THE ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT (ECRA): NEW ACCOUNTABILITY FOR INDUSTRIAL LANDOWNERS IN NEW JERSEY

Introduction

Not far from New York City in the Meadowlands of New Jersey, five hundred thousand pounds of mercury lay unchecked beneath a decaying chemical manufacturing plant. In the sediment of a nearby estuary, the mercury concentration levels are among the highest in the world. Fish can no longer inhabit this waterway and those unfortunate enough to be swept in by the tide become irreversibly toxified.

Without close inspection this site appears innocuous, looking quite similar to any manufacturing facility which reached maturity in the post-war period. A small real estate development company buys the site in anticipation of demolishing the buildings and erecting a warehouse. Although the developers know they are buying land from a chemical company which had used the site as a mercury processing plant, the seller does not disclose information regarding the extent of the pollution. As the new owner of the land, the development company becomes aware that it has purchased a veritable mercury mine. Who should be responsible for this enormous cleanup: the developers, their predecessors in interest, or both?

The foregoing is reflective of the facts and major issue which faced the New Jersey Supreme Court in the landmark case of *State v. Ventron*.[1] In that case, the New Jersey Department of Environmental Protection [hereinafter cited as Department] brought suit against the current owners and their predecessors in interest of such a facility.[2] Although the *Ventron* opinion helped to clarify many of the liability issues raised in such situations,[3] the litiga-

[1] State, Dept. of Environ. Protect. v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983).

[2] *Id.* at 482, 468 A.2d at 156.

[3] Ventron, *supra* note 1. For an in-depth analysis of landowner liability and hazardous waste law *see* NOTE, *Successor Landowner Liability for Environmental Torts: Robbing Peter to Pay Paul?*, 13 RUTGERS L.J. 329 (1982); *and see* Rodburg, *Landownership and Hazardous Waste Law*, 104 N.J. LAWYER 12 (1983).

tion process was expensive and time consuming.[4] The New Jersey Legislature recognized that such lengthy litigation could not be tolerated in similar situations where industrial sites posed an immediate environmental threat.

The New Jersey Environmental Cleanup Responsibility Act[5] [hereinafter cited as ECRA or Act] was passed largely in an effort to avoid future situations similar to *Ventron*. ECRA is designed to provide for expeditious cleanup of industrial sites at the time they are closed, sold or otherwise transferred.[6] The Act imposes the cleanup responsibility on the present owner or operator as the transferor of the industrial facility and mandates that in most cases[7] the cleanup must be completed prior to closing the transaction.[8] Providing the impetus for compliance are severe sanctions for the failure to heed the Act's requirements. If the transferor does not comply, the transferee may void the sale, shall be entitled to recover damages and the transferor will be held strictly liable for all cleanup and removal costs.[9] In addition, any person who falsifies information or who otherwise fails to comply with ECRA requirements may be assessed a fine of up to $25,000 for each offense.[10]

Some may hail ECRA as a major victory for the environment, while others have argued that the Act will have a "chilling effect" on industrial real estate transactions and will be detrimental to the economy of the State. Understandably, the possibility of an

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[4] The complaint was filed by the Department of Environmental Protection in March 1976. The New Jersey Supreme Court decided the case in July 1983. *See* Ventron, *supra* note 1, at 482, 473.

[5] N.J. STAT. ANN. §§ 13:1K-6 to -13 (West Supp. 1984-85), P.L. 1983 c. 330. The regulations promulgated pursuant to this Act are cited as N.J. ADMIN. CODE tit. 7, §§ 1-3.1 to -3.21 (1984).

[6] N.J. STAT. ANN. §§ 13:1K-7 (West Supp. 1984-85); N.J. ADMIN. CODE tit. 7, § 1-3.7(1984).

[7] The Act and regulations provide a mechanism whereby the implementation of a cleanup plan pursuant to the Act may be deferred "[i]f the premises of the industrial establishment would be subject to substantially the same use by the purchaser, transferee, mortgagee or other party to the transfer." N.J. STAT. ANN. § 13:1K-11(b) (West Supp. 1984-85); N.J. ADMIN. CODE tit. 7, § 1-3.14 (1984).

[8] N.J. STAT. ANN. § 13:1K-11(a) (West Supp. 1984-85); N.J. ADMIN. CODE tit. 7, § 1-3.1 (1984).

[9] N.J. STAT. ANN. § 13:1K-13 (West Supp. 1984-85); N.J. ADMIN. CODE tit. 7, § 1-3.16(c)(1984).

[10] N.J. STAT. ANN. § 13:1K-13(c) (West Supp. 1984-85); N.J. ADMIN. CODE tit. 7, § 1-3.16(c) (1984).

industrial land sale being declared void has caused immeasurable concern in the real estate, mortgage lending and legal communities. Of more immediate concern, however, is the identification of the particular business dealings to which ECRA applies and the effect it is having on the execution of these transactions. Since there may be a broad spectrum of effects, it is necessary to review the Act's regulatory background and legislative history prior to analyzing its full scope.

I. Regulatory Background

The New Jersey Environmental Cleanup Responsibility Act supplements current regulatory programs designed to curb the flow of hazardous waste and toxic substances into the environment. Federal legislative responses to this pervasive problem include the Resource Conservation and Recovery Act of 1976[11] [hereinafter cited as RCRA], the Toxic Substances Control Act[12] [hereinafter cited as TSCA] and the Comprehensive Environmental Response, Compensation and Liability Act of 1980[13] [hereinafter cited as CERCLA or Superfund]. In addition, New Jersey lawmakers have made significant advances in developing legislation to supplement federal initiatives. Probably the most notable New Jersey statute in this regard is the Spill Compensa-

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11 42 U.S.C. §§ 6901-74 (1982). The objectives of the Resource Conservation and Recovery Act of 1976 (RCRA) are to "promote the protection of health and environment and to conserve valuable material and energy resources" by, among other methods, "regulating the treatment, storage, transportation and disposal of hazardous wastes which have adverse effects on health and the environment." *Id.* § 6902(4).

12 15 U.S.C. §§ 2601-29 (1982). The Toxic Substances and Control Act (TSCA) gives the federal Environmental Protection Agency authority "to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment and to take action with respect to chemical substances and mixtures which are imminent hazards." *Id.* § 2601(b)(2).

13 42 U.S.C. §§ 9601-57 (1982). The Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known as "Superfund," authorizes the President to remove or arrange for the removal of, and provide for remedial action relating to a release or substantial threat of release of any hazardous substance or waste into the environment. This removal or remedial action will be implemented by the government unless the President determines that it can be done properly by the owner or operator of the contaminated facility. *Id.* § 9604(a). Most importantly, this Act establishes a fund to finance such removals and remedial actions. *Id.* § 9631.

tion and Control Act.[14]

These laws may be divided into two general categories according to their fundamental objective. On the one hand, the goal of statutes such as RCRA and TSCA is to prevent hazardous waste and substances from entering unchecked into the environment. These laws fall into a category which may be referred to as "preventive programs." On the other hand, Superfund and the New Jersey Spill Compensation and Control Act were created to aid in the cleanup of existing, abandoned hazardous waste sites and hazardous discharges. These statutes may be placed into what is called a "remedial programs" category.

The government's preventive programs often suffer from deficiencies in enforcement, while the remedial programs are troubled by sluggishness in implementation. The statutes in the preventive programs category provide for enforcement procedures such as periodic inspections[15] and fines for noncompliance.[16] Evidence of severe lapses in government enforcement and the ensuing noncompliance has, however, recently raised serious doubts about the effectiveness of these programs.[17] Noncompliance with these laws is said to be attributable in large part to deep cuts in the enforcement budget of the federal Environmental Protection Agency[18] [hereinafter cited as EPA]. The EPA has also been criticized for the slow implementation of the Superfund remedial program.[19] Conflicts within the EPA and

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14 N.J. STAT. ANN. §§ 58:10-23.11 to -23.24(West Supp. 1984-85). The New Jersey Spill Compensation and Control Act, commonly known as the "Spill Fund", enables the State to control the transfer and storage of hazardous substances and requires the prompt containment and removal of discharges of hazardous substances. This Act also establishes a fund for swift and adequate compensation to persons damaged by such discharges. *Id.* at § 58:10-23.11a; *see also id.* § 58:10-23.11i. For an analysis of this Act *see* Lesniak, *The Statutory Treatment of Wastes: A Legislator's Perspective*, 7 SETON HALL LEGIS. J. 35 (1983).

15 *See* 42 U.S.C. § 6927 (1982) (RCRA); *see also* 15 U.S.C. § 2610 (1982) (TSCA).

16 *See* 42 U.S.C. § 6928(a)(3), (d)(4) (1982) (RCRA); *see also* 15 U.S.C. § 2615(a), (b) (1982) (TSCA).

17 Shabecoff, *Group Sees Poor Compliance on Toxic Substances*, N.Y. Times, July 11, 1984, at A20, col. 1 (according to a study of government records by a non-profit, non-partisan research group, compliance with the nation's preventive environmental laws has "collapsed" because the Reagan Administration was failing to enforce them).

18 *Id.*

19 *E.P.A. Finds Some Causes of "Superfund" Lag*, N.Y. Times, May 15, 1983, at E7, col. 1.

mismanagement have been blamed for this sluggish response.[20]

ECRA does not suffer from these deficiencies in enforcement or cleanup implementation. As mentioned, the Act requires the owner or operator of a facility to detoxify the site prior to the conclusion of a real estate transaction and makes that transaction voidable for noncompliance.[21] By design, the Act's effectiveness will not depend solely upon government enforcement. Rather, mortgage lenders, apprehensive of a possible voided sale, should require compliance assurances, thus providing a unique and efficient enforcement mechanism. Cleanups should be implemented quickly due in large part to the transferor's desire to complete the transaction. Moreover, the cleanups will be financed entirely by private parties, thus eliminating dependence upon government funding. While these benefits have largely been realized, a subsequent section of this article demonstrates that the broad reach of the Act has caused unique concerns about enforcement and expeditious cleanup actions.[22]

II. ECRA Origins and Amendments

The precursor of the Environmental Cleanup Responsibility Act was a roughly-drafted legislative proposal that originated in the Department of Environmental Protection in 1981.[23] The main thrust of this proposal, entitled the "Decommission Bill", was to require that the present owner or operator of an industrial site clean up the premises prior to closing the facility.[24] At that time, State Assemblyman Raymond Lesniak agreed to sponsor legislation based upon this initiative.[25]

Throughout the development of this legislation, Assembly

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20 *Id.*

21 *See supra* notes 5-10 and accompanying text.

22 *See infra* pp. 366-69.

