Cent. Code § 23-29-04 (Supp. 1993); Tenn. Code Ann. § 68-211-106 (1992); Va. Code §§ 10.1-1408.1 to -1409 (1993).

30. 7 Del. Code Ann. § 7901 (Supp. 1994); 27A Okla. Stat. Ann. § 2-7-109(A) (West Supp. 1995).

31. 7 Del. Code Ann. § 7901(b).

32. 27A Okla. Stat. Ann. § 2-7-109(A). See the discussion of Oklahoma's purpose section in Part IV.

law specifically states that one of its purposes is to address organized crime; no other broad-based statute affirmatively states a similar purpose. Oklahoma's law, on the other hand, represents the minority of bad actor laws—those that narrowly focus only on environmental violations in the permit approval process.<sup>33</sup>

Almost all bad actor laws require permit applicants to submit a disclosure statement or certification as a mandatory part of the permit approval process.<sup>34</sup> State bad actor laws vary widely, however, in terms of what state agencies must do once they have received the disclosure. Most laws leave full discretion to deny or approve the permit with state environmental officials. Others, such as the New Jersey, Ohio, and Rhode Island laws, *require* denial of a permit if the applicant, any person listed on the disclosure statement, or any person shown to have a beneficial interest in the applicant's business has been convicted of any one of a long list of crimes.<sup>35</sup> Ironically, South Carolina, the only state that does not require a disclosure statement

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33. It should be noted that Delaware's law is not necessarily the most comprehensive or the broadest in scope of the broad-based bad actor laws. The Ohio and Rhode Island bad actor laws, for example, contain a long list of potentially disqualifying crimes that mirrors the list in New Jersey's law. The crimes include, *inter alia*, murder; kidnapping, gambling; robbery; bribery; extortion; criminal usury; arson; burglary; theft; forgery and fraudulent practices; fraud in the offering, purchase or sale of securities; alteration of motor vehicle identification; unlawful manufacture, purchase, use, or transfer of firearms; unlawful possession or use of destructive devices or explosives; racketeering; perjury or false swearing; purposeful, knowing, willful, or reckless violation of federal or state environmental protection laws; and felony assault. See N.J. Stat. Ann. § 13:1E-133b (West Supp. 1994); Ohio Rev. Code Ann. § 3734.44(B) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(2) (Supp. 1994). Also, no other law provides for an investigation process as comprehensive as the New Jersey law, which requires applicants to be fingerprinted, N.J. Stat. Ann. § 13:1E-128(2), and allows the state attorney general to issue investigative interrogatories and subpoenas in furtherance of an investigation of an applicant, *id.* §§ 13:1E-129 to -130.

Similarly, Oklahoma's law is not the narrowest in scope of the narrow bad actor laws. Tennessee's bad actor provisions relating to hazardous waste facilities, for example, mandate permit denial only if the applicant or other specified individuals associated with the applicant have convictions specifically relating to the unlawful treatment, storage, or disposal of hazardous wastes. Tenn. Code Ann. § 68-212-218 (1992). Tennessee's bad actor provision applying to solid waste facilities looks to an applicant's "past performance in this or related waste management fields." *Id.* § 68-211-106(h). According to Theresa Gearing of the Tennessee Department of Environment and Conservation, state officials are not sure what "related waste management fields" includes, and have petitioned the state attorney general for an opinion resolving this issue. Telephone interview with Theresa Gearing (cited in note 26). Missouri's bad actor law for hazardous waste facilities mandates permit denial for "habitual" violators of the state's solid or hazardous waste laws. Mo. Ann. Stat. § 260.395(16) (Vernon 1990).

34. Only one state, South Carolina, leaves the decision to require disclosure up to state environmental officials. S.C. Code Ann. § 44-96-300(A) (Law. Co-op Supp. 1993).

35. N.J. Stat. Ann. § 13:1E-133b (West Supp. 1994); Ohio Rev. Code Ann. § 3734.44(B) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(2) (Supp. 1994). For examples of offenses mandating permit denial, see note 33. Each of these laws, however, does provide an opportunity for the applicant to prove rehabilitation. N.J. Stat. Ann. § 13:1E-133.1 (West Supp. 1994); Ohio Rev. Code Ann. § 3744.44(C)(9) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(3) (Supp. 1994).

as a mandatory part of the permit approval process, does require the state to deny permits to applicants who submit disclosures showing, inter alia, a continuing history of criminal convictions or environmental violations.<sup>36</sup> Finally, while Missouri's bad actor law for solid waste permit applicants does not require the state to deny permits in specific instances, it does require the state to consider the report in the permit approval process.<sup>37</sup>

The level of discretion provided by most state bad actor statutes is troubling because it allows state officials to apply the laws in a non-uniform manner. Furthermore, allowing state agencies the discretion<sup>38</sup> to make the ultimate decision as to whether a permit application should be approved under the bad actor law leaves room for the agencies to pursue questionable goals in the name of environmental protection.<sup>39</sup>

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36. S.C. Code Ann. § 44-96-300(B)(4) (Law. Co-op Supp. 1993).

37. Mo. Ann. Stat. § 260.205(16) (Vernon Supp. 1994).

38. Under federal law, the Administrative Procedure Act ("APA") limits agency discretion through judicial review. 5 U.S.C. §§ 701-706 (1988). Under section 706 of the APA, a reviewing court can overturn agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 706(A). Most states have their own administrative procedure laws which function like the APA. However, judicial review under an "arbitrary, capricious" standard does not necessarily address the problem of states pursuing questionable goals via bad actor laws. As long as a state agency complies with the terms of the bad actor statute in denying a permit (for example, by denying a permit to an applicant with the requisite number of violations or an applicant who fails to show the required level of "good character"), the challenged agency action will likely survive judicial review. But judicial review of individual agency actions under a bad actor statute cannot address the fact that the statute may be *designed* to allow the state to deny permits for more suspect reasons simply by proving that the applicant fits the statutory definition of "bad actor."

39. An examination of bad actor laws would be incomplete without considering federal efforts to identify parties presumed to pose a threat to environmental protection. Federal lawmakers twice have sponsored a law similar to state bad actor laws. In 1990 and again in 1991, Representatives William Paxson of New York and Mike Synar of Oklahoma introduced a bill in the House of Representatives to disqualify "any individual or business concern who violates a federal environmental law, or who holds a beneficial business interest in a person who has violated such a law" from receiving "benefits" from the Environmental Protection Agency ("EPA") for a ten-year period. H.R. 4433, 101st Cong., 2d Sess. (Mar. 29, 1990); H.R. 3271, 102d Cong., 1st Sess. (Aug. 2, 1991). The Paxson/Synar bill did not make it out of committee either time it was introduced in the House.

The Paxson bill is not the only provision focusing on the "character" of federal permit applicants that has received attention at the federal level. In 1989, Representative Thomas Luken of Ohio introduced the Waste Export Control Act ("WECA"). H.R. 3736, 101st Cong., 1st Sess. (Nov. 19, 1989). WECA contained provisions establishing a permit program for waste exporters that would require permit applicants to disclose information on their officers, directors, partners, and key employees, as well as "any other information EPA may require that relates to the competency, reliability, or good character of the applicant." Thomas R. Munteer, *Codifying Basel Convention Obligations Into U.S. Law: The Waste Export Control Act*, 21 *Envir. L. Rep.* (Envir. L. Inst.) 10085, 10091 (1991). H.R. 3736 did not pass the 101st

### III. CONCERNS RAISED BY BROAD-BASED BAD ACTOR LAWS

If it is true that many state bad actor laws are modeled after the New Jersey prototype, yet do not purport to address the same organized crime concerns as the New Jersey law, the breadth of these subsequent laws may raise both constitutional and policy problems. The following Part discusses potential constitutional infirmities of these laws by analyzing facial constitutional claims that have already been brought against existing broad-based bad actor laws and by suggesting other constitutional problems not yet raised in the cases. This Part also points out several policy concerns raised by these laws.

#### A. Constitutional Concerns

##### 1. Facial Challenges to Bad Actor Laws

To date, at least three bad actor statutes have been challenged on a constitutional basis. Each of these cases involved a facial challenge to the constitutionality of the particular bad actor statute.<sup>40</sup> These decisions addressing the constitutionality of bad actor statutes provide direction for states that have not yet enacted their own bad

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Congress, but is expected to be reintroduced as part of the reauthorization of the Resource Conservation and Recovery Act ("RCRA"). *Id.* at 10085.

