NEW JERSEY'S POLLUTION PREVENTION ACT OF 1991: A REGULATION THAT EVEN THE REGULATED CAN ENJOY

I. Introduction

New Jersey's pollution policy had been in need of urgent change. The New Jersey Legislature was faced with the prospect that, despite its efforts, the pollution problem was still a very real threat to the environment and public health. Meanwhile, New Jersey's industries continued to incur the economic burdens caused by the state's pollution policy. The time had come for New Jersey to reevaluate its pollution policy in order to prevent environmental, as well as economic catastrophe.

Surprisingly, New Jersey has long been a leader in the nation's effort to defend its environment.[1] Since the early 1970's, the New Jersey Legislature pioneered several progressive measures for protecting its air, water and soil.[2] Unfortunately, despite these forceful initiatives, New Jersey remains one of the country's worst toxic polluters.[3] The statistics are especially discouraging

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[1] *See* Lewis Goldshore & Marsha Wolf, *Business Strategies for the 90's*, 36 NJ BUS. MAG. 76 (Nov. 1990).

[2] *See generally* The Department of Environmental Protection Act of 1970, codified at N.J. STAT. ANN. § 13:1D-1 (West Supp. 1991)(created a cabinet level position for the Department of Environmental Protection); The Environmental Rights Act of 1974, codified at N.J. STAT. ANN. § 2A:35A-1 (West 1987)(expanded persons' right to bring environmental lawsuits); The Spill Compensation and Control Act of 1976, codified at N.J. STAT. ANN. § 58:10-23.11 (West Supp. 1991)(strict liability imposed for petroleum and hazardous substance spills); Major Hazardous Waste Facilities Siting Act of 1981, codified at N.J. STAT. ANN. § 13:1E-49 (West Supp. 1991)(provided for the "siting, design, construction, operation and use of environmentally acceptable major hazardous waste facilities"); The Worker and Community Right to Know Act of 1984, codified at N.J. STAT. ANN. § 34:5A-1 (West Supp. 1991)(requires "disclosure of information about hazardous substances in the workplace and the community"); The Environmental Cleanup Responsibility Act of 1983, codified at N.J. STAT. ANN. § 13:1K-6 (West Supp. 1991)(required "adequate preparation and implementation of acceptable cleanup procedures" before closure, sale or transfer of certain industrial facilities); New Jersey Statewide Mandatory Source Separation and Recycling Act of 1987, codified at N.J. STAT. ANN. § 13:1E 99.11 (West Supp. 1991)(required each county to prepare and adopt a mandatory recycling program).

[3] Inst. for S. Studies, 1991-1992 Green Index, which rates New Jersey worst in the nation for total toxics released per square mile, and worst in total toxics sent to sewers per square mile; *see also* NEW JERSEY PUBLIC INTEREST RESEARCH GROUP

in light of the exorbitant costs borne by the state's businesses, industries and citizens under New Jersey's burdensome regulatory scheme.[4] It is not surprising, therefore, that the New Jersey Legislature has again attempted to come to the rescue with the Pollution Prevention Act of 1991.[5]

The Pollution Prevention Act [hereinafter Act] signifies the state's graduation from a policy of pollution control to a more aggressive policy of pollution prevention.[6] The Act, in theory, addresses both economic and environmental concerns. That is, the Act simply works towards reducing the amount of hazardous materials used and produced by New Jersey's industries, rather than focusing on the costly efforts to control, treat, and dispose of such materials after they are already created.[7]

This note will consider New Jersey's role, past and present, as a pioneer of innovative attempts to solve its environmental problems. Specifically, the Pollution Prevention Act will be analyzed for its symbolic significance as a dramatic change in New Jersey's long pollution policy history. Most importantly, this note will analyze the Act as a solution to the state's environmental/economic concerns.

II. Prior Law

A. *New Jersey Statutory Law*

With the creation of the Department of Environmental Protection [hereinafter DEP] in 1970, New Jersey became one of the first states to create an organization exclusively authorized to administer its pollution control statutes.[8] In the first five years after

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[NJPIRG], TOXIC TRUTH AND CONSEQUENCES (1991) or RISKY BUSINESS: AN INDUSTRY BY INDUSTRY INVESTIGATION OF TOXIC RELEASES IN NEW JERSEY (Nov. 1990).

[4] NJPIRG, CITIZEN ALERT, Vol. 19, No. 1 (June 1991) [hereinafter CITIZEN ALERT]. This newsletter lists several costs to the state's industries, including "expensive raw materials . . . non-productive pollution control devices . . . hazardous waste disposal . . . cleanup . . . chemical storage and transportation accidents," *see also* Goldshore & Wolf, *supra* note 1.

[5] N.J. STAT. ANN. § 13:1D-35-50 (West 1991).

[6] *Id.*

[7] *Id. See also* Linda Sadlouskos, *Stopping Pollution Before it Starts*, N.Y. TIMES, Oct. 14, 1990, at D1.