23 Interview with State Senator Raymond Lesniak (D-Union), in Elizabeth, New Jersey (Sept. 11, 1984); telephone interview with Keith Onsdorff, Esq., of the Office of Enforcement, United States Environmental Protection Agency (formerly Chief, Office of Enforcement, New Jersey Department of Environmental Protection) (July 31, 1984).

24 Interviews, *supra* note 23.

25 *Id.* Raymond Lesniak was a member of the New Jersey General Assembly from 1978 to 1983. He was chairman of the Assembly Agriculture and Environment Committee from 1982 to 1983 and in June 1983 was elected to the New Jersey State Senate in a special election.

Bill No. 1231[26] [hereinafter cited as A.1231], Assemblyman Lesniak solicited suggestions for amendments from the Department and from representatives of the industrial and environmental communities.[27] All parties to the negotiations agreed with the fundamental premise of the Act: a cleanup precondition should attach to the sale, closure or transfer of industrial real estate.[28] There was a major disagreement, however, concerning the types of property which were to be considered "industrial" for purposes of A.1231. The final version of A.1231[29] applied to "industrial establishments"[30] and defined them as "any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances or wastes on-site, above or below ground, having a Standard Industrial Classification number within 22-39 inclusive, 46-49 inclusive, 51 or 77."[31] In developing this definition the drafters selected the Standard Industrial

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26 A.1231, 200th Leg., 1st Sess. (1982) (Introduced May 13, 1982).

27 Interview with State Senator Raymond Lesniak (D-Union), in Elizabeth, New Jersey (Sept. 11, 1984).

28 *Id.*; interview with Hal Bozarth, Executive Director of the Chemical Industry Council of New Jersey, in Trenton, New Jersey (Aug. 10, 1983); telephone interview with Georgia Harnett, Esq., Assistant Vice-President, New Jersey Business and Industry Association (July 26, 1984).

29 A.1231, 200th Leg., 1st Sess. (1983) (Assembly Committee Substitute, May 26, 1983).

30 *Id.* § 3.f.

31 *Id.* The Standard Industrial Classification is a numerical system developed by the United States Bureau of Budget to classify establishments by type of activity for purposes of facilitating the collection and analysis of data relating to such establishments. J. ROSENBERG, DICTIONARY OF BUSINESS AND MANAGEMENT (1983).

The STANDARD INDUSTRIAL CLASSIFICATION MANUAL is published by the United States Government Printing Office, Washington, D.C. This manual and its supplements should be consulted whenever an ECRA issue arises. The major groups identified in the statute are numbers: 22 (textile mill products); 23 (apparel and other finished products made from fabrics and similar materials); 24 (lumber and wood products except furniture); 25 (furniture and fixtures); 26 (paper and allied products); 27 (printing, publishing and allied industries); 28 (chemicals and allied products); 29 (petroleum refining and related industries); 30 (rubber and miscellaneous plastic products); 31 (leather and leather products); 32 (stone, clay, glass and concrete products); 33 (primary metal industries); 34 (fabricated metal products, except machinery and transportation equipment); 35 (machinery except electrical); 36 (electrical and electronic machinery, equipment, and supplies); 37 (transportation equipment); 38 (measuring, analyzing, and controlling instruments; photographic, medical, and optical goods; watches and clocks); 39 (miscellaneous manufacturing industries); 46 (pipelines, except natural gas); 47 (transportation services); 48 (communication); 49 (electric, gas and sanitary services); 51 (wholesale

Classification [hereinafter cited as SIC] major group numbers on the basis of an industrial group's potential to generate, manufacture or otherwise utilize hazardous substances or waste on the property.[32]

Although the definition advocated by the Department broadly defined the term "industrial establishment", the Department recognized that certain sub-groups within a SIC major group would not pose a significant risk to public health and safety. Hence the Legislature amended A.1231 to include a provision designed to exempt such sub-groups.[33] In addition, there were two significant classes of operations, gasoline stations and farm operations, which were purposely excluded by the Legislature from the requirements of A.1231.[34] Gasoline retailers[35] were exempted because separate legislation was contemplated to help mitigate the hazards associated with leaking underground tanks.[36] Farm operations were excluded since the small quantities of hazardous substances such as pesticides and fertilizers usually stored at such facilities did not justify subjecting them to the bill's requirements.[37]

Another important amendment to the bill was the provision allowing industrial establishments to submit a "negative declaration" in lieu of a cleanup plan.[38] As introduced, A.1231 mandated the submission of a cleanup plan for every industrial establishment planning to sell, close or transfer operations.[39] The draft-

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trade-nondurable goods); 76 (miscellaneous repair services). THE STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1979).

32 Interviews, *supra* note 23.

33 A.1231, 200th Leg., 1st Sess. § 3.f. (1982) (Assembly Committee Substitute, May 26, 1983).

Whereas the first two digits of an SIC number signify a major industrial group (major group), the last two digits classify the type of industry more specifically. For example, the major group number 48, communication, has various sub-groups including 4811 (telephone communication), 4821 (telegraph communication), 4832 (radio broadcasting) and 4833 (television broadcasting).

34 Interviews, *supra* note 23.

35 SIC major group number 55; *compare supra* note 31.

36 Interviews, *supra* note 23; telephone interview with Mark Smith, New Jersey Office of Legislative Information and Research (Aug. 8, 1984). This underground tank legislation is cited as A.667, 201st Leg., 1st Sess. (1984).

37 Interviews, *supra* note 23.

38 A.1231, 200th Leg., 1st Sess. § 3.g. (1982) (Assembly Committee Substitute, May 26, 1983).

39 A.1231, *supra* note 26, § 4.

ers realized, however, that in many cases, a comprehensive cleanup plan would not be necessary if the industrial establishment is found to be uncontaminated. When industrial representatives requested an amendment which would allow such "clean facilities" to submit an affidavit of non-contamination or "negative declaration" instead of a cleanup plan, it was adopted with an added provision requiring the submission of a cleanup plan if the Department did not approve the negative declaration.[40]

Notwithstanding these changes, it became apparent in the final stages of the amendment process that A.1231 would be an extremely far-reaching and powerful regulatory instrument for the Department. Save for the previously mentioned exemptions, the powers and scope of the Department's authority under A.1231 were enhanced significantly as compared to those contemplated in the original "Decommission Bill". Indeed, A. 1231 applied not only to facility closures, but also to every sale or transfer of industrial real estate whose operations fell within a host of SIC categories.[41]

The bill also afforded the Department a great deal of flexibility in implementation. Most significantly, A.1231 proposed that the intended sale, transfer or closure be contingent upon the Department's approval of a cleanup plan or negative declaration.[42] The bill established no time constraint upon the departmental review process. Moreover, the determination of minimum standards necessary for detoxification in each cleanup situation were left to the discretion of the Department.[43] These provisions,

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40 Interviews, *supra* note 23; *see also* A.1231, *supra* note 29, §§ 3.g., 4.a.(2), 4.b.(2), 5.b.

41 A.1231, *supra* note 29, § 4.; *compare* A.1231, *supra* note 26, § 4; *see also supra* note 31.

42 A.1231, *supra* note 29, § 6.a.

43 *See id.* § 5.a. This section provides that:

> The department shall, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 *et seq.*), adopt rules and regulations establishing: minimum standards for soil, groundwater and surface water quality necessary for the detoxification of the site of an industrial establishment, including buildings and equipment, to ensure that the potential for harm to public health and safety is minimized to the maximum extent practicable, taking into consideration the location of the site and surrounding ambient conditions; criteria necessary for the evaluation and approval of cleanup plans; a fee schedule, as necessary, reflecting the actual costs associated with the review of the negative declarations

combined with the sections allowing a transferee or the Department to void the transaction for noncompliance,[44] made the proposed Environmental Cleanup Responsibility Act, A.1231, one of the most comprehensive and powerful legislative initiatives to emerge in recent years.

Prior to its passage, it was clear that A.1231 would place a considerable financial burden on industry in the State and would create a great deal of uncertainty in the real estate and financial communities. It is surprising, therefore, that A.1231 passed the State Legislature with relative ease. It can certainly be argued that representatives of the industrial community who were to be potentially affected by the bill, were given ample opportunity to voice their objections and recommendations.[45] To a large extent, however, members of the State's business and industry lobby who would have been expected to oppose A.1231 were preoccupied with the concurrent debates over the New Jersey Worker and Community Right to Know Act.[46] Rather than expending limited resources mounting a campaign against A.1231, the business and industry lobby hoped merely to minimize the impact of the proposal by including provisions for exemptions, negative declarations and deferrals.[47]

Another critical factor contributing to the unhindered passage of A.1231 was the discovery of dioxin in Newark, New Jersey.[48] While the bill was approaching ratification in the Legislature during the summer of 1983, large quantities of the toxic substance were found in unprecendented concentrations in an

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and cleanup plans; and any other provisions or procedures necessary to implement this act.

44 *Id.* §§ 8.a., 8.b. The Department can void the transaction only if a negative declaration or cleanup plan has not been submitted pursuant to § 4., whereas the transferee has grounds for voiding the transaction if the transferor fails to comply with *any* provision of the Act. *Id.* § 8.a.

45 Interviews, *supra* notes 23 and 28. There were twelve months between the time the Act was introduced and when it was adopted by the Legislature; *see supra* notes 26 and 29.

46 Interviews, *supra* notes 23 and 28. The New Jersey Community and Worker Right to Know Act is cited as S.1670, 200th Leg., 1st Sess. (1982) (codified at N.J. STAT. ANN. § 34:5A-1 to -30 (West Supp. 1984-85)).

47 Interviews, *supra* notes 23 and 28; *see also* A.1231, *supra* note 29, §§ 3.f., 3.g., 6.b..

48 Sullivan, *Dioxin Discovered Near Old Newark Plant*, N.Y. Times, July 29, 1983, at B2, col. 1.

industrial section of the city.[49] Since A.1231 had been developed largely to prevent this type of situation, there was little, if any, opposition to passage in either the State Senate or General Assembly. By August 1983, enactment of the Environmental Cleanup Responsibility Act had become a virtual foregone conclusion.

Signed by Governor Kean on September 2, 1983, the Act did not become effective until December 31, 1983.[50] During this interval the Department developed regulations designed to aid in the proper implementation of the Act.[51] These "emergency regulations" were rapidly drafted and adopted before the Act went into effect as an interim step to allow for immediate utilization of the statute.[52] The provisions of this emergency rule were concurrently proposed for readoption in compliance with the normal rulemaking requirements of the Administrative Procedure Act.[53] The public comments and suggested changes to these regulations were largely incorporated into the readopted regulations which became effective on March 5, 1984 and which will expire on March 5, 1986.[54] It is important to note that when attempting to comply with ECRA, these regulations should be consulted as the primary source of authority because, in addition to the substantive provisions of the statute, they include many detailed requirements and procedures not found in the language of the Act.[55]

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49 *Id.*

50 A.1231, 200th Leg., 1st Sess. (1982) (Assembly Committee Substitute, May 26, 1983) (Codified at N.J. STAT. ANN. §§ 13:1K-6 to -13 (West Supp. 1984-85)). The Department was given 120 days from the effective date (date of signing of the Act) to develop regulations. *Id.* § 11.