Currently, there are several federal provisions aimed at preventing bad actors who already *have* permits from continuing to violate environmental laws. Under the Clean Air Act and Clean Water Act, companies convicted of specified environmental violations are automatically "listed," or banned from contracting with the government until the situation that led to the conviction is remedied to the satisfaction of the EPA Administrator. See 33 U.S.C. § 1368 (1988) (Clean Water Act); 42 U.S.C. § 7606 (1988 & Supp. 1990) (Clean Air Act); 40 C.F.R. §§ 15.10-.41 (1994) (implementing regulations). The federal government may also suspend and, eventually, bar companies convicted of criminal conduct under any of the major federal environmental statutes from contracting with the federal government. See 40 C.F.R. §§ 32.100-635 (1994); 48 C.F.R. §§ 9.400-409 (1994).

The only existing federal laws that require permit applicants to inform the EPA of any past or current noncompliance with federal environmental laws *before* they can receive a permit are regulations providing for the disposal of polychlorinated biphenyls ("PCBs"). Strock and Runkel, 15 *Harv. Envir. L. Rev.* at 532-33 (cited in note 7). The PCB regulations are the closest in form and function to the state bad actor statutes. These regulations require applicants for PCB storage permits to disclose information relevant to their qualifications to engage in commercial storage of such waste, including any information on past violations of state or federal environmental laws involving waste handling. 40 C.F.R. § 761.65(d)(3) (1994). Furthermore, the regulations allow the EPA Administrator to approve or disapprove a permit application based in part on an assessment of the applicant's prior compliance history. 40 C.F.R. § 761.65(d)(2)(vii) (1994). Notice that the PCB regulation is a good example of a narrowly-drawn bad actor law, as it focuses solely on environmental violations in the permit approval process.

40. The Author is not aware of any as-applied constitutional challenges to a state bad actor law.

actor statutes or are in the process of amending current statutes,<sup>41</sup> and for future courts hearing challenges to other states' bad actor laws.

The following discussion focuses on a Third Circuit opinion upholding New Jersey's bad actor law, as well as state court opinions from both Indiana and Kentucky. The implications of each of these cases for existing and proposed bad actor laws are examined as well.

*a. Trade Waste Management Association, Inc. v. Hughey*

In 1985, a trade association and several solid waste disposal companies brought an action challenging New Jersey's A-901 law as violative of the United States Constitution. In *Trade Waste Management Association, Inc. v. Hughey*,<sup>42</sup> the Third Circuit Court of Appeals reversed a district court decision that had struck down New Jersey's bad actor law on freedom of association and freedom of privacy grounds.<sup>43</sup> The Third Circuit's decision to uphold New Jersey's bad actor law was limited, however, to a finding that the statute was valid on its face.<sup>44</sup>

*i. The Freedom of Association Claim*

The plaintiffs' central claim was that the disqualification criteria in the New Jersey bad actor statute violated their constitutional right of association guaranteed by the First and Fourteenth amendments.<sup>45</sup> The plaintiffs alleged that the disqualifying criteria violated this right by providing for denial of their permit application if they associated with certain individuals who had been convicted of or charged with certain listed offenses or who lacked a reputation for good character, honesty, and integrity.<sup>46</sup>

The court acknowledged that the constitutional right of association involves two distinct elements: (1) recognition of individual

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41. These decisions may also be a source of guidance for federal legislators who wish to support efforts to pass a bad actor statute applying to federal environmental benefits. See note 39 (dealing with relevant federal law).

42. 780 F.2d 221 (3d Cir. 1985).

43. *Id.* at 222-23.

44. *Id.* at 229-30, 239-40. The court was not able to determine whether New Jersey's bad actor statute might be invalid as applied because the plaintiffs had not yet been subject to a permit review under the statute.

45. *Id.* at 236.

46. *Id.*

autonomy to engage in intimate human relationships, namely family relationships; and (2) recognition of the right to engage in collective action with others to advance social, economic, and other interests.<sup>47</sup> The court held that New Jersey's law did not interfere with the types of intimate associations that the Supreme Court has held the First Amendment protects.<sup>48</sup> The court then addressed the second prong of associational freedoms, explaining that while maximum protection was provided for associations formed for expressive purposes, associations formed for the pursuit of private economic interests—such as waste disposal companies—were only eligible for a lesser degree of First Amendment protection.<sup>49</sup>

The court wavered as to the level of scrutiny to be applied to a state intrusion on commercial group associational rights, but eventually determined that a high level of scrutiny was appropriate.<sup>50</sup> The Third Circuit, however, found that New Jersey's A-901 provisions survived both prongs of the strict scrutiny analysis. First, the court held that the state had a "compelling" interest in "keeping the sensitive waste disposal business free from the influence of organized crime," especially "considering New Jersey's history of difficulties in the waste disposal business."<sup>51</sup> Second, the court found that the state's interest could not be achieved through less intrusive means.<sup>52</sup>

## ii. The Right to Privacy Claim

The plaintiffs' right to privacy claim in *Trade Waste Management* was directed at provisions of New Jersey's bad actor law that required fingerprinting of applicants, authorized the state attorney general to obtain criminal justice information from the FBI, and provided for the use of disclosure statements in investigations of permit applicants.<sup>53</sup> In analyzing the plaintiffs' privacy claim, the court explained that unspecified provisions of the federal Constitution protect privacy with respect to two interests: (1) the "interest in independence [from governmental intrusion] in making certain kinds of important decisions" (such as those related to marriage and

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47. *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)).

48. *Id.* at 237 (citing *Roberts*, 468 U.S. at 619-20).

49. *Id.* at 238 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 233.

procreation); and (2) the "individual interest in avoiding disclosure of personal matters."<sup>54</sup>

The court acknowledged that while the first of these interests was not implicated by New Jersey's bad actor law, the latter interest in avoiding disclosure of personal matters was.<sup>55</sup> However, the court found that none of the provisions challenged by the plaintiffs violated their right to privacy, as the criminal records and pending criminal charges required to be disclosed were public in nature, and the law's fingerprinting requirement was rationally related to the investigation process.<sup>56</sup> The court also noted that even if the required disclosures were deemed to be of a private rather than public nature, New Jersey's strong interest in the qualifications of persons involved in waste handling would overcome the plaintiffs' privacy interest.<sup>57</sup>

While the Third Circuit upheld New Jersey's bad actor law against various constitutional challenges in *Trade Waste Management*, its decision should not be viewed as a conclusive holding on the constitutionality of broad-based bad actor statutes in general. *Trade Waste Management* may be limited in applicability due to the fact that the Third Circuit's decision was based in part on New Jersey's compelling interest in keeping the waste disposal industry free from the influence of organized crime, particularly given the state's history in this area. Thus, a state law similar in scope to New Jersey's may be unable to withstand constitutional challenges on either of the grounds stated in *Trade Waste Management* if the state cannot present evidence of organized crime infiltration of the state's waste industry to serve as a compelling interest behind the adoption of its law.

b. *Indiana Department of Environmental Management v. Chemical Waste Management, Inc.*

In December 1994, the Indiana Supreme Court found that facial challenges to Indiana's so-called good character law<sup>58</sup> were not ripe for review since the state agency had not yet begun considering the plaintiff's application to modify its existing hazardous waste

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54. *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

55. *Id.* at 233-34.

56. *Id.* at 234.

57. *Id.*

58. Ind. Code Ann. §§ 13-7-10.2-1 to -8 (Burns 1990 & Supp. 1994). Indiana optimistically terms its bad actor law a "good character law."



treatment and storage facility in Fort Wayne, Indiana.<sup>59</sup> The court's opinion in *Indiana Department of Environmental Management v. Chemical Waste Management, Inc.* renders moot a June 1993 opinion in which the Marion County Superior Court had held Indiana's good character law unconstitutional, both as applied and on its face.<sup>60</sup> Although the Indiana Supreme Court failed to reach the merits of Chemical Waste Management's constitutional claims, the court did comment on each of the claims "solely to provide clarification as the Commissioner attempts to apply the statute."<sup>61</sup> The dicta in *Chemical Waste Management* suggests that the court would uphold the statute against the constitutional claims already advanced by Chemical Waste Management in the event the company brought another action when ripe for judicial review.<sup>62</sup>

It is difficult to predict the value the Indiana Supreme Court decision will have to courts, legislators, and state agency officials who look to this opinion for guidance in examining the constitutionality of other bad actor statutes. Since the opinion does not provide a holding on the merits of Chemical Waste Management's constitutional claims, however, it cannot be considered an authoritative stance by the Indiana state judiciary on the constitutional legitimacy of the state's good character law.

c. *Attwoods of North America, Inc. v. Kentucky Natural Resources and Environmental Protection Cabinet*

In January 1995, the Franklin Circuit Court of Kentucky handed down a judgment in response to Attwoods of North America's motion for partial summary judgment based on Attwoods' claim that

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59. *Indiana Department of Environmental Management v. Chemical Waste Management, Inc.*, 643 N.E.2d 331, 336-37 (Ind. 1994).