[8] N.J. STAT. ANN. § 13:1D-1 (West Supp. 1991); *see also* N.J. DEP'T OF ENVTL. PROTECTION, PROTECTING OUR EARTH: 1970-1990 PROGRESS AND NEW DIRECTIONS, ANNUAL REPORT (1990) [hereinafter DEP ANNUAL REPORT]; Lewis Goldshore &

its creation, the legislature enacted over 200 measures relating to the state's environmental concerns.[9] The impetus for the flood of legislation was the rapid rate of much welcomed industrial development.[10] Through the following two decades, New Jersey struggled to strike a balance between these competing interests.[11] Some members of the business sector maintain that this balance was never achieved; instead, they argue that New Jersey's businesses and industries are bearing the brunt of the high cost of compliance.[12]

Several pollution regulation measures enacted since 1970 have significantly effected New Jersey's industries.[13] For example, the Spill Compensation and Control Act, enacted in 1976, imposed strict liability on certain producers for unlawful petroleum or other hazardous substance discharge.[14] In addition, that Act required certain facilities to adhere to a complex "discharge cleanup and removal plan" and levied a tax on certain transfers

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Marsha Wolf, *View to the 90's: Environmental Protection in N.J.*, 111 N.J. LAW. 50 (Spring 1985).

9 Lewis Goldshore, *A Flood of Environmental Legislation: An Analysis of the New Jersey Experience, 1970-1975*, 1 SETON HALL LEGIS. J. 1 (1976). The author approximated, however, that only twelve of those laws addressed statewide concerns, with the remainder focusing on local problems or interest group concerns. *Id.* at 6.

10 DEP ANNUAL REPORT, *supra* note 8. The report illuminated the paradox by indicating that since 1970, the state's population has grown by approximately one million people. The booming economy encouraged wide-spread development, and consequently, society became dependent on New Jersey's chemical products. *Id.* at 2.

11 *Id.*, *see also* Goldshore and Wolf, *supra* note 8. The authors opine that while legislators have always noted the "need to accommodate economic development and growth objectives", the balance has generally been struck in favor of the environment. *Id.* at 50.

12 Goldshore & Wolf, *supra* note 1. The article warns:

> [i]n some cases, the high cost of complying with environmental regulations resulted in decisions to curtail or close operations. While it's difficult to measure, it appears that some businesses have decided not to locate in New Jersey, despite its access to markets and a skilled workforce, because of the state's approach concerning environmental issues.

Id. at 76.

13 *Id.*, *see also* DEP ANNUAL REPORT, *supra* note 8, at 3.

14 N.J. STAT. ANN. § 58:10-23.11 (West Supp. 1991). Section 23.11b (h) defines discharge as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping." *Id.*

of hazardous materials.[15]

New Jersey also boasted its Environmental Cleanup Responsibility Act [hereinafter ECRA] as one of the nation's toughest hazardous waste cleanup laws.[16] Passed in 1983, ECRA imposed a substantial responsibility on certain New Jersey industries.[17] Specifically, ECRA was designed to hold industrial facilities' operators or owners accountable for environmental integrity when they planned to sell, close or transfer the facilities.[18] ECRA created a complex two-step procedure to be followed upon event of sale, closure or transfer of the facilities.[19] The first step requires the owner or operator of specific industrial facilities to file a "General Information Submission".[20] The second step is even more burdensome, requiring the prompt filing of a "Site Evaluation Submission".[21]

Soon after the passage of ECRA, the New Jersey Legislature enacted another piece of demanding legislation.[22] The Worker and Community Right-to-Know Act [hereinafter Right-to-Know Act] required, amongst other things, significant disclosure of information regarding hazardous materials in the workplace and community.[23] Perhaps anticipating the Right-to-Know Act's im-

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15 *Id.*

16 N.J. STAT. ANN. § 13:1K-6 (West Supp. 1991). *See also* DEP ANNUAL REPORT, *supra* note 8; *see generally* Gregory Battista, Note, *The Environmental Cleanup Responsibility Act: New Accountability for Industrial Landowners in New Jersey*, 8 SETON HALL LEGIS. J. 331 (1984-85).

17 *See* Lewis Goldshore & Marsha Wolf, *Two New Hazardous Waste Initiatives*, 107 NJ LAW. 48 (Spring 1984).

18 N.J. STAT. ANN. § 13:1K-6 (West Supp. 1991); *see also* Goldshore & Wolf, *supra* note 17, suggesting that the Act was a legislative response to the fact that certain owners and operators were able to shirk their responsibility under other "hazardous waste legislation" simply by ridding themselves of the facility.

19 N.J. STAT. ANN. § 13:1K-6 (West Supp. 1991).

20 N.J. ADMIN. CODE, tit. 7, § 26B-3.2 (1987). The Submission requires an expression of the intent to sell, transfer or close operations, a general description of past and present operators, a list of all state and federal environmental permits, and the facility's history of performance under the permits. *See also* Battista, Note, *supra* note 16.

21 N.J. ADMIN. CODE, tit. 7, § 26B-3.2 (1987). The form requires detailed maps, operation descriptions, hazardous substance spill or discharge information, a complex sampling plan for air, soil, groundwater, and surface water; proposed decontamination plans, and copies of the results from on site soil, groundwater and surface water tests. *Id.*

22 *See* Goldshore & Wolf, *supra* note 17.

23 N.J. STAT. ANN. § 34:5A-1 (West Supp. 1991). In addition to the reporting

pact on regulated businesses and industries, the Legislature suspended its effective date until one year after enactment.[24]

As if the complexity and cost of compliance were not enough to bear, these laws levied severe monetary penalties for violations.[25] Some laws went as far as imposing criminal sanctions for reckless, willful or negligent offenses.[26] With the costs associated with compliance expected to rise steadily, New Jersey's industries could expect to see a proportional rise in the severity of sanctions.[27] Compliance in the 90s, however, was not expected to be difficult to elicit from any reasonably foresighted industry. Indeed, environmentally conscious business practices were considered wise investments in an industry's future.[28] In fact businesses were routinely accepting, or at least considering, environmentally conscious business practices as part of their cost of doing business.[29] Perhaps the business community's recogni-

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requirements, employers are also required to provide employees with readily accessible information, offer educational training programs, and provide detailed labeling for hazardous substances. *Id.*

24 N.J. STAT. ANN. § 34:5A-1 (West Supp. 1991). *See also* Goldshore & Wolf, *supra* note 8, which states that the reason for suspending the Act's effective date, in part, was in order to allow "the thousands of regulated employers . . . adequate time to become familiar with the new law and be able to bring their operations into compliance." *Id.* at 52.