51 16 N.J. ADMIN. REG. 151, Adopted Emergency New Rule: N.J. ADMIN. CODE tit. 7, § 1-3, Tuesday, Jan. 17, 1984.

52 *Id.* The new rule became effective upon acceptance for filing by the Office of Administrative Law (*see* N.J. STAT. ANN. § 62:14B-4(c) as implemented by N.J. ADMIN. CODE tit. 1, § 30-4.4 (1984)). *Id.*

53 *Id.* The New Jersey Administrative Procedure Act is cited as N.J. STAT. ANN. § 52:14B-1 to -15 (West Supp. 1984-85).

54 16 N.J. ADMIN. REG. 523, Readopted New Rule: N.J. ADMIN. CODE tit. 7, § 1-3, Summary of Public Comments and Agency Responses (Monday, March 19, 1984).

55 These requirements and procedures primarily relate to the initial notice requirements, implementation of sampling plans, criteria for cleanups and financial requirements for cleanup plans; *see* N.J. ADMIN. CODE tit. 7, §§ 1-3.7, 3.9, 3.12, 3.13 (1984).

III. Applicability

One of the most frequent inquiries regarding ECRA is "who is required to comply."[56] The regulations state that ECRA applies only to those industrial establishments which sell, close or transfer operations after December 31, 1983.[57] This statement, however, is broader than it would at first appear. Any industrial establishment which closed operations prior to December 31, 1983 and upon which hazardous substances or wastes remain in storage is considered an on-going operation by the Department and is subject to ECRA regulation.[58]

This applicability issue is most appropriately analyzed in terms of its component parts. The components are whether the property in question is an industrial establishment and whether the property is undergoing a sale, closure or transfer for purposes of the Act.

A. *Industrial Establishment: A Three Part Test*

The definition of industrial establishment can be divided into three parts which the regulations designate as the "ECRA threshold test".[59] First, the property in question must be a "place of business".[60] Property being used exclusively for residential purposes is therefore excluded. Second, the place of business must fall into a category of SIC codes within major groups 22-39 inclusive, 46-49 inclusive, 51 or 76 as designated by the *Standard Industrial Classification Manual*.[61] Third, the place of business must be engaged in on-site operations which involve at least one of the following activities: generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous waste or substances.[62] All three parts of this test must

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56 *A Guide to the Environmental Cleanup Responsibility Act*, Bureau of Industrial Site Evaluation, New Jersey Department of Environmental Protection (Aug. 1984) (available through the Bureau of Industrial Site Evaluation, CN-028, Trenton, New Jersey 08625).

57 N.J. ADMIN. CODE, tit. 7, §§ 1-3.4(a)1.ii., 1-3.7(a)(1984).

58 *Id.* § 1-3.4(a)1.ii.(1); *see also A Guide to the Environmental Cleanup Responsibility Act*, *supra* note 56 at 3.

59 N.J. ADMIN. CODE tit. 7, § 1-3.4(a) (1984).

60 *Id.* § 1-3.4(a)1. The term "place of business" is not defined in the Act.

61 *See supra* note 31.

62 N.J. ADMIN. CODE tit. 7, § 1-3.4(a)1.ii. (1984).

be satisfied in order for ECRA to apply.[63]

From this three part test a question arises concerning the definitions of "hazardous waste" and "hazardous substance". Hazardous waste is rather clearly defined as those waste products which (1) are required to be reported to the Department pursuant to the waste manifest programs,[64] (2) are designated as hazardous waste[65] or (3) are considered hazardous waste products in other provisions of the law.[66] The more controversial issue, however, is the ECRA definition of "hazardous substances". The Act defines hazardous substances as:

> those elements and compounds, including petroleum products, which are defined as such by the Department . . . and which shall include, the list of hazardous substances adopted by the [EPA] pursuant to Section 311 of the "Federal Water Pollution Control Act Amendments of 1972" (33 U.S.C. § 1321) and the list of toxic pollutants designated by Congress or the [EPA] pursuant to Section 307 of that Act (33 U.S.C. § 1317); except that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of this Act.[67]

The ECRA regulations add to this formulation by defining hazardous substances as:

> those elements and compounds, including petroleum products, which are designated as such by the Department . . . *including, but not limited to, the "List of Hazardous Substances" set forth in Appendix A of N.J.A.C. 7:1E*, and which shall include, the list of hazardous substances adopted by the [EPA] pursuant to Section 311 of the "Federal Water Pollution Control Act Amendments of 1972" (33 U.S.C. § 1321) and the list of toxic pollutants designated by Congress or the [EPA] pursuant to Section 307 of that Act (33 U.S.C. § 1317); except that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of the Act *and this subchapter*.[68] (addi-

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63 *See generally id.* § 1-3.4.

64 *Id.* § 1-3.3; *see* N.J. ADMIN. CODE tit. 7, § 26-7.4 (1984) (regulations governing the tracking of hazardous waste from point of generation to point of ultimate disposal).

65 N.J. ADMIN. CODE tit. 7, § 1-3.3 (1984); *see* N.J. ADMIN. CODE tit. 7, § 26-8 (1984) (hazardous waste criteria, identification and listing).

66 N.J. ADMIN. CODE tit. 7, § 1-3.3 (1984).

67 N.J. STAT. ANN. § 13:1K-8.d. (West Supp. 1984-85).

68 N.J. ADMIN. CODE tit. 7, § 1-13.3 (1984). The Department is interpreting the regulations' definition of hazardous substances as identical to this Appendix A list

tional language in italics.)

Thus, for the purposes of ECRA, hazardous substances include many types of household products such as ammonia, drain cleaners, bleach and kerosene.[69] In contrast to the definition of hazardous wastes which provides for an exemption of waste quantities below a specified level,[70] the ECRA definition of hazardous substances does not include such a *de minimus* exemption.

The lack of *de minimus* exemption allows for an extremely broad range of ECRA applicability, the breadth of which becomes even more pronounced when the variety of business activities covered by the SIC major groups is considered. The utilization of SIC major groups makes it applicable to a number of activities not generally considered "industrial".[71] For example, the Act would be applicable to bicycle repair shops,[72] snowplowing businesses,[73] greeting card wholesalers[74] and travel agencies.[75]

The apparent overbreadth of the SIC classifications is intended to be remedied by an exemption provision in the Act.[76] The regulations elaborate on this provision and set forth a procedure for exempting sub-groups within SIC major groups from the definition of

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because it incorporates hazardous substances and toxic pollutant lists adopted pursuant to § 311 and § 307 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1321, 1317 (1982).

69 *See* N.J. ADMIN. CODE tit. 7, § 1E Appendix A (1984). Although the Department has taken the position that the Act should not apply to industrial establishments which merely store small quantities of cleaning substances on the property, a literal reading of the Act and regulations suggests otherwise.

70 A small quantity generator of hazardous waste (100 kilograms of hazardous waste per month) is exempted from regulation under N.J. ADMIN. CODE tit. 7, §§ 26-7.1 to -7.8 (1984) and N.J. ADMIN. CODE tit. 7, §§ 26-9.1 to -9.14 (1984).

71 Hogan, *Environmental Cleanup Responsibility Act: A Jeopardy to Corporate and Real Estate Transactions*, 113 N.J.L.J. 165, 185 (1984).

72 STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1979). Major group number 76, sub-group number 7699.

73 *Id.* Major group number 49, sub-group number 4959.

74 *Id.* Major group number 51, sub-group number 5112.

75 *Id.* Major group number 47, sub-group number 4722.

76 N.J. STAT. ANN. § 13:1K-8.f. (West Supp. 1984-85). This section provides, in pertinent part that:

> The department may, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 *et seq.*), exempt certain sub-groups or classes of operations within those sub-groups within the Standard Industrial Classification major group numbers listed in this subsection upon a finding that the operation of the industrial establishment does not pose a risk to public health and safety.

Id.

industrial establishment.[77] Sub-groups or classes of operations within the designated SIC major group numbers may petition the Department in writing for an exemption based on a determination that their type of business "does not pose a risk to public health and safety."[78] Such petitioners must "submit all appropriate documentation, evidence and other proofs as they deem justify an exemption as a class."[79] In addition, the Department may upon its own initiative "establish a record based upon experience or other appropriate research justifying an exemption."[80] Although no such exemptions have been made as of the date of this writing, a list of sub-groups for possible exemption will be forthcoming from the ECRA Industrial Advisory Group.[81]

B. *Selling, Closing or Transferring Operations*

In order for ECRA to apply, the facility in question must not only be an "industrial establishment" but must also be subject to a sale, closure or transfer of operations. The term "sale" is not defined in either the statute or the regulations because the meaning of the term is not intended to differ from its common usage.[82] As a result of the definition, however, the meanings of the terms "close" or "transfer" pose unique interpretive problems. The Act defines "closing, terminating or transferring" operations as:

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77 N.J. ADMIN. CODE tit. 7, § 1-3.20 (1984).

78 *Id.* § 1-3.20(a).

79 *Id.* § 1-3.20(b).

80 *Id.* § 1-3.20(c).

81 Recognizing the need to continue a dialogue with the public to develop the best possible ECRA program, the Department formed an "ECRA Advisory Committee." 16 N.J. ADMIN. REG. 523 (Monday, March 19, 1984). This committee was to consist of "representatives from industry advocacy groups, environmental groups and other appropriate interested parties to be selected by the Department." *Id.* The committee is actually called the "ECRA Industrial Advisory Group" and consists of seventeen members who primarily represent business and industry in the State. *See infra* pp. 366-369.

82 Telephone interview with Joseph Schmidt, Esq., Office of Regulatory Services, New Jersey Department of Environmental Protection (July 31, 1984); *see generally* N.J. STAT. ANN. §§ 13:1K-6 to -13 (West Supp. 1984-85); N.J. ADMIN. CODE tit. 7, §§ 1-3.1 to -3.21 (1984).

Webster defines "sale" as "a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration), . . . distribution by selling . . . [or] public disposal to the highest bidder. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (16th ed. 1971).

