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# ECRA Verdict: The Successes and Failures of the Premiere Transaction-Triggered Environmental Law

David B. Farer\*

## I. Introduction

New Jersey's landmark Environmental Cleanup Responsibility Act (ECRA)<sup>1</sup> has permanently altered the environmental landscape. The law was the first to tie events in the real estate and business world to government sanctioned and monitored environmental audits and cleanups. Now in its fifth year, ECRA also has the dubious distinction of facing relentless criticism, not because of its basic and ingenious premises, but rather because of its flawed draftsmanship and questionable constitutionality as well as inadequacies, inefficiencies and delays in its administration. A number of other states have closely monitored New Jersey's ECRA. Several jurisdictions have proposed or adopted spin-off and related legislation. Many are expected to follow New Jersey's lead.

With four years of implementation, a revamped adminis-

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1. N.J. Stat. Ann. § 13:1K-6 to -13 (West Supp. 1987).

tration, new regulations and several legislative initiatives under its belt, ECRA now has a history upon which judgment of the successes and failures of the law and its administration may be based. The purpose of this article is to assess those successes and failures so that transaction-triggered environmental legislation and regulation in other jurisdictions may profit from the lessons learned through the New Jersey experience.

## II. Background

ECRA is an audit and cleanup law geared toward targeting spills and discharges of hazardous substances and wastes.<sup>2</sup> The method chosen by the New Jersey Legislature was to impose a “precondition” on the occurrence of particular events in the real estate and business world, including closure of industrial operations, transfers of real estate where such operations are located and transfers of companies owning or operating such real estate.<sup>3</sup> ECRA mandates that subject parties undertake environmental audits at the time of targeted business and real estate events and requires that cleanup plans be developed should contamination be found.<sup>4</sup> The New Jersey Department of Environmental Protection (DEP), the state agency charged with implementing and overseeing the law, must review and approve sampling and cleanup plans prior to their implementation. The DEP must then sign off at the conclusions of the audits (if sites are clean), or agree to cleanup plans (if contamination is found), before the subject transactions, closures or transfers are completed.<sup>5</sup> Once cleanup plans are approved, applicants must also post financial assurances equal to anticipated cleanup costs.<sup>6</sup>

The law is self-policing. Applicants must commence agency notification within five days after triggering events and

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2. See N.J. Stat. Ann. § 13:1k-7 Legislative Findings and Declarations (West Supp. 1987).

3. *Id.*

4. *Id.* § 13:1K-9, -11.

5. *Id.*

6. *Id.* § 13:1K-9.

must thereafter maintain a steady compliance schedule.<sup>7</sup> An array of non-compliance penalties act as a powerful enforcement hammer.<sup>8</sup> Failure to comply renders a subject transaction voidable, either by the agency or the transferee, and opens the door to fines of up to \$25,000 per day.<sup>9</sup> Non-complying owners and operators are rendered strictly liable, without regard to fault, for cleanup costs and other damages.<sup>10</sup> Officers and management officials who knowingly authorize ECRA violations may face personal liability.<sup>11</sup>

Unlike other cleanup laws triggered by the occurrence of a spill or discharge (for example, the New Jersey Spill Compensation and Control Act,<sup>12</sup> known as "the Spill Act"), or by an affirmative and unilateral determination of cleanup responsibility by an agency,<sup>13</sup> ECRA is transaction-triggered, and the agency need only intrude, Solomon-like, to divide the sale price between profit and priority pollutant. Costs from initial sampling and remedial investigation through cleanup and post-cleanup monitoring are borne solely by the private sector, and application fees — rather than taxes — provide the bulk of the program funding.<sup>14</sup>

While other permit programs<sup>15</sup> require that applicants obtain licenses in order to discharge pollutants, an ECRA "permit" is permission to stop operating or to transfer property, assets or shares. In the hot-house environmental climate

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7. *Id.*

8. *Id.* § 13:1K-13.

9. *Id.*

10. *Id.*

11. *Id.* § 13:1k-13(c).

12. N.J. Stat. Ann. § 58:10-23.11 (West 1982).

13. *See, for example*, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601-75 (West 1983 & Supp. 1987). Under CERCLA, the U.S. Env'tl. Protection Agency may designate "responsible parties" as joint and severally liable but courts have discretion to determine liability on a case by case basis. H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 73-73, *reprinted in*, 1986 U.S. Code Cong. & Admin. News 2835, 2855-56.