25 N.J. STAT. ANN. § 13:1K-13.C (West Supp. 1991) (ECRA) may impose a $25,000 penalty per day, per offense; and personal liability on officers and managers; N.J. STAT. ANN. § 34:5A-31 (West Supp. 1991) (Right-to-Know Act) imposes a $2500 civil penalty for each day that the negligent violation continues, and $5000 per day for each willful violation; *see also* Goldshore & Wolf, *supra* note 1.

26 *See* N.J. STAT. ANN. § 58:10A-1 (West Supp. 1991) (Water Pollution Control Act).

27 *See* Goldshore & Wolf, *supra* note 1. The authors cite New Jersey's recent clean water enforcement statute as being indicative of the toughening enforcement climate, stating that "under the new law, penalties for water quality violations were drastically increased, minimum mandatory penalties were required and the DEP's discretion in settling penalty assessments was limited." *Id.* at 76. The authors also suggest that "costs of compliance and noncompliance are likely to escalate", but "[b]usinesses that plan for and develop a detailed environmental compliance strategy will be those which outlast their competition." *Id.* at 77.

28 *See* Jeffrey A. Walder, *N.J. Pollution Prevention Policy Takes a New Direction*, N.J. L. J., Nov. 29, 1990, p.10. The author suggests that "the stigma associated with being perceived as environmentally irresponsible [and] . . . [t]he prospect of public backlash in the form of reduced sales, outright product bans or other modes of protest should provide added incentive to spur compliant conduct." *Id.*

29 *See* Goldshore and Wolf, *supra* note 1. This article reports that:

> [t]o avoid the substantial costs and disruption involved in enforcement actions, which can severely impact upon the profitability of a small to

tion of this harsh reality prompted lawmakers to move to the next phase of environmental protection.

B. *Federal Government's Version*

The United States Congress was first to propose a panacea for the economic/environmental woes facing the industrial sector of the country, in recognition of what it characterized was "millions of tons of pollution . . . and . . . tens of billions of dollars per year controlling this pollution."[30] Declaring it was the nation's policy to focus on pollution prevention first, and recycling and treatment second, the United States Congress enacted the federal Pollution Prevention Act of 1990.[31] The measure, introduced by Senator Frank Lautenberg (D-N.J.) in March of 1989, was intended to create a new business and environmental ethic "designed to foster efforts to eliminate or reduce pollution before it [was] generated."[32] The provisions in the bill designed a meaningful infrastructure for those companies who chose to participate.[33]

The federal Pollution Prevention Act of 1990[34] was designed to work in conjunction with the Emergency Planning and Community Right-to-Know Act[35] [hereinafter Right-to-Know]. The Pollution Prevention Act, however, takes the Right-to-Know law one step further by asking and encouraging those same facilities to include in the annual filing a toxic chemical source reduction

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> mid-size company, an environmental compliance strategy must become a continual and integral part of doing business. Such an approach will enable a company to plan to address these concerns from an affirmative, rather than a reactive, position.

Id. at 76.

30 42 U.S.C. § 13101(a)(1) (Supp. 1991).

31 Pollution Prevention Act of 1990, Pub. L. 101-508, Title VI, § 6602, 104 Stat. 1388-321 (1990) (codified at 42 U.S.C. § 13101 (Supp. 1991)).

32 *See* Turner, States News Service-Washington, Mar. 15, 1989.

33 *Id.*; *see supra* note 31. The infrastructure included educational information regarding pollution reduction techniques, federal grants for states offering technical assistance and training in pollution prevention methods, and monetary awards for significant progress. *Id.*

34 *See supra* note 31.

35 42 U.S.C. § 11001 (Supp. 1991). This Act required an annual report from operators and owners of facilities listing hazardous chemicals for which a material safety data sheet was required pursuant to the Occupational Safety and Health Act of 1970 [hereinafter OSHA], 29 U.S.C. § 651 (1990). *Id.*

and recycling report.[36] The report includes an annual account of the amounts of chemicals entering any waste stream or recycled, and more importantly, an explanation for the source reduction measures practiced with respect to those chemicals.[37] In addition, each annual report should track and expound on the successes and failures of the prior year's reduction measures.

Retrospectively, however, the Pollution Prevention Act, as passed, was a timid "first step" toward pollution prevention.[38] The law essentially left it to the industry to decide whether it would join in the "national policy" and comply.[39] The law failed to provide the mandate or punitive incentive necessary to get a national program up and running.[40] Such a new and innovative law was left resting on its whimsical appeal to industry officials who could not even fathom the tangible, let alone intangible, rewards offered by pollution prevention measures.