60. *Chemical Waste Management, Inc. v. Indiana Department of Environmental Management*, No. 49D029201-CP-0009, slip op. at 75 ([Ind.], Marion County Superior Ct., June 23, 1993). In a voluminous opinion containing extensive findings of fact based on testimony given by the Indiana Department of Environmental Management ("IDEM") regarding its intended application of the law, the superior court upheld each of Chemical Waste Management's eight constitutional challenges to Indiana's good character law. The court held that the law: (1) is impermissibly vague and standardless; (2) fails to provide procedural due process before the agency issues a negative "good character" determination; (3) exceeds the state's police power; (4) is being implemented by the agency without adherence to proper rule-making procedures; (5) violates due process by allowing the agency to attach new penalties to long-settled alleged violations; (6) violates the right of association; (7) is an unlawful delegation of legislative authority; and (8) denies equal protection of the law (by exempting non-commercial permit applicants from the requirements of the good character statute). *Id.* at 6, 37.

61. *Chemical Waste Management*, 643 N.E.2d at 337.

62. See *id.* at 337-42. The court noted that it did not intend to interfere unnecessarily in the state's "essential efforts" with regard to its bad actor law. *Id.* at 342.

Kentucky's bad actor law<sup>63</sup> was constitutionally invalid.<sup>64</sup> Attwoods' constitutional claims were based on Kentucky Natural Resources and Environmental Protection Cabinet's ("the Cabinet") decision to deny a permit to Bituminous Resources, Inc. under Kentucky's bad actor statute.<sup>65</sup> Attwoods challenged the constitutionality of Kentucky's bad actor statute on the grounds that it exceeds the state's police powers, is impermissibly vague, and deprives permit applicants of procedural due process.<sup>66</sup> The court upheld the statute against each of these challenges.<sup>67</sup>

#### i. Police Power Claim

Attwoods claimed that Kentucky's bad actor law exceeds the state's police powers in violation of Section 2 of the Kentucky Constitution.<sup>68</sup> Specifically, Attwoods challenged the law on the ground that it allows the Cabinet to consider both felonies unrelated to environmental crimes and outstanding notices of violations in the permit approval process.<sup>69</sup> However, the court held that Kentucky had acted in conformance with its police powers in requiring this type of information from permit applicants.<sup>70</sup>

The court found that the Cabinet could properly consider non-environmental felony convictions since the failure to follow criminal laws has a bearing on the fitness of an applicant and may have an

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63. Ky. Rev. Ann. Stat. § 224.40-330 (1991).

64. *Attwoods of North America, Inc. v. Kentucky Natural Resources and Environmental Protection Cabinet*, No. 93-CI-01873, slip op. ([Ky.], Franklin County Circuit Ct., Jan. 13, 1995).

65. *Id.* at 2-4. Attwoods Environmental Inc., a wholly-owned subsidiary of Attwoods of North America, Inc., owned 49% of the common stock of Bituminous Resources, Inc. at the time that Bituminous Resources, Inc. filed its permit application to operate and construct a solid waste landfill in Hopkins County, Kentucky. *Id.* at 1.

66. *Id.* at 4. Attwoods also challenged the Cabinet's actions under the statute as exceeding their statutory authority. *Id.* at 3-4. These claims are not examined here, as they are not of a constitutional nature.

67. *Id.* at 23-24.

68. *Id.* Section 2 of the Kentucky Constitution reads: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky Const., § 2.

69. *Attwoods*, slip op. at 8-10. Attwoods also claimed that the law exceeded the state's police powers by requiring permit applicants to disclose information on managers of affiliated corporations and by using the wrongdoings of such managers as grounds for a permit denial. *Id.* at 8. However, the court read the statute to exclude managers of affiliated corporations from the "key personnel" for which disclosures must be made and thus found Attwoods police power claim moot on this point. *Id.*

70. *Id.* at 10.

impact on the applicant's ability to follow Kentucky's laws.<sup>71</sup> With respect to outstanding notices of violations, the court read Kentucky's bad actor law as prohibiting the Cabinet from issuing a permit until the complaint was resolved, rather than allowing the Cabinet to base a permit denial on such unproven allegations.<sup>72</sup> The court determined that this delay was appropriate since an ultimate finding of wrongdoing would affect the Cabinet's final decision to approve or deny the permit.<sup>73</sup>

## ii. Vagueness Claim

Attwoods next claimed that Kentucky's bad actor law violates Section 2 of the Kentucky Constitution<sup>74</sup> and substantive due process<sup>75</sup> by giving the Cabinet discretion in deciding which permits to approve and deny.<sup>76</sup> However, the court found that the discretion provided to the Cabinet under the bad actor law violated neither the Kentucky Constitution nor principles of substantive due process since the legislature defined the "policy and principles" for when a permit may be denied<sup>77</sup> and the Cabinet's actions are subject to judicial review for abuse of discretion.<sup>78</sup>

## iii. Procedural Due Process Claim

Finally, Attwoods challenged the bad actor law on procedural due process grounds under both the United States Constitution and Section 14 of the Kentucky Constitution.<sup>79</sup> However, the court refused to recognize Attwoods's alleged loss of goodwill and damage to its liberty and reputational interests as protected under either the state or federal constitution.<sup>80</sup>

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71. *Id.* at 9.

72. *Id.* at 10.

73. *Id.*

74. *Id.* at 11.

75. The court is presumably referring to the protections provided to individuals under the Fourteenth Amendment of the U.S. Constitution, even though the court refers to the Fourth and Fifth amendments. *Id.*

76. *Id.* at 10-13.

77. *Id.* at 12.

78. *Id.* at 13.

79. *Id.* at 13-17. Section 14 of the Kentucky Constitution states, "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Ky Const., § 14.

80. *Attwoods*, slip op. at 14-17.

It is difficult to predict the value of the *Attwoods* opinion for future cases, given that it is an unpublished state court opinion and relies heavily upon a construction of the Kentucky Constitution. However, when viewed in conjunction with the opinion of the Indiana Supreme Court in *Chemical Waste Management*, the court's decision in this case may reflect state court reluctance to overturn bad actor laws on constitutional grounds.

## 2. A Proposed As-Applied Challenge to Some Bad Actor Laws

Neither the Third Circuit nor the two state supreme court cases discussed above involved as-applied challenges to bad actor laws.<sup>81</sup> As-applied challenges claim that laws fail constitutional muster not as written, but as they are applied to certain entities on a case-by-case basis. The following section suggests that while some broad-based bad actor laws appear to have survived facial constitutional scrutiny, these same laws may raise constitutional concerns if they are applied in prohibited ways.

As suggested earlier, the prevalence of broad-based bad actor laws raises the question of what motives guided state legislatures in adopting these laws. As the evidence below reveals, one goal that may have prompted states to adopt broadly drawn bad actor laws is a desire to foster economic protectionism for their own waste handling industry by keeping out-of-state waste haulers from importing trash into their states and preventing out-of-state operators from setting up shop within their borders. While it is difficult, and some would say impossible,<sup>82</sup> to determine what motivates a body of lawmakers to adopt a particular law, the following evidence suggests that protectionist concerns may be a primary policy underlying some state bad actor laws.

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81. The plaintiffs in the *Attwoods* case, however, did raise a statutory as-applied challenge to Kentucky's bad actor law, claiming that the state agency exceeded its statutory authority in the manner that it applied the law's provisions to Bituminous Resources, Inc.'s permit application. See *id.* at 17-23.

82. For a discussion of public choice theory and procedural obstacles to majoritarian preferences in the legislature, see generally William M. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* 368-77 (West, 1988).