> the cessation of all operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes, or any temporary cessation for a period of not less than two years, or any other transaction or proceeding through which an industrial establishment becomes non-operational for health or safety reasons or undergoes a change in ownership, except for corporate reorganization not substantially affecting the ownership of the industrial establishment, including, but not limited to sale of stock in the form of a statutory merger or consolidation, sale of the controlling share of assets, the conveyance of the real property, dissolution of corporate identity, financial reorganization and initiation of bankruptcy proceedings.[83]

It is unfortunate that this definition, so critical to an understanding of ECRA applicability, has been cryptically drafted. While the regulations distinctly outline the components of this definition, they fail to make their meaning more precise.[84] As a result, in situations where it is unclear whether a contemplated transaction is a closure, termination or transfer, the Department will make a determination of the applicability of ECRA.[85]

To further demonstrate the difficulty, an analysis of the use of the terms may be helpful. First, the word "terminating" is superfluous because it is used synonymously in the definition with "closing".[86] Second, the term "closing" is theoretically distinct from the term "transferring" and should not have been addressed by the same definition. A literal reading would make "the cessation of all operations"[87] equivalent to "the conveyance of real property."[88] However, the Legislature intended to equate these two events only in terms of ECRA applicability and not in terms of their true meaning.[89]

Recognizing the latter inconsistency, the Department drafted the regulations in an effort to treat "closure" and "transfer" as distinct occurrences. It was, however, obliged to retain the burden-

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83 N.J. STAT. ANN. § 13:1K-8.b. (West Supp. 1984-85).

84 *See* N.J. ADMIN. CODE tit. 7, § 1-3.18 (1984).

85 Interview, *supra* note 82.

86 *See* N.J. STAT. ANN. § 13:1K-8.b. (West Supp. 1984-85).

87 *Id.*

88 *Id.*

89 Interview, *supra* note 27.

some definition of the Act itself.[90] Nevertheless, "closure" is defined in the regulations as:

> The cessation of all operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes;
>
> Any temporary cessation for a period of not less than two years; or
>
> Any other transaction or proceedings through which an industrial establishment becomes non-operational for health or safety reasons.[91]

The key to a proper interpretation of "transfer" is an understanding of what the Act means by a "change in ownership". For purposes of the Act, however, "corporate reorganizations *not substantially affecting ownership* of the industrial establishment *shall not be considered a change in ownership.*"[92] (Emphasis added.) The statutory language, although it remains ambiguous in many respects, does provide some guidance regarding the term "change in ownership". The Act states, by way of example that such a "change" or transfer includes but is not limited to:

[1.] Sale of stock in the form of a statutory merger or consolidation;
[2.] Sale of the controlling share of the assets;
[3.] Conveyance of the real property;
[4.] Dissolution of corporate identity;
[5.] Financial reorganization; and
[6.] Initiation of bankruptcy proceedings.[93]

In order to demonstrate the ambiguity of the terminology consider the following. The second example of a change in ownership, the "[s]ale of the controlling share of the assets," was intended to utilize ECRA in situations where land parcels of an industrial establishment are sold intermittently, possibly in anticipation of eventual

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[90] Section 1-3.18 of the regulations does not actually distinguish "closure" from "transfer". It does, however, outline the definition in the Act so as to enable the reader to infer the distinction; *see* N.J. ADMIN. CODE tit. 7, § 1.3-18 (1984).

[91] N.J. ADMIN. CODE tit. 7, § 1-3.18(a)1., 2., 3. (1984).

[92] *Id.* § 1-3.18(b). The meaning of "substantially affecting ownership" in individual cases is subject to interpretation by the Department. There is a need, therefore, to develop a list of factors to be considered when examining corporate reorganizations in terms of ECRA. This would permit more certainty in the statute's application.

[93] N.J. ADMIN. CODE tit. 7, § 1-3.18(a)4.i., ii., iii., iv., v., vi. (1984).

closure.[94] It is unclear, however, what percentage of the original site or assets are to be considered "controlling". Further, the third example, "[c]onveyance of the real property," has created a wide range of interpretative difficulties, specifically problems which arise in the context of landlord-tenant relations. Suppose, for example, that an industrial tenant wishes to close his facility and terminate the lease. The Act clearly applies, but to whom? The owner and the operator are different and opposing parties. The Department has taken the position that in such situations compliance responsibility must rest with the party who is in the best relative position to comply.[95] This would be the entity which has the better resources with which to satisfy ECRA informational requirements.[96] Thus, in the above situation the tenant-operator would be a more likely candidate to assume ECRA responsibility.

A bit more complex is the situation where the landlord-owner of an industrial establishment plans to sell the property upon which the tenant is conducting operations and where the new owner simply assumes responsibility under the lease. While the tenant may be in the best relative position to comply according to the above criteria, he or she may not be affected by the sale. The tenant whose operations would remain substantially the same following such transactions may apply for the deferral of the cleanup,[97] but compliance with the initial notice requirements[98] would remain mandatory. The inequitable results of such a frequently occurring situation are apparent, nevertheless the Department has yet to settle on the proper approach.

Another area in which the question of compliance responsibility arises is in the condemnation or foreclosure situation. For example, a strict interpretation of the Act would require the owner of a parcel subject to condemnation or foreclosure to comply with ECRA in addition to relinquishing the land. This may, of course, result in unrealistic expectations by the Department.

Finally, a more remote yet curious problem involves the con-

94 Interview, *supra* note 27; *see also* Hogan, *ECRA: An Update*, 114 N.J.L.J. 529, 544 (1984).

95 Interview, *supra* note 82; *see also* Hogan, *ECRA: An Update*, 114 N.J.L.J. 529, 544 (1984).

96 Interview, *supra* note 82.

97 N.J. ADMIN. CODE tit. 7, § 1-3.14 (1984).

98 *Id.* § 1-3.7(f); *id.* § 1-3.14.

veyance of real property upon the death of a sole proprietor. If the sole proprietor of an industrial establishment suddenly dies, should that person's successor in interest be required to comply? Compliance with the ECRA prior notice requirements in this case is impossible.[99] A bizarre situation is created since the present owner and the transferee have become one and the same person whereas the Act is meant to apply only to those conveyances involving two distinct, existing parties. In such cases, the Department has maintained that it will adopt a reasonable posture that will balance the interests of the affected party[ies] and the best interest of the environment.[100] The Department has stated that ECRA was designed as a flexible regulatory tool to be used when necessary to protect the public health and the environment.[101] Indeed, if in the above example the sole proprietor's site required detoxification, there is little doubt that the Department would not hesitate to seek ECRA compliance.

The fourth example, "[d]issolution of corporate identity," is meant to describe those situations where a corporation changes its status to, for instance, a partnership.[102] It is important to recognize, however, that the "substantial change" requirement and the fact that ECRA was *not* intended to apply to situations where the management and operations of an industrial establishment remain essentially the same.[103] Thus, in situations where the identity of a corporation is dissolved, ECRA will apply only when there is a substantial change in the control or the management personnel of the company.

The sixth example, "[i]nitiation of bankruptcy proceedings," is highly controversial and is the subject of litigation in Federal Bankruptcy Court.[104] The Act states that none of its obligations shall "constitute a lien or claim which may be limited or discharged in a

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99 *See* N.J. ADMIN. CODE tit. 7, § 1-3.7 (1984); *see also* N.J. STAT. ANN. § 13:1K-4(b)(2) (West Supp. 1984-85). These sections require that the owner or operator of an industrial establishment notify the Department of any transfer and submit a negative declaration or cleanup plan at least 60 days prior to the transfer of title.

100 Interview, *supra* note 82.

101 *Id.*

102 Interview, *supra* note 27.

103 *Id.*

104 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* (Bankr. D.N.J. Mar. 15, 1984); In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* (Bankr. D.N.J. May 9, 1984).

bankruptcy proceeding" and that all obligations imposed by the Act or the regulations "shall constitute continuing regulatory obligations."[105] In the case of *In the Matter of Borne Chemical Co.*[106] the debtor sought judicial approval of the sale of two parcels of its property without complying with ECRA. The sales were part of a plan to provide funds for a reorganization.[107] The debtor alleged that the ECRA bankruptcy provision conflicted directly with the federal Bankruptcy Code[108] and, therefore, should be preempted under the Supremacy Clause of the Constitution.[109] This allegation was analyzed in terms of the preemption standards set forth in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n.*[110] The *Borne* court concluded that there is not a Bank-

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105 N.J. STAT. ANN. § 13:1K-7, (West Supp. 1984-85); *see also* N.J. ADMIN. CODE tit. 7, § 1-3.19 (1984).

106 No. 80-00495, *slip op.* at 1 (Bankr. D.N.J. Mar. 15, 1984).

107 *Id.*

108 *Id.* at 3; the federal Bankruptcy Code is cited as 11 U.S.C. §§ 101-151326 (1982).

109 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 3 (Bankr. D.N.J. Mar. 15, 1984); U.S. CONST. art. VI, cl. 2.

110 — U.S. —, 103 S.Ct. 1713, 1722 (1983). This decision refined and explained the law of preemption as set forth in Perez v. Campbell, 402 U.S. 637 (1971). In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 5 (Bankr. D.N.J. Mar. 15, 1984). In Perez v. Campbell the Supreme Court set forth a two-step procedure for analyzing preemption questions, stating that the procedure involves "first ascertaining the construction of the two statutes and then determining whether they are in conflict." Perez, *supra* at 644. Ascertaining the construction of the statutes involves a determination of the legislators' intended purposes. *Id.* at 644-68. Notwithstanding a legitimate state purpose, a state statute is superceded if it has the effect of interfering with the objectives underlying the federal law. *Id.* at 650-52.

In Pacific Gas and Electric, *supra*, the Court presents an overview of preemption standards:

> It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 148 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Even when Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a

ruptcy Code provision that explicitly states that the Code supercedes all state law[111] nor is the federal bankruptcy legislation so pervasive as to preclude enforcement of state law governing the sale of the property.[112] In addition, ECRA was not found to be "an obstacle to the accomplishment and execution of the full purposes and objectives" of the Bankruptcy Code.[113] The court held that since it was possible to comply with both the provisions of the Act and the Bankruptcy Code, ECRA was not preempted under the "physical impossibility" standard.[114]

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conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 6 (Bankr. D.N.J. Mar. 15, 1984) (quoting the Pacific Gas and Electric case, *supra* at 1722).

111 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 6 (Bankr. D.N.J. Mar. 15, 1984).

112 *Id.* at 7. The court quoted Rhodes v. Stewart, 705 F.2d 159, 163 (6th Cir. 1983): "[i]t is fundamental that the state and federal legislatures share concurrent authority to promulgate bankruptcy laws." Furthermore, the Borne court observed that the Bankruptcy Code specifically provides for the application of state bankruptcy law, or state law in general, citing as examples, 11 U.S.C. § 522(b) (1982) (state law bankruptcy exemptions) and 28 U.S.C. 959(b) (1982) (trustee or debtor in possession shall manage or operate property in accordance with state law where it is situated). *See infra* notes 131, 132, 142 and accompanying text.