In the makings in New Jersey, at the same time, was its own pollution prevention initiative, which proposed to take its "kinder, gentler" federal predecessor one step further.[41]

III. New Jersey's Pollution Prevention Act

A. *Legislative History*

Beginning in 1989, the New Jersey DEP developed an Office of Pollution Prevention.[42] This office was charged with the duty of investigating opportunities for hazardous substance use reduction by assisting industries in the comprehensive evaluation of

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36 42 U.S.C. § 13106 (Supp. 1991). The reduction and recycling report should cover each hazardous chemical required to be reported under 29 U.S.C. § 651 (OSHA). *Id.*

37 42 U.S.C. § 13106 (Supp. 1991). The source reduction practices were categorized as "A) equipment, technology, process, or procedure modifications, B) reformation or redesign of products, C) substitution of raw materials, and D) improvements in management, training, inventory, control, materials handling, or other general operational phases of industrial facilities." *Id.*

38 *See* THE BUREAU OF NATIONAL AFFAIRS, INC., DAILY REPORT FOR EXECUTIVES, *Pollution Prevention Bill May Pass*, Oct. 25, 1990, at A18.

39 *Id.*

40 42 U.S.C. § 13101 (Supp. 1991).

41 *See* 78 N.J. LEGIS. INDEX, No. 19 (Aug. 22, 1991).

42 N.J. DEP'T OF ENVTL. PROTECTION, ENVIRONMENTAL NEWS [hereinafter DEP ENVIRONMENTAL NEWS], vol. 6, no. 6 (Nov/Dec 1989). The office was created in response to a Kean Administration "call to action" for "a new era in environmental protection." *Id.* at 1.

manufacturing processes.[43] The creation of this office signified the beginning of New Jersey's official commitment to pollution prevention,[44] and was the result of a long grassroots campaign for toxics use reduction headed by the New Jersey Public Interest Research Group, a lobbying group based in Trenton, New Jersey.[45]

The Office of Pollution Prevention was dubbed by many "a natural evolution of DEP's role in protect[ing] New Jersey's environment."[46] The DEP itself called the initiative "the next order of business" after realizing the limits of the existing technological abilities for pollution control.[47] The Office of Pollution Prevention was a giant leap for New Jersey's environmental future. It essentially offered three services:

> First, OPP will determine the impact that existing and planned regulatory efforts have on source reduction and recycling. Second, OPP will establish a mechanism for integrating pollution prevention into existing DEP enforcement efforts. Third, OPP will plan, coordinate, and streamline the present permitting system as an inducement for industry to participate in effective pollution prevention efforts.[48]

To do so, the DEP provided the framework for unique measures for change.

Aware that the Office of Pollution Prevention needed statutory support in order to further the goals of pollution prevention, the DEP endorsed two pieces of proposed legislation in the Senate and Assembly.[49] The New Jersey Legislature, however, required almost two years of negotiation and campaign before it passed the pollution prevention initiative.[50] During that time, negotiations contin-

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[43] *Id.* The Office of Pollution Prevention was created pursuant to an internal DEP administrative order in 1989. *Id.*

[44] *Id.*

[45] *See* J. Craig Shearman, *Pollution Prevention Bill Clears Committee*, UPI, July 1990, *available in* LEXIS, Nexis Library, UPI file.

[46] *See* DEP ENVIRONMENTAL NEWS, *supra* note 42, in which DEP Commissioner Christopher J. Dagget announced the pollution prevention initiative in an August 16, 1989, press conference.

[47] *See* DEP ANNUAL REPORT, *supra* note 8.

[48] DEP ENVIRONMENTAL NEWS, *supra* note 42, at 3.

[49] A. 988, sponsored by Assemblyman Jim McGreevey (D-Middlesex); and S. 3581, sponsored by Senator Dan Dalton (D-Gloucester). *See* 78 N.J. LEGIS. INDEX, No. 19, at S38 (Aug. 22, 1991).

[50] *Id. See also* CITIZEN ALERT, *supra* note 4, at 1.

ued as well between the environmental groups and chemical industry lobbying in the legislature.[51] For the most part, surprisingly, the pollution prevention bill was endorsed by environmental and industry groups alike.

There was, according to industry leaders, not much to dislike about the pollution prevention measures.[52] Common sense notions dictated that the amount of hazardous substances produced was directly related to the amount of hazardous substances which would require costly treatment, disposal and recycling.[53] Though initial start-up under the bill would be taxing on a regulated facility, the industry groups proffered the general belief that the bill offered lower disposal costs, better public relations, and less opportunity for liability under pollution control statutes and workers' illness.[54]

The overwhelming support given to the bill enabled it to enjoy a constructive journey through the various committees of the New Jersey Legislature.[55] The most significant committee revision developed in the Assembly's Appropriations Committee.[56] Those

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51 *See* Shearman, *supra* note 45. This article offered insight regarding the competing positions. NJPIRG lawyer/lobbyist Marian Wise, for example, desired to expand the amount of manufacturers and facilities covered under the bill to include 1000 smaller users of toxic material. Carla Israel, for the New Jersey Chemical Industry, on the other hand, wanted the bill to apply to only 300 toxic chemicals rather than the 1000 it proposed to cover. *Id.*

52 *See* Sadlouskos, *supra* note 7. This article describes some generally positive reactions from industry leaders. *Id. See generally The Pollution Prevention Act, 1989: Public Hearing on S.3581 Before the Senate Energy and Environment Committee* [hereinafter *Public Hearing*], Dec. 18, 1989 (several testimonials by industry figures voice praise for an older, but very similar, version of the Act ("The Pollution Prevention Act", Senate Bill No. 3581 (1989)).

53 *See* Sadlouskos, *supra* note 7. Hal Bozarth, of the New Jersey Chemical Industry Council, admitted that an industry's incentive for cutting toxic emissions was skyrocketing disposal costs which, he added, have "increased a hundredfold in the past 10 years." *Id.*

54 *Id. See generally*, *Public Hearing*, *supra* note 52.