14. Pursuant to N.J. Stat. Ann. § 13:1K-10a (West Supp. 1987), the Dep't of Env'tl. Protection adopted a fee schedule, N.J. Admin. Code tit. 7, § 1-4 (1985) now supplanted by a new fee schedule, N.J. Admin. Code tit. 7, § 26B-1.10 (1987).

15. *See, for example*, the National Pollution Discharge Elimination System under the Federal Water Pollution Control Act. 33 U.S.C. §§ 1251-1376, 1342 (1983).

of New Jersey, ECRA dovetails with other state laws such as the Spill Act to create a new class of enforcer, mortgagees, who are as vigilant as the DEP. Under the Spill Act, the state has the right to impose a first priority lien, commonly known as a "superlien," on property which an owner or operator has failed to clean up on demand by the state.<sup>16</sup> The superlien takes priority over all other liens on the property, including first mortgages.<sup>17</sup>

New Jersey mortgagees, having learned the hard way by suffering superlien losses, were among the first to recognize the risks inherent in financing purchases of environmentally unsound real property or businesses which own such real property. As a result, not only do purchasers face more difficulty in securing financing, but mortgage lenders often take an aggressive stance to require that sellers, the ECRA applicants, proceed expediently and completely through the ECRA process.

The unique approach of ECRA as both site-specific and transaction-specific has generated intense interest throughout the nation. The Pennsylvania legislature has considered legislation almost identical to ECRA.<sup>18</sup> New York has kept a close eye on New Jersey's wide-ranging law and has proposed an act that acknowledges ECRA as its model.<sup>19</sup> In Massachusetts, an ECRA-type law is making its way through state government.<sup>20</sup> California has considered ECRA, while San Francisco passed an ordinance requiring applicants for particular types of building permits to undertake site histories and soil sampling regimens followed by cleanups where contamination is found.<sup>21</sup> In Connecticut, 1985 legislation requires pre-transfer filings of declarations as to the environmental status of industrial sites which generate hazardous wastes above a threshold

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16. N.J. Stat. Ann. § 58:10-23.11f (West 1982 & Supp. 1987).

17. *Id.* § 58:10-23.11f(f).

18. Pa. H. No. 1574, 1985 Session.

19. Governor's Program Bill 1986, Memorandum in Support of Bill No. 1474-B, 1987-1988 Regular Sessions at 2.

20. Mass. H. Bill No. 2130, 1987 Session.

21. City and County of San Francisco, Cal. Ordinance 253-86, art. 20, Public Works Code (1986).

amount.<sup>22</sup> Maryland and Illinois have proposed ECRA-type legislation. Michigan made recent inquiries of the DEP concerning the New Jersey experience.<sup>23</sup> These various laws and initiatives are discussed in further detail below.<sup>24</sup>

Other states with "superlien" type statutes include Connecticut, Massachusetts, and New Hampshire.<sup>25</sup> A number of states also require that sellers of hazardous waste sites notify purchasers of the existing wastes.<sup>26</sup> The United States Environmental Protection Agency recently proposed similar notice requirements in the sale of federal property.<sup>27</sup> Under those circumstances, sales trigger notification requirements but do not otherwise mandate action.

### III. The Legislation

ECRA was artlessly drafted. For all of its ingenuity in concept, the execution is incompletely realized, imprecise and confusing. Central to the problems of ECRA is the major issue of the triggers, those events or circumstances which give rise to the application of the law.

The ECRA trigger is defined as "the closing, terminating or transferring [of] operations" by the "owner or operator" of "an industrial establishment."<sup>28</sup> These terms of art are as difficult to decipher as Duchamp's "Nude Descending a Staircase," but yield decidedly less aesthetic enlightenment. "Closing, terminating or transferring operations" is defined as:

the cessation of all operations which involve the genera-

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22. Conn. Gen. Stat. § 223-454, Pub. Act No. 85-568, 1985.

23. Interview with Lance Miller, Assistant Director of the Dep't of Env'tl. Protection, Division of Hazardous Waste Management ("ECRA Chief"), Jan. 25, 1988 [hereinafter referred to as Miller Interview].