113 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 9-11 (Bankr. D.N.J. Mar. 15, 1984). The court noted that one of the primary purposes of the Code is to provide for an equitable, orderly and expeditious distribution of the assets of an estate. The court observed, however, that the Code itself suggests that Congress did not intend to promote these objectives "at all costs." *Id.* at 10.

The automatic stay provision of 11 U.S.C. § 362(a) (1982) enjoins all collection and foreclosure actions, permitting either orderly liquidation or an attempt to file a plan of reorganization. Citing exemptions to the stay provision, 11 U.S.C. § 362(b)(4) (1982) (allows government units to commence or continue actions to enforce police or regulatory powers) and 11 U.S.C. § 362(b)(5) (1982) (allows enforcement of injunction obtained by a government unit in furtherance of its police or regulatory powers, even though such an injunction could effectively foreclose the opportunity to reorganize), the Borne court concluded that these exemptions suggest that Congress did not intend that the objectives of the Bankruptcy Code are to be accomplished at the expense of the general public welfare. Borne, *supra* at 10.

114 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 2-4 (Bankr. D.N.J. May 9, 1984) (subsequent to March opinion, *supra* notes 106-113).

The case of Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), stands for the proposition that a state law or regulation is preempted by a federal law or regulation "where compliance with both . . . is a physical impossibility." *Id.* at 142. An example of physical impossibility would be a case where federal

Compliance with ECRA may result in costs to the debtor, thereby reducing the funds available for distribution.[115] The Act, however, does not necessarily impose *cleanup* costs on the debtor since responsibility for cleanup may be assumed by the transferee.[116] The *Borne* court recognized that if the bankrupt estate does not have the resources to comply, ECRA may be an obstacle to the sale of property.[117] Cleanup costs generally constitute the bulk of the expenditure for ECRA compliance when detoxification is necessary. The initial notification requirements, however, can also be quite expensive. Although the Act allows the transferee to assume *cleanup* responsibility, the statute does not exempt the transferor from the preliminary notice provisions.[118] The question thus presents itself: must a debtor, who is so insolvent that there are insufficient funds to meet the initial ECRA directives, nevertheless be required to comply with the Act? In such situations it is highly probable that the government will be forced to assume the financial responsibility for sampling and cleanup if necessary.

Notwithstanding the decision in *Borne* to prohibit the sale of the two parcels, the debtor was permitted to abandon one parcel of its property and to cease all operations on the second parcel, both free of ECRA obligations.[119] In granting the debtor's motion to abandon pursuant to 11 U.S.C. § 554[120] the Court relied almost exclu-

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law prohibits the marketing of avocados having a seven percent oil content and the state regulation excludes from the state any avocado having less than an eight percent oil content. *Id.* at 143. The Borne court concluded that such an impossibility did not exist in the instant case. Borne, *supra* at 4.

115 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 9 (Bankr. D.N.J. Mar. 15, 1984).

116 *Id.* at note 1; *see* N.J. STAT. ANN. § 13:1K-9.c. (West Supp. 1984-85); N.J. ADMIN. CODE tit. 7, § 1-3.10(e) (1984).

117 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 4 (Bankr. D.N.J. May 9, 1984).

118 *See* N.J. STAT. ANN. § 13:1K-9 (West Supp. 1984-85); *and see* N.J. ADMIN. CODE tit. 7, §§ 1-3.7 and 3.10 (1984).

119 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 5-8 (Bankr. D.N.J. May 9, 1984).

120 11 U.S.C. § 554 (1982) ("Abandonment of property of the estate"). Section 554 provides:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate

sively on the case of *In the Matter of Quanta Resources Corp.*[121] which has since been reversed. In *Quanta Resources*, a non-ECRA case, the district court held that a trustee in bankruptcy could abandon burdensome property even though such abandonment violated certain environmental statutes.[122] The Third Circuit, in reversal, held that the bankrupt company may not avoid compliance with state environmental statutes by using federal bankruptcy law to abandon property containing hazardous waste.[123] The Circuit Court addressed the issue of Section 554 abandonment[124] in contravention of state law in two stages pursuant to the test set forth in *Perez v. Campbell*.[125] First, the primary purposes of the state and federal laws were examined.[126] Second, the question of whether state environmental statutes presented an obstacle to the effectuation of federal bankruptcy law was considered.[127] The issue was posed as: whether

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that is burdensome to the estate or that is of inconsequential value to the estate.

(c) Unless the court orders otherwise, any property that is scheduled under section 521(l) of this title and that is not administered before a case is closed under section 350 of this title is deemed abandoned.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under section (a) or (b) of this section and that is not administered in the case remains the property of the estate.

Id.

121 No. 82-3524, *slip op.* (D.N.J. Jan. 24, 1983), *rev'd*, 739 F.2d 927 (3d Cir. 1984) (Gibbons, J., dissenting), *cert. granted*, 53 U.S.L.W. 3584 (U.S. Feb. 19, 1985) (No. 84-805).

122 *Id.* (The district court in New York allowed the trustee in bankruptcy to abandon property on which at least 70,000 gallons of contaminated oil was located. The State of New York argued that such abandonment would constitute a prohibited disposal of hazardous waste pursuant to N.Y. ENVTL. CONSERV. LAW § 71-2702 (McKinney Supp. 1982)).

123 In the Matter of Quanta Resources Corp., 739 F.2d 912, 921-22 (3d Cir. 1984); *cert. granted*, 53 U.S.L.W. 3584 (U.S. Feb. 19, 1985) (No. 84-805).

124 *See supra* note 120.

125 402 U.S. 637, 644-49 (1971); *see also supra* note 110.

126 Quanta Resources, *supra* note 123 at 915. The court stated the objective of federal bankruptcy law is to provide for an equitable settling of creditors' accounts by usurping from the debtor his power to control the distribution of his assets. *Id.* (citing Kothe v. R.C. Taylor Trust, 280 U.S. 224, 226 (1930)). The abandonment power embodied in section 554 enables the trustee to rid the estate of burdensome or worthless assets, and so speeds the administration of the estate. The purpose of state law regulating the disposal of hazardous waste is obviously to protect the public from the toxic effect of dangerous substances by preventing their uncontrolled discharge into the environment. *Id. See supra* note 120; *and see* 11 U.S.C. § 704(1) (1982).

127 Quanta Resources, *supra* note 123 at 915.

"Congress intend[ed] that the trustee's abandonment power be unrestricted by public health and safety regulation."[128] The court's examination of prior case law interpreting the Bankruptcy Code "reveal[ed] no such congressional intent."[129] In addition, an analysis of 11 U.S.C. § 554[130] and 28 U.S.C. § 959(b)[131] indicated that the

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128 *Id.*

129 *Id.* at 915-922. The court began its analysis with the following general propositions: (1) there is a basic assumption that Congress did not intend to displace state law, Maryland v. Louisiana, 415 U.S. 725, 746 (1981); (2) where it is argued that Congress intended to withdraw police power from the state, that intention must be unmistakable, Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 272 (3d Cir. 1984); and (3) although there has been no express recognition of the abandonment power in the pre-1978 bankruptcy statute, courts approved the exercise of such a power subject to the application of general regulations of a police nature, 4A COLLIER ON BANKRUPTCY ¶ 70.42[2] at 502-04 (14th ed. 1978)). Quanta Resources, *supra* note 123 at 916.

The Quanta Resources court proceeded to examine the following four cases: Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952), *aff'g*, 102 F. Supp. 913 (D.Md. 1952) (trustee in bankruptcy could not abandon four worthless barges in a harbor, where abandonment would violate federal law relating to the obstruction of the harbor, even though the cost of complying with the laws would be much greater than the value of the barges); In re Lewis Jones, Inc., 1 Bankr. Ct. Dec. 277 (Bankr. E.D.Pa. 1974) (trustee in bankruptcy could not abandon underground steampipes, vents and manholes where abandonment would create health and safety hazards notwithstanding the fact that the cost of alleviating the problem would amount to approximately 25 percent of the available funds); In re Chicago Rapid Transit Co., 129 F.2d 1 (7th Cir. 1942), *cert. denied*, 317 U.S. 683 (1942) (trustees in reorganization for a railroad could not abandon service on a branch line even though operating the line would burden the estate with expenditures); In re Adelphi Hospital Corp., 579 F.2d 726 (2d Cir. 1978) (trustee for bankrupt hospital *could* abandon medical records even though a state law required insolvent hospitals to maintain and store them). The court interpreted Adelphi Hospital as categorizing types of state regulations on the basis of their relative importance to the public by their intrusiveness in the regulation of a particular industry. Quanta Resources, *supra* note 123 at 918. The court concluded that all four cases shared a common concern: "where important state law or general equitable principles protect some public interest, they should not be overriden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their suspension by the abandonment power."

Id.

130 11 U.S.C. § 554 (1982); *see supra* note 120 for full text of section 554.

131 28 U.S.C. § 959(b) (1982) ("Trustees and receivers suable; management; State law"). Section 959(b) provides:

> Except as provided in section 1166 of title 11, *a trustee, receiver or manager* appointed in any cause pending in any court of the United States, including a debtor in possession, *shall manage and operate the property in his possession* as such trustee, receiver or manager *according to the requirements of the valid laws of the State in which such property is situated*, in the same

Bankruptcy Code is not intended to abrogate relevant state law.[132] Ultimately, the court relied on equitable principles for its decision.[133] The state's policy of protecting the public health and regulating disposal of hazardous waste[134] was weighed against the federal policy of providing for an equitable settling of creditors' accounts by preserving for distribution as much of the estate as possible.[135] Although it was clear that compliance with state waste

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manner that the owner or possessor thereof would be bound to do if in possession thereof.

Id. (emphasis added).

132 Quanta Resources, *supra* note 123 at 918-21. The Court found that, in light of other provisions of the Bankruptcy Code that limit the supercession of state laws and specifically incorporate equity principles into a bankruptcy court's jurisdiction, it was clear that section 554 did not itself preempt state police power regulations. Quanta Resources, *supra* note 123 at 918.

In support of the propositon that Congress did not intend the Bankruptcy Code to generally abrogate the enforcement of state police power regulations, the Third Circuit first cited the express exception to the automatic stay provision. *Id.* That provision halts all actions against the debtor for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." *Id.* (quoting 11 U.S.C. § 362(b)(4) (1982)). This is the same preemption analysis applied in part by the Borne Court in deciding not to allow the sale of two parcels of the debtor's property. *See supra* note 113 and accompanying text.