55 78 N.J. LEGIS. INDEX, No. 19 (Aug. 22, 1991). *See* SENATE ENVIRONMENTAL QUALITY COMMITTEE and SENATE REVENUE, FINANCE AND APPROPRIATIONS COMMITTEE, 204 N.J. Leg., 1st Sess., REPORT on S. 2220 (1990); and ASSEMBLY APPROPRIATIONS COMMITTEE, 204 N.J. Leg., 2d Sess., REPORT on A. 988 (1991).

56 *See* Assembly Appropriations Committee Report, June 13, 1991. Some of the committee amendments included a provision for the protection of trade secrets, a provision giving the Pollution Prevention Advisory Board broader powers, a provision reserving the right to require non-priority facilities to conform, and an appropriation of $200,000 for the Hazardous Substance Management Research Center "for the implementation of a technical assistance program for pollution prevention." *Id.* (*See infra* text 831).

amendments, for the most part, strengthened and clarified various provisions, to which the Senate easily gave approval.[57]

B. *Law as Passed*

After much deliberation and careful planning, Governor Florio signed the Pollution Prevention Act into law on August 1, 1991.[58] It is New Jersey's most progressive environmental law to date. The Act essentially mandates certain of New Jersey's largest, toxic producing industries to reduce the amount of hazardous substances used and emitted in the production process by 50%.[59] The reduction can be achieved, according to the idealistic New Jersey Legislature, "through a more efficient and rational use of hazardous substances, or through the use of less hazardous substitute substances or processes less prone to produce pollution."[60]

The Act recognizes the DEP's Office of Pollution Prevention[61] [hereinafter Office] as the enforcement authority behind the law.[62] The Office is charged with the duty of "implementing a comprehensive pollution prevention program and integrating the air pollution, water pollution, and hazardous waste management programs" into the program.[63] The Act gives the Office the bold power to review and change any "rule or regulation, administrative consent order, administrative order, compliance schedule, permit, or license" issued pursuant to New Jersey's many "pollution control" statutes when those statutes do not encourage or require pollution prevention measures.[64]

A Pollution Prevention Advisory Board [hereinafter Board] is also created in the DEP for ongoing review of the Act's effec-

57 *See* 78 N.J. LEGIS. INDEX, No. 19 (Aug. 22, 1991).

58 N.J. STAT. ANN. § 13:1D-35-50 (West 1991). Though effective on August 1, 1991, certain provisions, however, will be inoperative until the DEP adopts rules and regulations necessary to implement the program. *Id. See generally* David Schwab, *Landmark Pollution Law is Enacted*, STAR-LEDGER (Newark), Aug. 2, 1991.

59 N.J. STAT. ANN. § 13:1D-36 (West 1991).

60 *Id.*

61 See DEP ENVIRONMENTAL NEWS, *supra* note 42.

62 N.J. STAT. ANN. § 13:1D-38 (West 1991).

63 N.J. STAT. ANN. § 13:1D-36 (West 1991). The New Jersey Legislature declares in the Act that the prior system that separately regulated air pollution, water pollution, and hazardous waste management was a fragmented approach. That system allowed pollution "to be shifted from one environmental medium to another". *Id.*

64 *Id.*

tiveness.[65] The fifteen member Board[66] is asked to conduct an ongoing review of the Act and its implementation, and investigate the latest feasible prevention techniques.[67] The Board, consisting of twelve public members[68], will offer practical assistance in planning and coordinating pollution prevention strategies.[69] In doing so, the Board is authorized to conduct research and public hearings, and if needed, make written recommendations to the New Jersey Legislature.[70] In addition, the Board will evaluate the occupational, environmental and public health risks posed by specific hazardous substances.[71]

For the law to be implemented, a priority industrial facility[72] must develop, and maintain on-site, a two-part Pollution Prevention Plan [hereinafter Plan] by July 1, 1994.[73] Each Plan must give a complete and certified[74] inventory and analysis of the facility's use and release of hazardous substances[75], as well as its pro-

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65 N.J. STAT. ANN. § 13:1D-39 (West 1991).

66 *Id.* The Board is comprised of the Administrator of the Office of Pollution Prevention, the Executive Director of the Hazardous Waste Facilities Siting Commission, and the Director of the State Technical Assistance Program who will serve ex officio. (*See infra* text p. 831).

67 *Id.*

68 *Id.*, stating that the Advisory Board will consist, in part, of twelve public members, including academic, environmental, industrial, and labor leaders, who shall be appointed for a three year term by the Governor.

69 *Id.*

70 *Id.*

71 *Id.*

72 N.J. STAT. ANN. § 13:1D-37 (West 1991): "any industrial facility required to prepare and submit a toxic chemical release form pursuant to 42 U.S.C. § 11023 [the federal Emergency Planning and Community Right-to-Know Act]," or any other facility having a Standard Industrial Classification. This means any industry producing more than 25,000 pounds of toxic substances or using more than 10,000 pounds in the industrial process per year. Note, however, that the Act reserves the right to require a "non-priority" facility to submit a Plan in instances when the non priority facility has been a notorious offender. N.J. STAT. ANN. § 13:1D-40 (West 1991).

73 N.J. STAT. ANN. § 13:1D-42 (West 1991). The Act also requires a complete revision of the entire Plan every five years. *Id.*

74 N.J. STAT. ANN. § 13:1D-41 (West 1991), requiring the personal certification by facility's highest ranking official that the Pollution Prevention Plan has been read, and is a true and accurate reflection of the industrial facility's pollution prevention policy.