24. See text accompanying notes 90-136.

25. Conn. Gen. Stat. § 22a-452a (West 1985 & Supp. 1988); Mass. Gen. Laws Ann. ch. 21E(14) (West Supp. 1987); N.H. Rev. Stat. § 147-B:10:10-b (Equity Publishing Co. Supp. 1987).

26. *E.g.*, 35 Pa. Cons. Stat. Ann. § 6018.405 (West Supp. 1987)(grantor must so indicate in deed); Ill. Stat. Ann. ch. 111-½, 1021, 1039 (West 1977)(state agency can also impose restrictions).

27. See 53 Fed. Reg. 850-54 (1988)(to be codified at 40 C.F.R. at 8).

28. N.J. Stat. Ann. § 13:1k-8 to -9 (West Supp. 1987).

tion, 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 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 the assets, the conveyance of the real property, dissolution of corporate identity, financial reorganization and initiation of bankruptcy proceedings.<sup>29</sup>

The "cessation" trigger is relatively clear when it involves a complete shutdown of operations. Interpretational problems have arisen, however, when an operator ceases all of its operations involving hazardous substances and wastes but continues operating the rest of its business, or where, for instance, all but a "caretaker" presence is terminated.

The most problematic definition is that of "change in ownership," a term which is followed in the text by several examples such as merger or acquisition, dissolution of corporate identity and bankruptcy. There is a single limitation to the cited examples, corporate reorganization not substantially affecting the ownership of the industrial establishment.

Exemplary terms such as "sale of the controlling share of the assets"<sup>30</sup> confuse control of a corporation through stock ownership with the sale of whatever constitutes the majority of an entity's assets (however the term "assets" is to be defined). There is an implicit assumption that subject entities will be corporations. The sole exception to the change of ownership definition involves "corporate reorganizations." The specificity of the exception appears to rule out similar activities in other entities which do not substantially affect underlying equity interests.

The bankruptcy trigger does not differentiate between

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29. *Id.* § 13:1k-8b.

30. *Id.*

situations such as a Chapter 11 reorganization under federal bankruptcy law, pursuant to which a company may be attempting to resolve financial difficulties and then move forward without terminating its business or transferring the majority of its assets,<sup>31</sup> and a Chapter 7 liquidation proceeding.<sup>32</sup> There is no reference to other types of insolvency. Furthermore, the "initiation of bankruptcy proceedings" is not, per se, a closing, terminating or transferring operations, in any sense of those words.

Such obscurities as these are compounded when considering the object of the trigger, the "industrial establishment." It is defined 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," which is within particular groupings of the Standard Industrial Classification Manual (SIC Manual),<sup>33</sup> a publication of the Executive Office of the President, Office of Management and the Budget.<sup>34</sup>

The SIC Manual was conceived as a tool for measuring rates of development within American industry and commerce, and was first prepared prior to any of the modern environmental legislation and without any consideration as to whether a particular business was a user, producer or dumper of hazardous substances and wastes.

The SIC Manual divides all industry and businesses into two digit "Major Groups" such as "Primary Metal Industries" (Major Group 33), and "Amusement and Recreational Services" (Major Group 79), and four digit categories within the Major Groups, such as steel foundries (3325) and aerobic dance facilities (7991). In delineating those industries which are subject to ECRA, the law goes no further than to specify twenty-four Major Groups. Most are within the manufactur-

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31. 11 U.S.C. § 1101-74 (1983).

32. 11 U.S.C. § 701-66 (1983).

33. N.J. Stat. Ann. § 13:1k-8f (West Supp. 1987).

34. Office of Management and Budget, Standard Industrial Classification Manual (1987 ed.). Available from National Technical Information Service, Springfield, Va. 22150.



ing sector, but several are found in other areas such as Communications, Transportation Services and Wholesale Trade — Nondurable Goods.

While the legislative goal was apparently to target those operations most likely to use, generate or dispose of hazardous substances or wastes, the failure of ECRA to further delineate subject businesses resulted in a plethora of anomalies. One of the examples cited most often was the inclusion of travel agencies (Industry Number 4724) among the subject Transportation services (Major Group 47) which includes airports, railroad car repair shops and horse-drawn carriages. The result was that travel agencies heated by oil (deemed a hazardous substance in New Jersey) were compelled to proceed through a complete ECRA audit and cleanup, while the gas station up the street and the muffler shop next door were exempt by virtue of non-applicable SIC codes. While the travel agency subgroup was later exempted by regulation, many inequities still exist.