*a. Evidence of Protectionist Motives*

The logical starting point of an inquiry into the motives behind broad-based bad actor laws is to assume that these laws, like the New Jersey law after which they are modeled, are aimed at eliminating the presence of organized crime from the solid and hazardous waste industry.<sup>83</sup> However, it may be that some states merely tout the goal of fighting or controlling organized crime as a pretext for a more constitutionally suspect goal—protectionism.<sup>84</sup> Media accounts of legislative and public debate concerning waste disposal and bad-actor statutes reveal that while states seek to avoid the influence of organized crime, there may be other, more troubling agendas behind state bad actor laws. These accounts, drawn for purposes of this Note from the Midwest, suggest a growing concern over the relationship between organized crime and hazardous waste. Not one account,

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83. With few exceptions, however, nothing in the statutes themselves indicates that states are pursuing the eradication of organized crime in the hazardous waste industry by the adoption of bad actor statutes. But see 7 Del. Code Ann. § 7901(b) (Supp. 1994) (referring possibly to organized crime in identifying applicants with “criminal activities and/or associations”); R.I. Gen. Laws § 23-19.1-10(b)(6) (Supp. 1994) (prohibiting specifically the issuance of permits to an applicant if any person with a beneficial interest in the applicant’s business has “pursued economic gain in an occupational manner or context which is in violation of the criminal or civil public policies of [the] state”). See also Douglas Meiklejohn, *The New Mexico Solid Waste Act: A Beginning for Control of Municipal Solid Waste in the Land of Enchantment*, 21 N.M. L. Rev. 167, 177 (1990) (suggesting that New Mexico’s disclosure law was adopted at least partially in response to the threat of organized crime).

Conversations with state environmental administrators reveal that concern over organized crime was clearly part of the reason that some states adopted bad actor laws, though one may wonder whether that concern is warranted. One Ohio environmental official noted that the main concern behind Ohio’s bad actor legislation was fear of “east coast organized criminals getting involved in Ohio landfills.” Telephone interview with Mark Navarre (cited in note 28). When asked whether Ohio ever actually had problems with mob infiltration of its waste industry, Navarre explained that around the time Ohio’s bad actor law was passed, there was one “bad guy” in particular who operated in the east side of the state around whom public concern was centered. *Id.* It is interesting to note that parts of the Ohio statute were drawn almost verbatim from the New Jersey statute, which is also concerned primarily with organized crime. See Ohio Rev. Code Ann. § 3734.44(A) & (B) (Baldwin 1995).

Ray Furrh of the Mississippi Department of Environmental Quality noted that problems in the Northeast and concerns about a “big criminal element” in the waste industry prompted Mississippi to adopt a bad actor law, but explained, “we don’t seem to find the same problems [here].” Telephone interview with Ray Furrh (cited in note 28). Similarly, Theresa Gearing of the Tennessee Department of Environment and Conservation pointed to “some problems up north,” and referred to the *Trade Waste Management* case when asked about influences for Tennessee’s bad actor law. Telephone interview Theresa Gearing (cited in note 26).

84. This theory is the result of research conducted with the intention of proving the Author’s original theory—that states were indeed adopting bad actor laws in order to ensure that organized criminals did not gain a foothold in their own waste industry as had happened in New Jersey. This research consisted of a search of newspaper articles over the last five years that discuss both organized crime and hazardous waste, with the midwestern states randomly chosen as a geographical limitation. The search was done on LEXIS, NEWS library, MWEST file, using the following search request: “hazardous waste” /25 “organized crime.”

however, discusses the current presence of organized crime in the states at issue; instead, the accounts focus heavily on concerns that the importation of trash from northeastern states would *bring* organized crime to the Midwest.

A 1989 article in the Chicago Tribune, for example, threatened: "Gangsters and garbage often go together," and warned that "huge profits" from disposing northeastern waste in midwestern landfills could cause an increase in the amount of waste coming from the Northeast and lead to mob infiltration of the waste disposal industry in the Midwest.<sup>85</sup> The article quoted the chief of criminal justice of the New Jersey Attorney General's office as encouraging midwestern states to adopt laws requiring background investigations of entities in the waste disposal industry as a way to prevent the mob from gaining a foothold in their states.<sup>86</sup>

Another article, from a 1991 edition of the Louisville, Kentucky, Courier-Journal, spoke of connections between existing and proposed Kentucky landfills and "individuals or companies targeted *elsewhere* in probes of organized crime and its grip on the garbage trade."<sup>87</sup> This article also suggested background checks as a necessary legal barrier to infiltration of the mob into Kentucky landfills, looking to bad actor statutes in New Jersey, Pennsylvania, and Ohio as successful examples.<sup>88</sup> In another newspaper story in the Courier-Journal, one journalist described a gubernatorial candidate's proposal to require background checks on the waste industry, and then wrote about "*another* way to block waste imports," implicitly suggesting that the disclosure law would be merely one element of a broader campaign to limit the influx of out-of-state waste.<sup>89</sup> Once Kentucky did adopt the suggested bad actor statute, a 1993 article in the Courier-Journal described the law as "aimed at keeping the state from becoming a second home to notoriously corrupt elements of the Northeastern garbage industry."<sup>90</sup>

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85. Casey Bukro, *Crime Ties to Garbage Firms Told*, Chi. Trib. B5 (Dec. 3, 1989).

86. *Id.* Interestingly, the article also quoted Jerry Gladden, chief investigator for the Chicago Crime Commission, saying that no particular organized crime group from the Chicago area was known to control the waste disposal industry there. *Id.*

87. Michael M. Jennings, *Organized Crime Extends Influence to Garbage Trade in Kentucky*, Courier-Journal 10A (Jan. 13, 1991) (emphasis added).

88. *Id.*

89. Al Cross, *Jones' Platform Proposes Background Checks for Trash Companies*, Courier-Journal 2B (April 10, 1991) (emphasis added).

90. Fran Ellers, *Legal Woes Beset Firm Planning Landfill: British Company Disputes Findings in State Report*, Courier-Journal 1A (Dec. 6, 1993).

It is well documented that landfill space is rapidly decreasing and that dumping fees are rising just as rapidly in the Northeast.<sup>91</sup> As this happens, the overwhelmed northeastern states look to the Midwest and other regions for places to dump their waste.<sup>92</sup> States facing an influx of waste from the Northeast undoubtedly are looking for some way to stop or reduce the flow. This is not to say that bad actor statutes are merely clever devices to exclude out-of-state waste by scrutinizing "character" during the permitting process.<sup>93</sup> However, if some of these statutes seem particularly well-designed to smoke out organized crime, and the only organized crime concerning the state is out-of-state organized crime, it follows to ask whether the true concern lies with the mob or the trash.<sup>94</sup>

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If the officials quoted in these stories have suggested that their states have adopted bad actor statutes out of a fear of corrupt waste from *other* states, the stories also suggest that protectionist concerns may enter into the hazardous and solid waste treatment permit approval process through the bad actor statute. It may be that states that profess to be concerned about accepting mob-tainted waste from the Northeast are really concerned about accepting waste from the Northeast, period.

91. See Melinda Beck, *Buried Alive*, Newsweek 67 (Nov. 27, 1989) (discussing the shrinking capacity and decreasing number of the nation's landfills, particularly in the Northeast).

92. *Id.*

93. However, the nexus that many states have drawn between criminal convictions and permit denials must have some meaning, and the fact that such convictions do not bear an obvious connection to an applicant's reliability or competence to run a waste disposal operation begs the question as to what the nexus really is.

94. This question of statutory motive becomes even more pertinent considering the large flow of trash from the Northeast and the apparently high profits to be gained from moving this waste to cheaper rural landfills in the Midwest and the South. Furthermore, the courts have been besieged with cases concerning state attempts to prevent or dissuade out-of-staters from dumping waste in their landfills since the Supreme Court's landmark decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Although the Court's decision in this case made clear that measures which seemed to be protectionist in nature would be subjected to searching scrutiny, states have continued to devise taxes, tipping fees, and other barriers directed at imported waste. These attempts have been uniformly struck down. See, for example, *Government Suppliers Consolidating Serv. v. Bayh*, 753 F. Supp. 739, 766 (S.D. Ind. 1990) (invalidating an Indiana law which imposed greater tipping fees on out-of-state waste than on in-state waste); *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244, 265 (S.D. Ohio 1991) (striking down a state law requiring garbage transporters coming into Ohio to submit to Ohio jurisdiction); *American Trucking v. Secretary of State*, 595 A.2d 1014, 1017 (Me. 1991) (ruling that a flat fee per truck for solid waste haulers was unconstitutional, because similar actions by every state would create a significant burden on commerce); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2017 (1992) (holding that an additional disposal fee imposed by Alabama on hazardous waste generated outside the state was unconstitutional); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1355 (1994) (invalidating a surcharge on in-state disposal of out-of-state waste); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1684 (1994) (striking down a flow control ordinance which required all solid waste to be processed at a local transfer station before leaving the town).