75 N.J. STAT. ANN. § 13:1D-37 (West 1991), defines "hazardous substance" according to federal standards under the federal Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023 (Supp. 1991) and the Standard Industrial Classification, though again, the Act reserves the right to establish crite-

duction of hazardous waste as non-product output.[76] Perhaps most difficult, the industrial facility must include in its Plan a five year proposal for the 50% reduction of each hazardous substance it inventories.[77]

The first part of the Plan, in addition to enumerating the hazardous materials within the facility, is required to include an identification of each production process[78] from which the hazardous substances are produced.[79] This part of the Plan will tally the amount of hazardous material polluting at each pollution source.[80]

The second part of the Plan seeks information regarding the industry's biggest pollution sources, referred to in the Act as "targeted" production processes and sources.[81] Using that information, the facilities are required to break down their five year, fifty percent reduction goal for each of the identified targets.[82] The proposal should include documentation of simple housekeeping efforts to plug leaks and prevent spills, as well as complicated raw material substitutions and production changes for

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ria for the inclusion of additional hazardous substances. The report shall include the chemical identity and Chemical Abstract Service number, the address of each off-site treatment, disposal or storage facility to which hazardous waste is transported, the amounts of hazardous waste generated, recycled, treated, stored, disposed of or recycled off-site, and the amounts of hazardous material released into the air or discharged into water following recycling or treatment. *Id.*

76 *Id.* Non-product output is defined as "all hazardous substances or hazardous wastes that are generated prior to storage, recycling, treatment, control, or disposal, and that are not intended for use as a product." *Id.*

77 N.J. STAT. ANN. § 13:1D-36 (West 1991).

78 N.J. STAT. ANN. § 13:1D-37 (West 1991), defined as "a process, line, method, activity or technique, or a series or combination of processes, lines, methods or techniques used to produce a product or reach a planned result."

79 N.J. STAT. ANN. § 13:1D-41 (West 1991). The report should include an identification of the product produced in the process, and the total number of units produced. *Id.*

80 *Id.*

81 *Id.* "Targeted" processes and sources are those which significantly contribute to the use, release and output of hazardous wastes and substances. The identification of such processes and sources is based on a consideration of their toxicity and amount of contribution to the production of hazardous wastes and substances. N.J. STAT. ANN. § 13:1D-37 (West 1991).

82 N.J. STAT. ANN. § 13:1D-41 (West 1991). The breakdown requires a description of techniques, such as "employee training, management policies, inventory control, scheduling improvements, material handling improvements, and spill and leak prevention" that the facility owner or operator plans to undertake for each identified target over the next five years. *Id.*

operational improvements.[83] Also required in Part II of the Plan, a priority facility's owner or operator must offer a justification for the decision to opt out of certain readily available pollution prevention measures.[84]

A Pollution Prevention Plan Summary [hereinafter Summary] will also be prepared under the Act.[85] This document essentially requires the same information as a Plan, but in a condensed form so as to facilitate random on-site inspection by DEP officials.[86] The Summary offers the essentials contained in the Plan, plus an owner or operator's certification that a Pollution Prevention Plan exists and is available for DEP inspection within the facility.[87] The Summary must be submitted to the DEP, who will make copies available for a requesting member of the public.[88]

After developing and submitting the original Plan and Summary, the Act requires that an annual Pollution Prevention Plan Progress Report [hereinafter Progress Report] is filed to account for the prior year's activity.[89] The Progress Report, again, requires a priority facility to identify the hazardous materials from each production source, and elaborate on how it fared in its attempt to reduce these during the prior year.[90] As if to stress a valuable economic lesson to industry officials, the Progress Report is to include in its analysis an accounting for costs "associated with the use, generation, release, or discharge" of hazardous

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83 *Id.*

84 *Id.* The justification must be supported by a "description of the valuation methods used by the owner or operator to determine whether to install or utilize each option . . . that would have resulted in a greater percentage reduction in the use of hazardous substances or generation of nonproduct output than the option chosen." *Id.*

85 *Id.*

86 *Id.* These documents are required to be maintained at the industrial facility. Also, pursuant to N.J. STAT. ANN. § 13: 1D-46, a DEP official may enter a facility "for the purpose of obtaining information concerning the industrial facility's pollution prevention practices, reviewing a Pollution Prevention Plan, ascertaining the quality of any work performed in accordance with this [Pollution Prevention] [A]ct . . ., or ascertaining compliance with a facility-wide permit."

87 N.J. STAT. ANN. § 13:1D-41 (West 1991).

88 *Id.*

89 *Id.* This measure goes into effect after the first year that the Pollution Prevention Plan measures have been in place. *Id.*

90 *Id.* This includes an explanation if the annual progress was less than that previously projected in the five year Plan. *Id.*

substances, as well as "the cost of treatment and disposal of hazardous waste and liability insurance; and the savings associated with investments in pollution prevention and the more efficient use of raw materials" amongst other things.[91] The Progress Report is also to include the bottom line calculation of reduction or increase in the use or production of hazardous materials, per unit of production, for each targeted production process, as compared with the previous year.[92]

Demonstrating that the DEP is willing to be reasonable, the Act provides the DEP the authority to except certain hazardous materials in certain production processes from the reduction requirement.[93] These exceptions, called input-use exemptions, will only result after the DEP has been satisfied that there exists no reasonable alternative to the current use or process.[94] Another provision of the Act allows for the protection of an industry's trade secrets.[95] The provision allows a facility to refrain from reporting the specific chemical identities of protected hazardous substances[96], and other information, but requires a generic description in their stead. The DEP, however, is ultimately able to judge the validity of a trade secret claim.[97] If the trade secret claim is deemed valid, the protected information is omitted from the Pollution Prevention Plan Summaries which are made available to the public.[98]