The Quanta Resources court also relied upon 28 U.S.C. § 959(b) in support of this proposition. Quanta Resources, *supra* note 123 at 919; *see supra* note 131 for full text of section 959(b). Implicit in section 959(b) is the notion that the goals of the federal bankruptcy laws do not authorize transgression of state laws setting requirements for the operation of the business even if the continued operation of the business would be thwarted by applying state laws. Quanta Resources, *supra* note 123 at 919 (citations omitted). The court recognized that the language of section 959(b), "manage[ment] and opera[tion]" of the "property," could be meant to include abandonment *or* could be read narrowly to mean only the administration of the business as a going concern. *Id.*; *see also infra* note 142 and accompanying text. It was concluded, however, that, "at the very least, the existence of section 959(b) indicates that Congress has not 'unmistakenly ordained' that state law is superceded by the trustee's powers to administer the property of the estate." Quanta Resources, *supra* note 123 at 920.

133 Quanta Resources, *supra* note 123 at 921.

134 *Id.* The court found that "great weight" attached to the state's interest, making this case more akin to those of Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952), *aff'g*, 102 F. Supp. 913 (D.Md. 1952), and In re Lewis Jones, Inc., 1 Bankr. Ct. Dec. 277 (Bankr. E.D.Pa. 1974) than it was to In re Adelphi Hospital Corp., 579 F.2d 726 (2d Cir. 1978). Quanta Resources, *supra* note 123 at 921; *see also supra* note 129 and accompanying text.

135 Quanta Resources, *supra* note 123 at 921. The court indicated that this policy reflected in bankruptcy law must be viewed in light of the implications of concurrent federal legislative policy to limit intrusion into state police power regulations including environmental protection laws. *Id.*

disposal laws required substantial expenditures, thus depleting assets available for distribution, the *Quanta Resources* court found that the extent of the expenditure "[was] not sufficient in itself to outweigh the public interest at stake here."[136] The court concluded that in the absence of congressional intent otherwise, the Supremacy Clause does not require suspension of the operation state hazardous waste disposal laws.[137]

The *Borne* court's decision to permit abandonment of one parcel of property rests squarely on the district court's opinion in *Quanta Resources*.[138] The Third Circuit's reversal of *Quanta Resources*, notwithstanding the dissent,[139] calls into question the validity of the *Borne* decision to allow such an abandonment. Moreover, the Third

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136 Quanta Resources, *supra* note 123 at 921.

137 *Id.* at 921-22. The court warned that if trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the "cloak" of the abandonment power, compliance with environmental protection laws will be transformed into "government cleanup by default." *Id.* at 921. The bankruptcy laws, therefore, were not intended to create such a radical change in the nature of local public health and safety regulation (the substitute of government action for citizen compliance) without an indication that Congress so intended. *Id.* at 922. In support of this proposition the court cites the Comprehensive Environmental Response, Compensation and Liability Act of 1980, which indicates that government units must be reimbursed by those responsible for the disposal of hazardous waste for the government's cost of emergency cleanup and which creates a federal cause of action for reimbursement. 42 U.S.C. § 9607 (1982) ("Superfund" legislation); *see also supra* note 13 and accompanying text. Indeed, one of the objectives of imposing liability is "to induce such [liable] persons *to voluntarily pursue appropriate environmental response actions* with respect to inactive waste sites." H.R. REP. No. 1016, Pt. I, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120 (emphasis added).

138 In the Matter of Borne Chemical Co., Inc., No. 80-00495, *slip op.* at 6 (Bankr. D.N.J. May 9, 1984).

139 Quanta Resources, *supra* note 123 at 923-27. In his dissent, Justice Gibbons asserted that the majority failed to consider additional points of extreme importance. *Id.* at 923. He argued that the intended purpose of section 554 of Title 11 is clear and that there is no legislative history suggesting that the language be altered or amended. *Id.*; *compare supra* note 132 and accompanying text. Justice Gibbons found that the cases relied upon by the majority, Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952), *aff'g*, 102 F. Supp. 913 (D.Md. 1952) and In re Lewis Jones, 1 Bankr. Ct. Dec. 277 (Bankr. E.D.Pa. 1974), were unpersuasive under the 1978 Bankruptcy Reform Act. This is because both of these cases were decided *prior* to the enactment of the Bankruptcy Reform Act of 1978 and its codification in section 554 of the express authority for trustees to decline to undertake the responsibility for property which cannot benefit the estate. Quanta Resources, *supra* note 123 at 924; *see also supra* note 120 for full text of section 554. Justice Gibbons argued, moreover, that Congress did not see fit to provide an exception to this statutory power of abandonment, as it has in other areas. Quanta Resources, *supra* note 123

Circuit's broad interpretation of 28 U.S.C. § 959(b) weakens the *Borne* decision to allow the cessation of operations on the second parcel. Section 959(b) provides:

> *a trustee, receiver or manager* appointed in any cause pending in any court of the United States, including a debtor in possession, *shall manage and operate the property in his possession* as such trustee, receiver or manager *according to the requirements of the valid laws of the State in which such property is situated*, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.[140] (Emphasis added.)

Whereas the debtor in *Borne* successfully contended that section 959(b) applies only when property is being managed or operated for the purpose of continuing operations,[141] the Third Circuit indicated that this section might be construed to include the abandonment of a facility.[142] If "abandonment" is sufficiently analogous to "cessa-

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at 924 (citing 11 U.S.C. § 362(a) (1982) (express exception to automatic stay)); *compare supra* note 132.

Most significantly, the dissenting Justice explored the questions raised, but not addressed, by the majority under the taking clause of the fifth amendment. Quanta Resources, *supra* note 123 at 925-26; *see also* U.S. CONST. amend V. The "taking" concern had been raised previously:

> [T]he public interest cannot demand the erosion of the bankrupt's assets to the point of confiscating practically the entire estate. At some point the extent and degree of taking runs into the constitutional prohibitions in the Fifth Amendment [on] the taking of private property for public use without just compensation.

Quanta Resources, *supra* note 123 at 925, n.2. (quoting In re New York, New Haven and Hartford Railroad Co., 330 F. Supp. 131, 147 (D. Conn. 1971). The holding of United States v. Security Industrial Bank, 459 U.S. 70 (1982) (Bankruptcy Act should not be construed to destroy the interest of creditors when a substantial question arises as to whether the Act constitutes a taking of property without just compensation) compels a construction of 11 U.S.C. § 554 (1982) and 28 U.S.C. § 959(b) (1982) that avoids this difficult constitutional issue. Quanta Resources, *supra* note 123 at 924-25; *see also supra* notes 120, 131 and 132. According to Justice Gibbons such a construction is available if there is a "fair" or "plain" reading of the statutory language. Quanta Resources, *supra* note 123 at 925-26. Moreover, there is no legislative history of either of the above-cited sections providing exceptions to the statutes or expressing any intent contrary to their plain meaning. *Id.* at 925-26.

140 28 U.S.C. § 959(b) (1982) ("Trustees and receivers suable; management; State law").

141 In the Matter of Borne Chemical Company, Inc., No. 80-00495, *slip op.* at 6-8 (Bankr. D.N.J. May 9, 1984).

142 Quanta Resources, *supra* note 123 at 919. The court also found that it "would not be a gross misreading [of section 959(b)] to construe 'manage and operate' narrowly to mean only the administration of the business as a going concern." *Id.* The court found no legislative history to aid its interpretation. *Id.*

tion of operations," it can, therefore, be argued that section 959(b) is applicable in cases where the debtor wishes to close a facility. Consequently, the *Borne* court's decision to allow closure without ECRA compliance can also be challenged.

The most recent guidance regarding the issue of whether environmental liability is subject to discharge in bankruptcy comes from the United States Supreme Court. In *Ohio v. Kovacs*[143] the Court held unanimously that a debtor's obligation under an injunction to clean up a hazardous waste site is a "debt" or "liability on a claim" pursuant to section 101(4)(B)[144] of the Bankruptcy Code and is, therefore, dischargeable.[145] For bankruptcy purposes, a debt is considered a liability on a claim.[146] A claim is defined by section 101(4)(B) as follows:

> a "claim" means ... [a] right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.[147]

The Court found that "there is little doubt that the State had the right to an equitable remedy under state law and that the right had been reduced to judgment in the form of an injunction ordering the cleanup."[148] The Court affirmed the Sixth Circuit's opinion holding that, under the circumstances, the debtor's cleanup duty had been reduced to a monetary obligation, an obligation dischargeable in bankruptcy.[149]

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143 45 S.Ct. Bull. P. (CCH) B664 (Jan. 9, 1985).

144 11 U.S.C. § 101(4)(B) (1982).

145 Kovacs, *supra* note 143 at B665.

146 *Id.* at B669.

147 *Id.* (citing 11 U.S.C. § 101(11) (1982)).

148 *Id.*

149 *Id.* at B673. The Court quoted a portion of the Sixth Circuit's opinion:

> Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovacs' assets. Ohio later used state law to try and discover Kovacs' post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the . . . cleanup. . . . The impact of [the State's] attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters.

In *Kovacs*, Justice O'Connor, in a concurring opinion addressed the State's concern that the Court's action will impede the enforcement of state environmental laws.[150] She indicated that, although Kovacs' obligation under the circumstances was dischargeable, the Court's holding did not entirely excuse the obligation or leave the State without any recourse against Kovacs' assets to enforce the order.[151] Indeed, a state may protect its interest in enforcement by giving cleanup judgments the status of statutory liens or secured claims.[152] If state law provides for such a classification of judgments, the state's claim to the assets of the estate may be given priority over other creditors.[153] It was emphasized that the Court's holding "cannot be viewed as hostile to state enforcement of environmental laws."[154]

C. *Letters of Non-applicability*

In certain cases, mortgage lenders, title insurors or purchasers may require written confirmation from the transferor that a specific property is not subject to ECRA.[155] Letters confirming

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> He cannot perform the affirmative obligations properly imposed upon . him by the State Court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance.

Id. (citing In re Kovacs, 717 F.2d 984, 987-88 (6th Cir. 1983)). The Court distinguished Penn Terra, Ltd. v. Department of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984), upon which the State relied. *See also supra* note 129. In Penn Terra the court held that the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362 (1982), did not apply to the State's injunction against a bankrupt to require compliance with environmental laws. Penn Terra at 274-78. The injunction was held to be an effort to enforce the police power statutes of the State, not a suit to enforce a money judgment. *Id.* The Supreme Court in Kovacs stated that although "[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of the State . . . the enforcement of such a judgment by seeking money from the bankrupt . . . is another matter." Kovacs, *supra* note 143 at B674 n.11.

150 Kovacs, *supra* note 143 at B677.

151 *Id.*

152 *Id.*

153 *Id.* Justice O'Connor recognized that "[b]ecause 'Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law,' Butner v. United States, 440 U.S. 48, 54 (1979), the classification of Ohio's interest as a lien on the property itself, a perfected security interest or merely an unsecured claim depends on Ohio law." Kovacs, *supra* note 143 at B677. This statement should serve as a strong recommendation to states that wish to protect their interests in enforcing environmental laws.