*b. The Constitutional Problem*

This Note makes no attempt to speculate whether some states *actually* have used their bad actor statutes to exclude out-of-state landfill operators and haulers from operating in their state.<sup>95</sup> However, it does argue that the weak nexus between disqualifying factors and permit denial in many bad actors laws opens these laws to misuse in the advance of protectionist concerns. And if this misuse indeed occurs, then these laws may be constitutionally infirm.

There are two primary strains of case law in which the Supreme Court has struck down a protectionist state law under the so-called dormant Commerce Clause: (1) when the challenged law facially discriminates against out-of-state interests; and (2) when the challenged law discriminates in effect only.<sup>96</sup> *Philadelphia v. New Jersey*<sup>97</sup> is an example of the first type of case. In *Philadelphia*, the Supreme Court held unconstitutional a 1973 New Jersey law that prohibited the importation of waste that originated or was collected

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95. However, conversations with state officials reveal that out-of-state trash may, in fact, be an underlying concern behind the implementation of bad actor statutes. Roy Furrh of the Mississippi Department of Environmental Quality, while explaining that Mississippi had never denied a permit based on its bad actor statute, noted that the law "has prevented more than one applicant from applying *in our state* based on their compliance record," implicitly suggesting that Mississippi's law may act more to the detriment of out-of-state applicants than others. Telephone interview with Roy Furrh (cited in note 26) (emphasis added). Inquiries into the roots of Indiana's bad actor law elicited the explanation that Indiana's law "grew out of problems with long haul trash from New Jersey, New York, and eastern Pennsylvania which was being shipped to Indiana because it was cheaper to dispose of it here." Telephone conversation with Pat Morrison, External Affairs Department, Indiana Department of Environmental Management (Nov. 15, 1993). Finally, Mike Apple, Assistant Director of the Division of Solid Waste Management in Tennessee's state environmental agency, explained that Tennessee's bad actor law had been adopted as a very small component of the state's comprehensive solid waste management program in order to appease political concerns about "out-of-state wastes and unscrupulous operators." Telephone interview with Mike Apple, Assistant Director, Division of Solid Waste Management, Tennessee Department of Environment and Conservation (Oct. 7, 1994). He further noted that the Department of Environment and Conservation had been given little guidance on how to implement the statute, and that as a result, it had been difficult to administer. *Id.*

96. For a discussion of the dormant Commerce Clause and protectionism, see generally Gerald Gunther, *Constitutional Law* 242-61 (Foundation, 12th ed. 1991). There is also a third strain of case law which, like the second, involves facially nondiscriminatory state regulations which nevertheless impact interstate commerce. These cases involve state laws which have some incidental effect on commerce, but which presumably were not enacted for protectionist purposes. For a discussion of the Supreme Court's treatment of state legislation under the dormant Commerce Clause, see Daniel A. Farber and Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 Vand. L. Rev. 1401, 1411-18 (1994).

97. 437 U.S. 617 (1978).



outside the state's borders.<sup>98</sup> In striking the law down, the Court held that it did not need to determine the ultimate legislative purpose behind the law since the statute, both facially and in its effect, violated the dormant Commerce Clause's principle of nondiscrimination.<sup>99</sup> Nevertheless, the Court went on to note that the law was "an obvious effort" to saddle out-of-staters with the burden of preserving the dwindling capacity of New Jersey's landfills.<sup>100</sup> It does not seem likely that any of the bad actor laws currently in existence would be found unconstitutional under a *Philadelphia v. New Jersey* rationale as none of these laws facially purports to exclude out-of-state waste.

However, it may still be possible to challenge bad actor laws as discriminatory in their effect. For example, in *Hunt v. Washington Apple Advertising Commission*,<sup>101</sup> the Supreme Court held unconstitutional a North Carolina law that required apples sold or shipped into the state to bear only the U.S. grade or standard. The law, while facially neutral, was found to discriminate against Washington state, the source of nearly half of all apples shipped in closed containers in interstate commerce.<sup>102</sup> Washington state had developed its own grading system for apples with equivalent or higher grades than the comparable federal standards, so North Carolina's system imposed a higher cost on Washington apple growers who wished to do business in the state of North Carolina.<sup>103</sup> The Court found that North Carolina's asserted interest in eliminating deception and confusion in the marketplace was not sufficient to justify the law's discriminatory effect.<sup>104</sup> In striking the law down, the Court relied mainly on the law's discriminatory effect, rather than seeking to determine whether the North Carolina state legislature actually possessed a protectionist motive when passing the statute.<sup>105</sup>

The *Hunt* case is evidence that the Supreme Court will scrutinize a state statute for discriminatory effects even after finding the law neutral on its face. This case may provide an adequate basis in the law for striking down a bad actor law that, in effect, serves to disadvantage out-of-state interests for local benefit. However, the *Hunt* case may be applicable only to those state laws that have the effect of disadvantaging out-of-state interests.

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98. *Id.* at 628.

99. *Id.* at 626-27.

100. *Id.* at 629.

101. 432 U.S. 333 (1977).

102. *Id.* at 336.

103. *Id.* at 350.

104. *Id.* at 352-53.

105. *Id.* at 353.

Yet bad actor statutes may lend themselves to protectionist goals in a subtly different way, by providing sufficient discretion for officials to pursue protectionist motives.<sup>106</sup> If this is so, these laws may be more accurately described as discriminatory as applied, rather than discriminatory in effect. For a plaintiff to wage a successful as-applied challenge to a bad actor law, the plaintiff might have to prove not only that the bad actor law discriminated in its effect, but also that the state officials or the state legislature were improperly motivated or intended to discriminate to further protectionist goals. However, the Supreme Court has been reluctant to find that laws challenged under the dormant Commerce Clause result from improper purposes and motives on behalf of the relevant state legislature.<sup>107</sup>

### B. Policy Concerns

Even if bad actor statutes stand on firm ground constitutionally, an examination of their legitimacy is not complete without scrutiny of the policy concerns they raise. Laws that are constitutional may yet be unfair or unwise if they leave too much room for discretion in the hands of those who implement them. Room for discretionary behavior is room for state officials to pursue goals that may not be in the public interest or to discriminate against certain types of entities. Furthermore, constitutional laws may nevertheless raise serious policy concerns if they purport to serve one goal, but are susceptible to administrative manipulation to serve others. This section discusses policy concerns raised by overly broad bad actor laws.

#### 1. Protectionism

If broad-based bad actor statutes are actually adopted as a mechanism for protecting state waste industries from outside compe-

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106. See note 38.

107. Gunther, *Constitutional Law* at 252-53 (cited in note 96). Gunther suggests that the Court has been more willing to find purposeful discrimination outside of the Commerce Clause realm. *Id.* A plaintiff could perhaps bring a similar purposeful discrimination challenge to a bad actor law on equal protection grounds. In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266-68 (1977), the Supreme Court elaborated on what considerations go into a finding that a legislature or administrative body was motivated by a discriminatory purpose. However, even if a plaintiff could succeed in proving such a purpose, the equal protection claim would receive only rational basis review because bad actor statutes are business regulations. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955) (holding that an Oklahoma statute regulating the field of optometry survived rational basis review).

tition and for excluding out-of-state trash from in-state landfills, then these protectionist laws raise policy concerns. The national economy, and indeed, our national unity would be harmed if all states pursued clever methods of protecting their own resources and wealth to the disadvantage of other states.<sup>108</sup> This is particularly true in the area of waste handling, as the entire nation has been affected by lack of available waste disposal sites.<sup>109</sup>

## 2. The "Not in My Backyard" Syndrome

Some bad actor statutes are couched in terms so vague they allow ample room for administrators to make permitting decisions in less than evenhanded ways. In addition to listing various types of prior conduct that may disqualify an applicant, some bad actor statutes link permit approval decisions to standards such as exhibition of "sufficient reliability, expertise, and competency,"<sup>110</sup> "lack of ability or intention to comply with any provision" of the act,<sup>111</sup> or "good character, honesty, and integrity."<sup>112</sup> This looseness of standards in bad actor laws creates a problem quite distinct from the theory postulated in Part III.A.2.a that state officials may be systematically using bad actor laws to stop the flow of out of state waste. Rather, vague standards in a law *prevent* its systematic application and invite ad hoc implementation or, even worse, manipulation. At least one commentator has suggested that some states with bad actor laws are guilty of the "not in my backyard" ("NIMBY") syndrome with regard to permitting waste disposal and treatment facilities.<sup>113</sup> This suggestion is based on a concern that community pressure to prevent the construction of a hazardous waste facility in a certain neighborhood, for example, might sway the permitting authority to

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108. Donald H. Reagan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1112-25 (1986) (discussing three policy objections to state protectionist legislation: (1) the "concept of union" objection, (2) the "resentment/retaliation" objection, and (3) the "efficiency" objection).