The DEP is equipped with the authority to approve the Plan, Progress Report, or Summary.[99] It can also require revisions and

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91 *Id.*

92 *Id.* The report should indicate the procedures implemented in order to achieve reduction. *Id.*

93 N.J. STAT. ANN. § 13:1D-40 (West 1991).

94 *Id.* A facility owner or operator is required to exhibit, in writing, that the use or emission of hazardous material cannot be reduced below the then-existing level. *Id.*

95 N.J. STAT. ANN. § 13:1D-47 (West 1991).

96 *Id.* A facility's owner or operator must file a trade secret claim with the DEP's Commissioner pursuant to this provision. The claim must demonstrate, amongst other elements, that the information, if disclosed, would be likely to cause substantial economic disadvantage or harm. *Id.*

97 *Id.* The facility owner or operator's only recourse is an administrative hearing, at which the owner or operator has the burden of showing the validity of the trade secret claim. *Id.*

98 *Id.*

99 N.J. STAT. ANN. § 13:1D-43 (West 1991).

modifications before approval.[100] A facility's license to operate, however, may be in the balance until the DEP is satisfied.[101]

Upon knowledge of a facility's violation of the Act, the DEP has several legislatively proscribed actions from which to choose.[102] Aside from issuing an order for compliance[103], the DEP Commissioner can commence a civil action for relief[104] or impose a civil administrative penalty of $15,000 per violation, for each day the violation exists.[105]

1. Facility-Wide Permitting System

Another way the DEP's Office of Pollution Prevention will police the Act is by better controlling the permits the industries need in order to operate.[106] The provision is significant as a marked change from New Jersey's previous method of permit regulation.[107] New Jersey had for years issued hundreds of permits to each facility, regulating emissions from different pollution

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100 *Id.*, though the DEP is required to consider the financial impact any such disposition would have on the facility.

101 *See infra* note 106 and accompanying text.

102 N.J. STAT. ANN. § 13:1D-49 (West 1991).

103 *Id.* The order should specify the violations and apprise the violator of the right to an administrative hearing.

104 *Id.* Relief includes "an assessment against the violator for the costs of any investigation, inspection, or monitoring survey that led to the discovery and establishment of the violation, and for the reasonable costs of preparing and litigating the case."

105 *Id.* This section also provides that a $15,000 civil penalty may also be imposed for each day the violation continues after the DEP has commenced any one of the actions available to them (i.e. order, civil action, or civil administrative penalty).

106 N.J. STAT. ANN. § 13:1D-48 (West 1991); *see also* Walder, *supra* note 28.

107 *See* N.J. STAT. ANN. § 13:1D-1 (West Supp. 1991). For years, New Jersey's regulatory efforts focused on a system that issued permits for each separate source of pollution, creating difficulties in efficiency. *Id.* In a December 18, 1989, public hearing on the pollution prevention initiative, the DEP Commissioner, Christopher Daggett, characterized the permit system in the following way:

> [I]n many facilities there are many different permits that [an industry] has to get from the DEP. There will be an air permit, a water permit, various hazardous type waste permits — those sorts of things. And they are on different timetables as well. You are just finishing one and you have to start on a water permit, or they are overlapping, whereas you are winding up one, and the other one begins, and so on. There is not a real good ability in the Department to take all those permits together and look at them comprehensively for pollution prevention reasons.

See Public Hearing, *supra* note 52, at 11.

sources.[108] The emissions from the different sources were monitored by enforcement units assigned to separate DEP divisions.[109] This method was not only cumbersome to manage, it also allowed pollution to be transferred from saturated pollution medias to medias that had not yet reached quotaed emission limits.[110]

The Pollution Prevention Act instead proposes a single, facility-wide permitting system which will regulate the cumulative emissions.[111] This measure will not only serve the purpose of limiting total emissions in the first place, but will also improve the program's efficiency.[112] The permitting system under the Act also ensures compliance due to its threat to the industry's operations.[113] That is, the Office of Pollution Prevention is authorized to condition the issuance of a facility's permit on the submission of a Pollution Prevention Plan.[114]

2. Piloting Programs

Perhaps anticipating the Act's eventual approval in the Assembly and Senate, three New Jersey chemical companies volunteered their participation in a pollution prevention pilot program.[115] The pilot program, instituted by a farsighted Department of Environmental Protection, will essentially test the sweeping change that a pollution prevention policy proposes to require.[116]

Announced in April of 1991, four months prior to the Act's passage, the pilot companies began the eighteen month pro-

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108 *See* Walder, *supra* note 28.

109 *See* Christopher M. Loder, *Florio Tells of Industrial Permit Consolidation*, STAR-LEDGER (Newark), Mar. 22, 1991. According to DEP Commissioner Scott Weiner, the former process treated air, water and hazardous waste discharge as "individual environmental issues subject to standards monitored by independent enforcement units." *Id.*

110 *See* DEP ENVIRONMENTAL NEWS, *supra* note 42.

111 *Id.*, *see also* Loder, *supra* note 109.

112 *See* Loder, *supra* note 109.

113 *See* Walder, *supra* note 28.