154 Kovacs, *supra* note 143 at B678.

155 *See* "ECRA Guide", *supra* note 56, at 3.

non-applicability may be obtained from the Department's Bureau of Industrial Site Evaluation[156] by submitting a duly notarized affidavit clearly describing appropriate reasons for non-applicability.[157] For example, ECRA may not apply because the business in question (1) does not fall within the designated SIC categories, (2) is not involved with hazardous wastes or hazardous substances or (3) has ceased all operations, including storage prior to December 31, 1983.[158]

In the first example of non-applicability, the on-site activities must be described in sufficient detail for an independent interpretation of the appropriate SIC number to be made.[159] In the second case, the affidavit must include a statement that the signer has reviewed the lists of hazardous substances and hazardous wastes and has determined that no such materials are generated, manufactured, refined, transported, treated, stored or disposed on the property.[160] The statement must also provide evidence of the signer's qualifications.[161] In the third case, it must be shown that operations including all storage have ceased prior to the effective date of the Act.[162]

IV. Procedural Requirements

A. *Notice to the Department*

Once it is determined that a place of business is an industrial establishment which plans to sell, close or transfer operations, the ECRA regulations require that the owner or operator comply with a two stage notice procedure.[163] The Department has made available application forms for each notice requirement.[164] If the

156 The Bureau of Industrial Site Evaluation was created within the Department to administer the Act; *see* N.J. ADMIN. CODE tit. 7, § 1-3.5 (1984).

157 *See* "ECRA Guide", *supra* note 56, at 3. Any such affidavits should be submitted to the Bureau of Industrial Site Evaluation, CN-028, Trenton, New Jersey 08625, Attn: Applicability Section.

158 *See* "ECRA Guide", *supra* note 56, at 3-4.

159 *Id.* at 4.

160 *Id.*

161 *Id.*

162 The "ECRA Guide", *supra* note 56 does not explicitly set forth standards with which to approach the third case; *see id.* at 4.

163 N.J. ADMIN. CODE tit. 7, § 1-3.7(d) (1984).

164 Available through the Bureau of Industrial Site Evaluation, CN-028, Trenton, New Jersey 08625.

operations are to be ceased and the facility closed, written notice must be provided to the Department no more than five days subsequent to the public release of the closure decision.[165] If the operations are to be sold or otherwise transferred, written notice must be provided "within five days of the execution of any agreement of sale or any option to purchase."[166] This language, however, can be misleading. In regard to the "execution" of a purchase option, ECRA is meant to apply only to the *exercise* of the option to purchase.[167] The Department has taken the position that the law was designed to affect those transactions where the ownership of the property was actually changing hands rather than those situations where the option was first "executed" but not acted upon.[168]

This initial stage of notification known as the "General Information Submission"[169] must include not only the expression of intent to close, sell or transfer but also a general description of past and present operations and the ownership of the facility.[170] These descriptions must include a list of all federal and state environmental permits for which the facility applied and which were subsequently issued.[171] The General Information Submission must also include a history of performance under those permits.[172]

Critics of the proposed regulations[173] argued that this requirement would constitute a "needless and redundant exercise" on the part of the industrial establishment because it duplicates information supposedly in the possession of the Department.[174] The Department replied that it "strongly believes that the owner or operator . . . will be in the best position to compile the permit and enforcement information [and that] . . . the Department files may not contain Federal, local, or other governmental infor-

165 N.J. ADMIN. CODE tit. 7, § 1-3.7(b) (1984).
166 *Id.* § 1.3-7(c).
167 Telephone interview with Joseph Schmidt, Esq., Office of Regulatory Services, New Jersey Department of Environmental Protection (Aug. 2, 1984).
168 *Id.*; *see also* Hogan *ECRA: An Update*, 114 N.J.L.J. 529, 544 (1984).
169 N.J. ADMIN. CODE tit. 7, § 1-3.7(d) (1984).
170 *Id.*
171 *Id.* § 1-3.7(d)7.
172 *Id.*
173 *See* Public Comments, *supra* note 54 and accompanying text.
174 *Id.* Public Comment No. 6.

mation concerning an industrial establishment."[175]

The second stage of this notification procedure, the "Site Evaluation Submission,"[176] requires that additional information be provided to the Department no later than thirty days after a public notice of closure, the execution of a sales agreement or the exercise of a purchase option.[177] This information must include detailed maps[178] and operations descriptions,[179] hazardous substances and waste inventories,[180] a description and location of any known spill or discharge of hazardous substances or wastes,[181] a detailed sampling plan for soil, surface water, groundwater and air,[182] proposed decontamination procedures[183] and copies of all soil, groundwater and surface water sampling results conducted on the site during the history of recent ownership.[184] Under the regulations, the owner or operator of an industrial establishment can save needless expense and delay, by successfully applying for an exemption from the sampling plan requirement.[185] It is not likely, however, that the Department will discharge this obligation unless the documentation for the exemption can clearly show that there is little or no possibility of encountering hazardous substances or waste during the sampling procedure.[186]

Business and industry representatives have observed that the substance of these notice requirements is not specifically included in the statute.[187] As a reaction to the cost of ECRA compliance, especially in regard to expensive sampling plans, these representatives have challenged the information requirements as

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175 *Id.*

176 N.J. ADMIN. CODE tit. 7, § 1-3.7(d) (1984).

177 *Id.*

178 *Id.* § 1-3.7(d)9, 14.i., 14.ii.

179 *Id.* § 1-3.7(d)10.

180 *Id.* § 1-3.7(d)12.

181 *Id.* § 1-3.7(d)13.

182 *Id.* § 1-3.7(d)14.

183 *Id.* § 1-3.7(d)15.

184 *Id.* § 1-3.7(d)16.

185 *Id.* § 1-3.7(d)14. viii(1). The owner or operator of an industrial establishment seeking an exemption must provide full documentation of the justifications, *other than economic reasons.*

186 Interview, *supra* note 167.

187 Statement of Hal Bozarth, Executive Director of the Chemical Industry Council of New Jersey, at a meeting of the ECRA Industrial Advisory Group in Trenton, New Jersey (Aug. 21, 1984).

having little, if any, legislative authority.[188] The Department has answered, however, that the ECRA statute authorizes the adoption of regulations which include "any . . . provisions or procedures necessary to implement th[e] Act"[189] and that it "stands behind the [r]egulations as a proper interpretation of the Act."[190] Finally, the regulations make it clear that the Department will not process an ECRA application until all the required information has been satisfactorily submitted and completed.[191] This additional cautionary note is meant to help expedite the review of ECRA applications.[192]

B. *Preliminary Inspection*

Following the submission and review of the notice information, the Department will conduct a preliminary inspection of the site if additional site information or verification is deemed necessary for a complete review.[193] Although it is not always essential, an inspection of the premises will be made in almost all cases.[194] The inspector will produce a report intended to assist the facility owner or operator in complying with the remainder of the ECRA regulations.[195] The regulations indicate that at this point the Department will review any additional records of, for example, the EPA or the agencies of the counties or municipalities where the particular facility under review is located.[196]

C. *Subsequent Requirements*

The review of the sampling data by the Department will indicate whether the owner or operator of an industrial establishment will be required to submit either a negative declaration[197] or a cleanup plan.[198] The time required for submission varies

188 *Id.*
189 N.J. STAT. ANN. § 13:1K-5.(a) (West Supp. 1984-85).
190 *See* Public Comments, *supra* note 54, No. 30.
191 N.J. ADMIN. CODE tit. 7, § 1-3.7(B) (1984).
192 *Id.*
193 *Id.* § 1-3.8(a).
194 *Id.* § 1-3.3(a)1.
195 *Id.* § 1-3.8(c).
196 *Id.* § 1-3.8(f).
197 *Id.* § 1-3.10(a)1., (b)1; *see infra* notes 201-208 and accompanying text discussing the negative declaration.
198 *Id.* § 1-3.10(a)2, (b)2.

depending upon the nature of the intended transaction. If the owner or operator intends to close the facility a negative declaration or cleanup plan must be submitted upon closing or sixty days subsequent to public release of its decision to close, whichever is later.[199] If the facility is to be sold or otherwise transferred the submission of the negative declaration or the cleanup plan must be made at least sixty days prior to the transfer of title.[200]

1. Negative Declaration - ECRA Shortcut

A negative declaration is a written affidavit, notorized and signed by an authorized officer or management official of the facility, stating that there has been no discharge of hazardous substances or waste on the site or that any such discharge has been cleaned up in accordance with procedures approved by the Department.[201] Such an affidavit should further state that no hazardous substances or waste remain on the site in quantities greater than those found acceptable by the Department based upon its review of the data submitted.[202]

In support of the affidavit the negative declaration must include a description of any cleanup actions taken at the site[203] and the results from the sampling plan submitted as part of the initial notice requirements.[204] The Department has forty-five days from the submission of the negative declaration to approve or disapprove the document.[205] If approved, the Department will issue written statement to this effect,[206] thereby removing any impediments to the sale, transfer or closure. If the Department does not approve the negative declaration the owner or operator must submit a cleanup plan within sixty days of the notification of this

199 *Id.* § 1-3.10(a).
200 *Id.* § 1-3.10(b).
201 *Id.* §§ 1-3.3; 3.11(a).
202 *Id.* § 1-3.11(a). In order to take advantage of this shortcut mechanism, owners or operators of industrial establishments often attempt to clean up their properties *prior* to the submission of a negative declaration. In many cases, however, these unsupervised cleanups result in unexpected delays in completing the transactions. This is because the Department has not approved an appropriate level of detoxification and therefore disputes may arise between the applicant and the Department.
203 *Id.* § 1-3.11(b)1.
204 *Id.* § 1-3.11(b)2.
205 *Id.* § 1-3.11(c).
206 *Id.* § 1-3.11(c)1.

denial.[207]

The availability of this "short cut" alternative may encourage more environmentally sound business operations by New Jersey's industrial establishments.[208] Indeed, since the path through ECRA via a cleanup plan may be strewn with obstacles, maintaining a clean facility in anticipation of avoiding unnecessary costs at the time of sale, closure or transfer is now an attractive alternative for New Jersey's industries.

2. Cleanup Plan, Financial Assurances and Implementation

Assuming that a negative declaration does not apply or has not been granted, the preparation of an acceptable cleanup plan is the most critical element of the compliance requirements of ECRA. The cleanup plan provides the regulatory basis upon which the Department will decide to allow a sale, transfer or closure to go forward. Since there are no time constraints on the Department's review of any cleanup plan, it is in the industrial establishment's best interest to initially prepare as comprehensive a cleanup plan as possible in order to avoid any delays due to requests for additional information from the Department.[209] The benefits of this approach are apparent. Until a cleanup plan is approved, any sale, transfer or closure remains at a standstill.