109. See notes 91-92 and accompanying text.

110. N.J. Stat. Ann. § 13:1E-133(a) (West 1991); Ohio Rev. Code Ann. § 3734.44(A) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(1) (1989 & Supp. 1994). See also Minn. Stat. Ann. § 115.076, subd. 1 (West Supp. 1995) (requiring "sufficient expertise and competence").

111. Kan. Stat. Ann. § 65-3407(c)(3) (1992); 35 Pa. Cons. Stat. Ann. § 6018.503(c) (Purdon 1993).

112. R.I. Gen. Laws § 23-19.1-10(b)(4) (1989 & Supp. 1994). See also S.D. Cod. Laws § 1-40-27(1)(e) (1992 & Supp. 1994) (requiring only "good character and competency").

113. Steven B. Drucker, Comment, *Bad Actor Statutes: New Weapons in Environmentalists' Arsenal*, 2 U. Balt. J. Envir. L. 73, 85 (1992).

One state environmental official has opined that bad actor statutes exist because "some states just don't want landfills." Telephone interview with Theresa Gearing (cited in note 26).

deny the contested permit, given that the standards for permitting under the bad actor statute leave room for such discretion.<sup>114</sup> While such a misuse of bad actor statutes would be hard to document, there is at least some evidence that state permitting officials are influenced by community concerns when performing background investigations on permit applicants.<sup>115</sup>

### 3. At the Expense of Environmental Protection

This Note suggests that broad-based bad actor statutes may be adopted and applied to accomplish a variety of goals besides environmental protection. They may be drafted to serve as a first-line defense against organized crime. They may be applied by state officials in such a way as to favor in-state waste handlers and exclude imported garbage. They may even be manipulated to accommodate citizens' concerns about landfills in their neighborhoods. Yet our legal system should not tolerate abuses of the citizenry's belief that laws are designed to accomplish their apparent purpose, rather than to advance other goals that, if revealed, would raise serious questions about the laws' validity.

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114. Drucker, 2 U. Balt. J. Envir. L. at 86.

115. For example, a 1993 story in the Cleveland Plain Dealer highlighting a massive investigation conducted by the Ohio Attorney General under the state's bad actor law suggests that there was more to the investigation than a simple check into a permit applicant's qualifications. T. C. Brown, *Fisher Rules WTI Ownership Changes Illegal: Incinerator Must Seek New Permit, Undergo Another Hearing*, Plain Dealer 5B (July 1, 1993). The story recites details of a three-year investigation of a proposed hazardous waste incinerator operation, which resulted in a 296-page report revealing that the partnership behind the project had substituted new partners for those in the original partnership without notifying state waste management officials. This failure to notify officials of the ownership change was described in the voluminous report as "a violation of hazardous waste law [that] will reflect negatively on [the permit applicant's] reliability." *Id.* (This statement refers to the requirement in Ohio's bad actor law that a permit applicant exhibit "sufficient reliability, expertise and competence" to operate a hazardous waste facility. Ohio Rev. Code Ann. § 3734.44(A) (Baldwin 1995)). According to the story, the Attorney General's findings mean that the incinerator operators will be required to seek a permit modification reflecting the changes in ownership, "a process that will offer opponents of the controversial plant another chance to scuttle the operation," which has been challenged as being too close to both a source of drinking water and an elementary school. Brown, Plain Dealer at 5B. This news story strikingly depicts how the permit approval process under a bad actor statute can become intertwined with community sentiments regarding a pending project.

Notice that if community fears about health hazards are warranted, federal, state, or local environmental laws will likely ensure that the controversial facility is not built on the proposed site, as these laws are designed primarily to protect human health. However, bad actor statutes may allow state officials to respond to irrational citizen concerns related to the siting of waste facilities in their communities by manipulating loose standards to deny permits to facilities that have become the target of public outcry.

Furthermore, if bad actor laws are being manipulated to further protectionist and other non-environmental aims, environmentalists may have a right to be disgruntled. Since the beginnings of the environmental movement in the early 1970s, environmentalism has often been a front for more unworthy causes. For example, those opposed to development have often hidden behind the environmental movement to ensure that specific projects did not proceed.<sup>116</sup> In the name of preserving natural habitats or protecting the environment, those satisfied with the status quo have identified endangered species or negative environmental impacts which have stopped their development projects in their tracks, costing enormous amounts of money, but all in the name of the "public good." Adopting bad actor statutes to further non-environmental goals in the name of protecting public health, welfare, and the environment manipulates the environmental cause and undermines the laws themselves. Environmental issues are highly political, highly expensive, and environmentalists' success in passing protective laws comes often at the expense of strong business interests.<sup>117</sup> Thus, assuming that each battle to pass a statute in the name of the environment is hard won, it would be wasteful, from an environmentalist's perspective, to expend scarce resources and political good will to pass laws that actually serve other purposes.<sup>118</sup> If bad actor statutes are fought for and won in the name of the environment, but implemented mainly to serve protectionist or other non-environmental goals, they are won at the eventual expense of environmental protection itself.

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116. See generally William Tucker, *Environmentalism and the Leisure Class*, Harper's 49 (Dec. 1977).

117. See Risk Assessment and Cost-Benefit Act of 1995, H.R. 1022, 104th Cong., 1st Sess. (Feb. 23, 1995). This bill would require federal agencies issuing environmental regulations to engage in cost-benefit analysis with respect to any rule with annual compliance costs of more than \$25 million. The background to this bill cites estimates that environmental compliance costs will exceed \$180 billion by the year 2000. It also suggests that the bill is based on a "fear that the federal government has entered into a reckless, multi-billion dollar will-o-the-wisp chase in search of illusory benefits at the public's expense." Congressional Press Release, Federal Document Clearing House (Feb. 26, 1995).

118. It could be that bad actor laws are actually quite easy to pass, since they do not necessarily impose high costs on industry, and their pro-environment label may be appealing to the public. However, even if this is true, these laws may still take the place of more substantive environmental protection laws since legislators can support a bad actor law without political cost and then "check off" their debt to environmentalists and pro-environmental constituents for the legislative session.

This Note acknowledges that the goal of environmental protection is an important one, and accepts that bad actor statutes can play a critical role in accomplishing that goal. However, broadly drawn bad actor statutes may not be the ideal vehicle. As argued in this Note, bad actor statutes that base permit disqualification on crimes and violations unrelated to the environment are suspect from both a constitutional and policy perspective. These broad-based bad actor statutes lend themselves to misuse in advance of protectionist goals and NIMBYism, which can thwart the ultimate goal of environmental protection. The ideal bad actor statute is one that limits its focus to applicants with a history of environmental crimes.<sup>119</sup> The following Parts demonstrate that bad actor statutes *can* be narrowly tailored to achieve environmental goals. Parts IV and V set forth the aims and terms of a model statute to guide both state and federal lawmakers in crafting reasonable, efficacious, and fair bad actor statutes.