114 N.J. STAT. ANN. § 13:1D-43 (West 1991).

115 *See* Gregory De Morris, *New Jersey Starts Pollution Prevention Pilot Program*, CHEMICAL WEEK, Apr. 3, 1991, *available in* LEXIS, Nexis Library. The initial pilot companies included Schering-Plough Pharmaceuticals, Sybron Chemicals & Fisher Scientific. *Id.*

116 *Id.*

gram.[117] The pilot program consisted of the DEP's onsite review of each company's production practices for purposes of implementing and evaluating pollution prevention measures.[118] The same companies, it was proposed, would serve as a classic model to the rest of the regulated industry after the anticipated passage of the Pollution Prevention Act.[119] Demonstrating that the environmentalists and industrialists are willing to work together, the pilot program may just be one key to the Pollution Prevention Act's success.

Aware that the Act proposed to traverse unchartered territories for New Jersey legislation, the New Jersey Legislature also provided for a trial and error period for the established facility-wide permitting system.[120] Specifically, the Act provides for the designation of ten to fifteen priority facilities each to receive a facility wide permit for evaluation purposes.[121] After a three year evaluation period, the DEP will report to the Legislature and Governor an analysis of the facility-wide program.[122]

3. Companion Bills

Two companion bills, each complementing the Pollution Prevention Act, were introduced in the New Jersey Legislature within the same time period.[123] This well plotted barrage of revolutionary measures was initially what made up New Jersey's Pollution Prevention package,[124] and demonstrated the serious changed efforts on the part of New Jersey lawmakers. Though not adopted as law at the same time as the Pollution Prevention Act, the companion bills are expected to gain approval.[125]

The first of the companion bills is dedicated to the establishment of a technical assistance program to expeditiously assist in

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117 *Id.*

118 *Id.*

119 *Id.*

120 N.J. STAT. ANN. § 13:1D-48 (West 1991).

121 *Id.*

122 *Id.* Evaluating the successes, as well as shortcomings of the program, the DEP will measure the viability of an expanded facility-wide permit program.

123 78 N.J. LEGIS. INDEX, No. 19, at S29, S39 (Aug. 22, 1991). *See* CITIZEN ALERT, *supra* note 4, at 3.

124 *See* CITIZEN ALERT, *supra* note 4, at 3.

125 *Id.*

the development of efficient prevention measures.[126] The program, which is provided for financially out of the Pollution Prevention Fund,[127] will be established at the New Jersey Institute of Technology, and will assist on the technical aspects of an industry's pollution prevention plan.[128]

The Toxic Packaging Reduction Act completes the pollution prevention "package", providing the mechanism whereby certain manufacturers and distributors will be required to reduce the level of toxics in the manufacturing and use of packaging[129] materials.[130] This bill will specifically prohibit a packaging or product manufacturer from selling any packaging material or products packaged with materials containing "inks, dyes, pigments, adhesives, stabilizers, or any other additives containing any lead, cadmium, mercury or hexavalent chromium which has been intentionally introduced. . .during manufacturing."[131]

Beginning in July of 1992, the bill proposes to incrementally phase out the use of toxic laden packaging materials, especially, according to the bill, due to the fact that discarded packaging constitutes the largest category of solid waste in New Jersey's waste stream.[132] This bill, like the Pollution Prevention Act, will reduce the amount of toxics to be dealt with using costly disposal or treatment measures.[133]

IV. Analysis and Conclusion

A skeptic might say that the Pollution Prevention Act is ineffective, too good to be true, or alternatively that it may be easier said than done. Such sentiment is prompted, understandably, by the presence of industry support for the measure in such unprecedented magnitude. Is the law so weak and ineffectual that it eas-

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126 *See* 78 N.J. LEGIS. INDEX, No. 19, at S29 (Aug. 22, 1991).

127 N.J. STAT. ANN. § 34:5A-26 (West Supp. 1991), which allocates $200,000 for the implementation of a technical assistance program.

128 *See* CITIZEN ALERT, *supra* note 4, at 3.

129 Defined as "container[s] specifically manufactured for the purpose of marketing, protecting or handling a product." A. 2916, 204 N.J. Leg., 2d Sess. (1991).

130 *Id.*

131 *Id.* The bill excuses the incidental, as opposed to intentional, presence of the listed toxics.

132 *Id.*

133 *Id.*

ily elicits industry support? This seems doubtful considering the aggressive reduction numbers (50%) posed by the Act.

Even the greatest optimist, however, would note that the industrial officials triumphing the measure consist predominantly of New Jersey's larger industrial manufacturers—with mechanisms (i.e. money, technology and human resources) currently in place to facilitate the implementation of such a productions overhaul. This fact begs many questions. What happens to the forgotten small to mid-size manufacturer? Does it have the resources and ability to substitute expensive alternative raw materials for the materials currently used in the manufacturing process? Will these manufacturers, as some suggest, be run out of New Jersey?

One answer to the small to mid-size manufacturer's concerns may be a technical assistance program, or additionally, the Pollutionion Prevention Advisory Board. These provisions propose to pioneer the investigation for prevention techniques on behalf of "the industry". The likelihood of success of these provisions will depend on what the investigators define as "the industry". A prevention technique that is feasible to one facility may not be feasible in general. Ideally, the investigation should be conducted with a smaller industry's inherent resource limitations in mind.

Undeniably, the full implementation of the Pollution Prevention Act will require much effort. The New Jersey Legislature and industry leaders do, however, have the incentive to make this law work. If New Jersey's Pollution Prevention Act can serve as a viable solution for the state's economic/environmental problems, other states will follow its lead, thereby eliminating any conceivable disadvantage industries are placed in as a result of operating in New Jersey. Above all, the incentive exists because it makes good sense in a state that has long sought to preserve and protect the health of its public, as well as its fragile environment.

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