The cleanup plan must be prepared and submitted by an officer or management official of the facility.[210] It must include the results of the sampling plan conducted as part of the initial notice requirement[211] and must address, in a detailed manner, a practicable method of cleanup for the site including time schedules for implementation and itemized cost estimates for the plan.[212] While reviewing the submission, the Department will, as it deems necessary, request additional information[213] and conduct meet-

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207 *Id.* § 1-3.11(c)2.

208 Schmidt, *Environmental Cleanup Responsibility Act: Another Environmental First for New Jersey*, 113 N.J.L.J. 165, 184 (1984).

209 *See generally* Picco, *Getting Through ECRA*, contributed especially for an ECRA seminar presented by Princeton Aqua Science (June 19, 1984); *see also* N.J. ADMIN. CODE tit. 7, § 1-3.12(a)3. (1984).

210 N.J. ADMIN. CODE tit. 7, § 1-3.12(a) (1984).

211 *Id.* § 1-3.12(a)1.

212 *Id.* § 1-3.12(a)2.

213 *Id.* § 1-3.12(a)3.

ings between facility representatives and the Department.[214] If the cleanup plan is insufficient, the Department will advise the owner or operator of the changes required to ensure the Department's approval.[215]

Once a cleanup plan is given written authorization an owner or operator of an industrial establishment has fourteen days from the date of that approval to obtain a surety bond or other financial security approved by the Department that is equal to the cost estimate for the plan.[216] If, at any time, the cost estimate exceeds the amount of the surety bond the owner or operator must, within sixty days of the increase, adjust the amount of the bond accordingly.[217]

Following approval of the cleanup and the financial security arrangements by the Department, the owner or operator must begin implementation of the cleanup plan.[218] Upon completion of the cleanup, the Department will conduct a final inspection of the site to ensure compliance with the approved plan.[219] Any deficiencies in the cleanup that are detected at this time must be remedied before the Department issues its final written approval.[220] This approval document may then be used to move forward with the sale, transfer or closure of the facility.

The Act and the regulations do provide for the deferral of the cleanup operations in certain circumstances.[221] If the facility would be subject to "substantially the same use" by the transferee, the implementation of the cleanup plan may be deferred until the use changes or until the transferee closes, terminates or transfers operations.[222] Upon the happening of any one of these events the transferee as present owner or operator must then begin the ECRA review process anew, utilizing in part the information compiled by the previous owner. The standards for granting such deferrals appear to be rather stringent. The Department will only approve deferrals after reviewing submissions by the fa-

214 *Id.* § 1-3.12(b)2.
215 *Id.* § 1-3.12(b)1.
216 *Id.* § 1-3.13(a).
217 *Id.* § 1-3.13(b)7, (c)7.
218 *Id.* § 1-3.12(d).
219 *Id.* § 1-3.12(e).
220 *Id.* § 1-3.12(e)1.
221 *Id.* § 1-3.14.
222 *Id.* § 1-3.14(a).

cility which must show that postponing the cleanup poses no threat of potential harm to public health or the environment.[223]

D. *Sanctions for Failure to Comply*

One of the most notorious features of ECRA is its penalty provisions for failure to comply. The buyer or transferee has grounds for voiding the sale or transfer of an industrial establishment if the seller or transferor fails to comply with *any provision* of the Act or Regulations.[224] Also, the Department has grounds for voiding the sale or transfer if the owner or operator of the industrial establishment fails to submit a negative declaration or cleanup plan.[225]

When a sale is voided, the transferee is also entitled to recover damages from the transferor.[226] Furthermore, the owner or operator of a facility is held strictly liable without regard to fault for all cleanup and removal costs as well as direct and indirect damages resulting from the failure to implement any necessary cleanup plan.[227] Completing the list of sanctions is a provision which calls for fines of up to $25,000[228] for individuals, including officers and management officials, who knowingly give or cause to be given any false information or who otherwise fail to comply with ECRA.[229]

V. The Regulators and the ECRA Industrial Advisory Group

The effectiveness of any regulatory program can be said to be as much a function of the personalities of the regulators as the technical requirements of the regulations. The Department's Bureau of Industrial Site Evaluation has pledged a firm commitment to work with the owners or operators of industrial establishments in order to ensure expeditious ECRA reviews and to avoid delays that may negatively affect pending sales or closures.[230] Although

223 *Id.* § 1-3.14(c)3.
224 *Id.* § 1-3.16(a).
225 *Id.* § 1-3.16(b).
226 *Id.* § 1-3.16(a)1.
227 *Id.* § 1-3.16(a)2.
228 *Id.* § 1-3.16(c), (c)1. If the violation is one considered continuing in nature, each day during such continuance shall constitute an additional and separate offense. *Id.* § 1-3.16(c)1.
229 *Id.* § 1-3.16(c).
230 *See* Public Comments, *supra* note 54, No. 2.

complying with ECRA has proven to be a rather tedious and expensive process for many, the overall impression of the regulated community is that the Bureau has been responsive to its problems and is indeed committed to an expeditious review without sacrificing a clean environment.[231]

The Bureau presently employs a staff of approximately twenty-five individuals. They function primarily as case managers and administrative personnel. The staff was at first overwhelmed by the influx of applications, but now the rate appears to have stabilized at approximately sixty applications per month.[232] Additionally, the Bureau reports that many of these ECRA applications are requests for negative declarations.[233] It is anticipated that, without significant complications, negative declarations for truly clean properties can be approved in about four weeks.[234] The process is, of course, extended when cleanup plans are required and debates ensue between the Bureau and the party responsible for cleanup. These conflicts arise primarily in regard to the requisite levels of detoxification or the actual management of the cleanup plan.

Although the Bureau reviews many ECRA applications, the inference has been drawn that these applications represent only a small percentage of the transactions that should be subject to the law. There are two possible explanations for this situation. The first is that many persons involved in such transactions are simply unaware of the existence of ECRA and its requirements. The second is that some parties have intentionally avoided compliance. It is hoped that an increased awareness of the law within the legal and investment communities will help reduce the number of transactions conducted without ECRA. Currently, however, it is nearly impossible to discover and prevent transactions where the parties intend to evade the law.

Along with the present volume of ECRA applications, there

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231 Interview with Hal Bozarth, Executive Director of the Chemical Industry Council of New Jersey in Trenton, New Jersey (Aug. 10, 1984); telephone interview with Georgia Hartnett, Esq., Assistant Vice-President of the New Jersey Business and Industry Association (July 26, 1984).

232 Telephone interview with Anthony McMahon, Chief of the Bureau of Industrial Site Evaluation (July 26, 1984).

233 *Id.*

234 *Id*; statement of Anthony McMahon at a meeting of the ECRA Industrial Advisory Group in Trenton, New Jersey (Aug. 21, 1984).

exists a potential for a significant backlog in the workload of the already understaffed Bureau. Although a fee schedule designed to finance additional personnel is presently being discussed,[235] it will probably not be established in the immediate future. Expeditious review is the most essential function of a workable ECRA program and the responsibility to see that this function is properly performed lies primarily with the Legislature and the Department. Accordingly, the Bureau must be allocated the necessary resources with which to effectively carry out its task.

In addition to problems concerning resource allocation, the Bureau is experiencing other difficulties in developing this novel regulatory program. As discussed, these difficulties include those of statutory interpretation. In order to resolve these problems, the Bureau has enlisted the services of the ECRA Industrial Advisory Group. The Advisory Group will provide the Bureau with constructive counsel to assist in improving the ECRA program. The members of this group are representatives from various sectors of the regulated community, and their contributions should prove invaluable.

An initial task of the Advisory Group is to conduct a thorough review of the industries in the SIC categories and make recommendations for exempting certain sub-groups. A list of proposed exemptions is expected shortly. Also assigned is the development of a fee schedule to help finance the ECRA program. The Act provides that the Department "shall adopt regulations establishing . . . a fee schedule, as necessary, reflecting the actual costs associated with the review of negative declarations and cleanup plans."[236] Considerable debate is expected on this subject due in large part to industrial interest in minimizing costs and the Department's interest in maximizing resources.

Another subject which is likely to be of importance to the Advisory Group is the issue of confidentiality of proprietary information. It is quite possible that the ECRA requirement of detailed information submission may lead to a disclosure of trade secrets. Industry is opposed to the release of information about the materials and waste involved in an operation which could re-

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235 Meeting of the ECRA Industrial Advisory Group in Trenton, New Jersey (Aug. 21, 1984).

236 N.J. STAT. ANN. § 13:1K-5.a. (West Supp. 1984-85).

sult in the revelation of clues to a particular manufacturing process. Since at the present time the Bureau is not equipped to deal with this type of situation, it will look to the Advisory Group for suggestions on appropriate security measures.

VI. Conclusion

The New Jersey Legislature intended that the Environmental Cleanup Responsibility Act would hold the present owners or operators of industrial establishments accountable for the environmental problems on their properties. Accordingly, the Act mandates detoxification as a precondition to any sale, transfer or closure of operations. To the extent that ECRA has compelled close scrutiny of particular industrial sites, the law has been rather successful. Furthermore, it is foreseeable that ECRA will encourage businesses to engage in more self-scrutiny by conducting environmental audits and cleanups *prior* to the submission of any ECRA application. This would be consistent with the intent of the legislation while enabling the swift consummation of real estate transactions.

The Act, however, seems to be the subject of more criticism than praise. This criticism includes the fact that the Legislature, by making ECRA applicable only to present owners or operators, apparently chose to ignore the complex issue of predecessor landowner liability.[237] Also, the broad reach of ECRA has caused a great deal of uncertainty in the industrial and financial communities. The statute is so broad that many businesses may be completely unaware that they are potentially subject to compliance. Furthermore, it has been argued that the Act will have a negative impact on the State's commercial real estate market in general and on urban industrial redevelopment in particular. At this time, however, the actual degree of this alleged chilling effect remains largely unknown because such a consequence is not readily quantifiable.

While it may be necessary to admit that ECRA is adversely affecting the real estate sector, it must also be recognized that new opportunities have been created as a result of this statute. Indeed, ECRA has generated substantial business for environmental consultants and attorneys. The reader should also be

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237 *See* Ventron, *supra* notes 1, 3 and accompanying text.

aware of the likely emergence of ECRA liability insurance which promises growth primarily for the title insurance industry.

Finally, when all aspects of this law are considered the question becomes whether the incremental benefit of cleaning up New Jersey's polluted properties outweighs the high costs of compliance. It is this author's opinion that the benefits do outweigh the marginal costs. Ultimately, the price of a healthy environment must be reflected in the cost of doing business in New Jersey.

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