#### IV. CHARACTERISTICS OF AN IDEAL BAD ACTOR STATUTE

Not all bad actor laws are vulnerable to misuse or subject to constitutional flaws in the ways described above. Some, for instance, are limited in scope solely to environmental crimes.<sup>120</sup> As described above, Oklahoma's bad actor law states that its purpose is to protect public health and safety and the environment of the state.<sup>121</sup> Accordingly, the statute prescribes a permit denial only for violations related to hazardous waste handling, a history of noncompliance with environmental laws, or an affiliation with any person with such a record.<sup>122</sup> Oklahoma's statute is exemplary not only because it states its goals clearly and directly, but also because its clear nexus between

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119. The Author acknowledges that some states may indeed face a genuine threat of infiltration of their waste industry by organized crime. For these states, adopting a broadly drawn statute aimed directly at combating that threat is both a necessary and reasonable approach to an identified problem. See *Trade Waste Management*, 780 F.2d at 238-39 (noting that New Jersey has a compelling interest in "protecting the sensitive waste disposal business from the influence of organized crime"). Additionally, a broad bad actor law promotes environmental protection by ensuring that organized criminals do not violate environmental regulations to advance their economic interests.

120. See, for example, Mich. Comp. Laws Ann. §§ 299.518-.519 (West Supp. 1994); 27A Okla. Stat. Ann. § 2-7-109 (West Supp. 1995); 35 Pa. Cons. Stat. Ann. § 6018.503(c) (Purdon 1993).

121. See note 32 and accompanying text.

122. 27A Okla. Stat. Ann. § 2-7-109(A) (West Supp. 1995).

failure to adhere to environmental laws in the past and propensity to disregard those laws in the future supports the statute's goals.

The ideal bad actor statute is, similarly, narrowly tailored to accomplish an express environmental objective, containing specific language restricting the discretion of those implementing the law. Thus, this ideal statute hmits the possibility that the statute will be misused to advance nonenvironmental goals. An ideal bad actor statute should contain a purpose section, specifically delineating the goals sought to be achieved by the statute. It should establish a strong nexus between the type of bad actors to be identified and the disqualifying factors, and should base permit denials on a history of specific occurrences or acts, rather than vague standards. The ideal statute should also provide procedures for a hearing in the event that a permit is denied. Finally, a model bad actor statute should encompass all permitting activities that the relevant environmental agency administers.<sup>123</sup>

#### *A. The Purpose Section*

There are distinct advantages to drafting a purpose section for bad actor statutes. A statement of the statute's purpose would clearly express to enforcement officials, the judiciary, and the public the goals sought to be achieved by its passage and implementation. Thus, the purpose section may serve to limit discretionary behavior by those who apply the statute's provisions to specific applicants. It may also provide a focus for judicial appeal should an aggrieved applicant complain that a permitting decision does not comport with the defined goals of the law. Finally, designing laws which state their purpose in a clear and straightforward manner reflects good lawmaking policy; it will prevent misperception of statutory goals by the community and will assist lawmakers in obtaining genuine community endorsement

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123. It is beyond the scope of this Note to address all of the potential elements of an ideal bad actor law. For example, some lawmakers may wish to allow applicants with histories of environmental noncompliance to obtain permits if they have since shown evidence of rehabilitation. Allowing permitting officials to consider mitigating circumstances may be appropriate as long as the circumstances are clearly and specifically defined and the process for weighing such factors against the potentially disqualifying factors is explicitly spelled out in the statute. Several states' statutes allow evidence of rehabilitation or mitigating factors. See, for example, Ind. Code Ann. § 13-7-10.2-4(b) (Burns 1990); Ky. Rev. Ann. Stat. § 224.40-330(1)(d)(6) (1991); Minn. Stat. Ann. § 115.076, subd. 4 (West Supp. 1995); Miss. Code Ann. § 17-17-505(3) (Law. Co-op Supp. 1994); N.J. Stat. Ann. § 13:1E-133.1 (West Supp. 1994); N.M. Stat. Ann. § 74-4-4.2(E) (1993); N.D. Cent. Code § 23-29-04(14) (Supp. 1993); Ohio Rev. Code Ann. § 3734.44(C) (Baldwin 1995); R.I. Gen. Laws § 23-19.1-10(b)(3) (Supp. 1994); S.C. Code Ann. § 44-96-300(C)(7) (Law. Co-op Supp. 1993); Va. Code § 10.1-1409(8)(f) (1993).

of their work. An ideal bad actor statute will contain a purpose section indicating that the sole goal of the law is to ensure protection of the environment by identifying permit applicants who have habitually violated environmental requirements and by prohibiting these applicants from obtaining a waste handling permit.

### *B. Strong Nexus between Ends and Means*

Perhaps even more critical to the drafting of an ideal bad actor statute is the careful determination of disqualifying factors that indicate a propensity to violate environmental standards and requirements.<sup>124</sup> In making this determination, the lawmaker should first consult available studies, statistics, and commonly available knowledge regarding the tendency of certain kinds of applicants to disregard environmental laws.<sup>125</sup> Second, lawmakers should denote as disqualifying factors *only* those characteristics or prior bad acts deemed sufficiently probative of future bad acts to mandate a permit denial in every case, regardless of the individual applicant involved. This will ensure that the bad actor statute only targets those permit applicants whose histories are strongly indicative of a predilection for disobeying environmental laws. Finally, a bad actor law should only require information on those entities most prone to contribute to the applicant's potential violation of environmental laws. Adherence to

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124. Furthermore, an ideal bad actor law will seek only that information which is critical to its final decision, rather than requiring applicants to disclose information about activities that will not be considered in the permit approval process. Limiting an applicant's disclosure burden solely to such information which is vital to the permit approval determination ensures that applicants will not be supplying government agencies with information that may taint agency consideration of the permit application, even though the agency is not formally allowed to consider such information in denying a permit. The potential for such abuse is evident in laws like the Paxson/Synar bill, which would require applicants to disclose information about "any judgment of liability or conviction" rendered against them. H.R. 3271, 102d Cong., 1st Sess. (Aug. 2, 1991). However, under this bill, an applicant can only be found ineligible for EPA benefits upon conviction of any federal environmental law. *Id.* See note 39. Similarly, Delaware's bad actor law requires disclosure of *all* felonies committed by the applicant and other identified persons, but limits a permit denial to a finding that "the applicant *has operated . . . a facility in a manner* which casts substantial doubt on the ability or willingness of the applicant to operate the facility for which a permit is being requested in a manner that will protect the health and welfare of the citizens of Delaware." 7 Del. Code Ann. § 7904(2) (Supp. 1994) (emphasis added). Delaware's law seems to require more information than the agency needs to make a permit approval decision.

125. In states such as New Jersey, this analysis could validly consider the strong presence of organized crime in the waste industry and the particular likelihood that applicants associated with the organized crime world will put profit ahead of law-abiding behavior.



these guidelines can ensure a strong nexus between statutory means and ends.

### C. *Precise, Definitive Standards*

Bad actor statutes should focus on specific elements in an applicant's history as disqualifying factors rather than relying on such indeterminate characteristics as reliability or good character. Use of vague terms in a bad actor statute creates room for undesirable discretionary behavior by enforcement officials, and arguably provides inadequate notice to the applicant of what kinds of activity will later result in a permit denial.<sup>126</sup> Lawmakers can reduce ambiguous standards to a set of specific acts which, if engaged in by the applicant, will indicate that the applicant should not be granted a permit.<sup>127</sup>

### D. *Hearing Procedures*

All bad actor statutes should make available a process through which an applicant may appeal a permit denial.<sup>128</sup> Individualized hearings will ensure each applicant that the agency's decision regarding its permit application was fair and procedurally correct. Hearing procedures for a permit denial under a bad actor statute should differ from the procedures for a standard permit denial. This is due to the fact that the latter type of permit denial only implicates technical or other insufficiencies in the permit application. On the other hand, implicit in a denial under a bad actor statute is an allegation that the applicant has a record of environmental compliance problems and cannot be trusted to operate a facility according to environmental requirements. Thus, a hearing may need to be conducted before

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126. Notice is an essential element of fairness, as it provides citizens with an opportunity to modify their behavior in order to avoid the consequences of a particular law.

127. For arguments that ambiguous character standards are also inappropriate in other fields, see Stephen A. Sharp and Don Lively, *Can the Broadcaster in the Black Hat Ride Again? "Good Character" Requirement for Broadcast Licensees*, 32 Fed. Comm. L. J. 173, 202 (1980) (concluding that the FCC should eliminate character as a qualification and focus instead on the more reliable indicator of specific acts of misconduct); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L. J. 491, 497, 500-01 (1985) (explaining that the character requirement for admission to the bar was historically used to exclude women, Jews, and persons of foreign parentage from the legal profession).

128. Many bad actor statutes already contain hearing procedures. Hearing procedures can be a critical safeguard in ensuring that the ideal bad actor law, once narrowly drawn, is also correctly applied to individual situations.

denial<sup>129</sup> since information regarding the denial may reach the public forum and damage the applicant's reputation, which in many states is protected by the state constitution.<sup>130</sup>

### *E. Broad Application to All Permitting Programs*

For bad actor statutes to have a strong impact on environmental protection, they must focus on the entire gamut of environmental permitting, rather than solely on the waste treatment and disposal industry.<sup>131</sup> It is doubtful that any recidivistic tendency of environmental bad actors is confined solely to the solid and hazardous waste industry. While it may be true that the waste industry, with its promise of high profit margins, draws entities desiring to make money at the expense of environmental protection, compliance with environmental standards will also dramatically raise the cost of doing business for those with permits to discharge air or water pollutants as well. If applicable to all types of permits, bad actor statutes would help to identify and weed out all entities inclined to give profit takes precedence over compliance with environmental laws.

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129. See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process"); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (determining that before the state of Georgia could deprive an uninsured driver of his or her driver's license after an accident, the state must provide a hearing to determine whether there was a reasonable possibility that a judgment would be rendered against the driver as a result of the accident). But see *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974) (concluding that post-termination hearing procedures adequately protect a government employee's right to procedural due process); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (finding that an evidentiary hearing is not required prior to termination of disability benefits under the Social Security Act).

130. Many states provide constitutional protection for their citizens' reputational interests. See, for example, Ala. Const., Art. I, § 13; Ark. Const., Art. II, § 2; Conn. Const., Art. I, § 10; Del. Const., pmb.; Ill. Const., Art. I, § 12; Ind. Const., Art. I, § 12; Kan. Const., Bill of Rights, § 18; La. Const., Art. I, § 22; Me. Const., Art. I, § 19; N.C. Const., Art. I, § 18; N.D. Const., Art. I, § 1; Oh. Const., Art. I, § 16; Okla. Const., Art. II, § 6; Or. Const., Art. I, § 10; Pa. Const., Art. I, § 1; S.D. Const., Art. VI, § 20; Utah Const., Art. I, § 11; W. Va. Const., Art. III, § 17; Wyo. Const., Art I, § 8.

However, in *Chemical Waste Management*, the Indiana Supreme Court suggested that a post-deprivation hearing would be adequate to protect the reputational interest of a waste handler because reputation is not an essential component of functioning in that profession. 643 N.E.2d at 339.

As discussed in Part III.A.1.c., the Franklin County Circuit Court in Kentucky held that Kentucky's bad actor law did not deprive the plaintiff permit applicant of any interest protected by either the United States or Kentucky constitutions, and that the plaintiff was thus not entitled to procedural due process. See *Attwoods*, slip op. at 13-17.

131. Most state bad actor laws currently focus on solid and hazardous waste. See notes 9-11 and accompanying text.

## V. A MODEL BAD ACTOR STATUTE

The model statute set forth below draws on the strengths of current and proposed bad actor laws. Yet it is narrowly tailored to achieve the specific goal of identifying repeat environmental offenders; it leaves little room for undesirable discretionary behavior in advance of protectionist or punitive goals. Furthermore, it ensures each applicant for an environmental permit fair treatment and a predictable result. It is nevertheless broad enough to reach a wide array of environmental offenders and to prevent them from continuing to endanger the environment through the disregard of environmental standards.

### MODEL BAD ACTOR STATUTE

#### Section 1. Purpose

The purpose of this statute is to require examination of the history of all permit applicants in order to identify applicants with a record of past environmental violations. In order to ensure the continued protection of the public health, safety, and welfare and the environment of this state, this statute provides that all permit applicants who, based on the standards below, have exhibited a propensity to disregard environmental laws shall be denied permits to operate facilities within this state.

#### Section 2: Disclosure Statement

All applicants for a permit to discharge pollutants under the environmental laws of this state shall submit a disclosure statement to the permitting authority. The disclosure statement shall include the following information:

(a) a list of all corporate officers and directors, stockholders owning at least 50<sup>132</sup> percent of the company's stock or assets, and persons responsible for the daily operation of the proposed facility; and

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132. Fifty percent is not a magic number; it is certainly possible that individuals with a smaller investment in the company might have a say in management of company affairs and thus might contribute to a company's violation of environmental regulations. However, investors with a stake in the corporation representing at least half of the company's stock or assets definitely should be included in the scope of the ideal bad actor statute, as these individuals will, by virtue of their majority ownership in a company, be able to actively participate in and control the daily operations of the company.

(b) a list of all violations of any state or federal environmental law, regulation, permit, license, or order occurring in the past five years, which resulted in a conviction or civil or administrative penalties for the corporate permit applicant or any member of the corporate entity required to be listed on the disclosure statement.

### Section 3. Permit Denial

The agency shall issue a proposed determination to deny any permit application upon a finding that:

(1) the applicant or any person required to be listed on the disclosure statement has exhibited a propensity to disregard environmental requirements, based upon two or more violations as described in Section 2(b); or

(2) the applicant withheld or misrepresented any material information required to be included in the disclosure statement.

### Section 4. Hearing

If the agency proposes to deny a permit under this Act, the permit applicant may request a hearing on the merits of the agency's proposed determination. The hearing shall be conducted prior to the agency's final action on the permit application.<sup>133</sup>

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The model statute above represents a bare-bones approach to the problem of environmental bad actors,<sup>134</sup> and admittedly leaves little flexibility for case-by-case determination. However, it is just such a determination that this statute seeks to avoid. Once agency officials are in the position to make decisions based on the individual, rather than on pre-determined norms, there is room for unfairness and inconsistency in the application of the law. Furthermore,

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133. The hearing procedures furnished by the ideal bad actor statute are those necessary to ensure that the agency has made a correct determination to deny a permit application given the provisions of Section 3 - Permit Denial. See note 127 and accompanying text.

134. See note 122.

overbroad bad actor laws become a likely conduit through which private and public sentiment can work to prevent the siting of facilities for non-environmental reasons, such as protectionism or "NIMBYism."

The statute above could be adopted at either the state or federal level, and would be most effective if adopted at both levels in a relatively uniform manner. Adoption of a similar bad actor law applying to all permitting activities of the EPA, in addition to adoption of bad actor laws in every state, would establish a network of bad actor laws that would prevent proven bad actors from gravitating to more lenient states or areas in order to avoid scrutiny and to continue to profit from disregard of environmental laws.

Some commentators have stressed the importance of adopting bad actor statutes solely at the federal level.<sup>135</sup> These commentators have suggested that a unified federal program would do away with inconsistencies between states and would accordingly decrease transactions costs for companies operating in more than one state.<sup>136</sup> Others have proclaimed that adoption of a bad actor statute at the federal level would boost the effectiveness of the "EPA's deterrence arsenal."<sup>137</sup> However, it must be recognized that many important permitting activities occur at the state and local levels.<sup>138</sup> Thus, a federal law which failed to recognize this fact would leave a gaping hole through which many bad actors would escape.

## VI. CONCLUSION

Bad actor statutes can play a critical role in environmental protection by screening out entities who have proven through prior behavior their inability or unwillingness to comply with environmental standards. Yet in drafting such statutes, lawmakers must be careful not to create a law that is subject to manipulation in pursuit of nonenvironmental goals. The battle to pass environmental laws that are acceptable both to industry and environmentalists presents too

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135. Strock and Runkel, 15 Harv. Envir. L. Rev. at 562 (cited in note 7); Drucker, 2 U. Balt. J. Envir. L. at 92-93 (cited in note 113).

136. Drucker, 2 U. Balt. J. Envir. L. at 92-93.

137. Strock and Runkel, 15 Harv. Envir. L. Rev. at 562 (cited in note 7).

138. For a discussion of state and federal permitting under the Resource Conservation and Recovery Act, which governs the disposal of solid and hazardous waste, see Donna L. Kolar, *Practical Advice for Permitting a Waste Disposal Facility*, in Theodore L. Garrett, ed., *Environmental Law Manual* 137, 141-42 (Section of Natural Resources, Energy, and Environmental Law, American Bar Association, 1992).

great a challenge to accept “environmental protection” laws that may actually be designed to further other purposes. Narrowly tailored bad actor statutes that craft a careful nexus between disqualifying factors and the goal of weeding out proven bad actors, while avoiding the use of vague, manipulable standards, will ensure progress towards the goal of environmental protection in a fair and efficient manner.

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