A provision for subgroup exemptions by petition to the DEP is written into the law,<sup>35</sup> but DEP has by and large acted primarily on its own to exempt certain benign subgroups based upon DEP experience.<sup>36</sup> Failure of the legislature to carefully delineate subject businesses was one cause for the extraordinary agency backlogs discussed below. More careful drafting could have avoided these inequities, inconsistencies and ambiguities.

In determining who is responsible for complying with ECRA, the statute simply refers to the "owner or operator of an industrial establishment."<sup>37</sup> The terms "owner" and "operator" are not defined; priorities in responsibility are not set forth. Since the array of ECRA triggers includes the conveyance of real property, it appears implicit in the law, given the legislative declaration of intent, that one who owns real estate where an unrelated industrial operator carries on a subject business must proceed through ECRA when the real estate is

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35. N.J. Stat. Ann. § 13:1k-8f (West Supp. 1987).

36. See N.J. Admin. Code tit. 7, § 26B-1.8 (1987).

37. N.J. Stat. Ann. § 13:1k-9 (West Supp. 1987).

to be sold or where any of the other triggering events concern the ownership entity alone.

For example, if all of the shares of a Nebraska company which owns New Jersey industrial real estate are purchased by a California corporation in a transaction negotiated and consummated in Los Angeles, the transaction affects ownership of subject property and ECRA ostensibly applies. The Nebraska corporation is considered the "owner" of an "industrial establishment," and DEP considers the "controlling share of the assets" of that corporation to have been transferred. However, this is not spelled out with any specificity in the law. Interpretations are left to the DEP. Nor is there any division of responsibility between, for example, a landlord as owner and a tenant as operator of an establishment where the tenant's operation is ending. While the phrase "owner or operator" is common to environmental compliance statutes and is used in the ECRA penalty provision to create a strict liability framework,<sup>38</sup> lack of a comprehensive chain of responsibility has led to widespread confusion.

Another failing of the legislation is that there are no threshold amounts of hazardous substances or wastes, the presence of which invoke the law. Also, while there are time requirements for actions by applicants, there are no substantial requirements that the DEP act in a timely manner.

A major oversight in the legislation was the failure to provide a mechanism by which an applicant may determine whether or not its business or transaction is subject to ECRA compliance. Shortly after the law went into effect on December 31, 1983, a flood of requests for "non-applicability" status overwhelmed the DEP. With the spectre of DEP's power to void transactions on top of the pre-existing superlien hammer, buyers and lenders demanded that sellers obtain determinations from the DEP as to whether or not particular transactions and events were subject to the law. The sellers and the buyers themselves, confused by the law and seeking guidance

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38. Failure to comply "renders the owner or operator of the industrial establishment strictly liable, without regard to fault, for all cleanup and removal cost . . ." *Id.* § 13:1k-13.

from the DEP, were powerless to act without agency approval. Lawyers, confronted by the array of ambiguities inherent in the legislation, were unwilling and unable to issue opinion letters as to the applicability or non-applicability of ECRA in a given situation.

DEP reacted in makeshift fashion, issuing decisions which were, and still are, questionable in analysis, consistency and authority. In the understaffed agency, scarce manpower was diverted to cope with the thousands of requests. Also absent from the legislation was a process whereby applicants could enter into bonded agreements with the state to proceed with all required ECRA obligations while the state in turn would permit the particular transaction to proceed to closing.

#### IV. Administration

DEP never knew what struck when ECRA took effect. The legislature approved \$400,000 to fund the program.<sup>39</sup> The Bureau of Industrial Site Evaluation (BISE), the DEP subdivision appointed to administer ECRA, was staffed in anticipation of perhaps one hundred ECRA submissions for 1984, its first year of operations.<sup>40</sup> DEP had no plans concerning determinations of applicability or non-applicability of the law to particular transactions or businesses, and no one within BISE had any substantial business or real estate experience. In fact, nearly five hundred full submissions were filed.<sup>41</sup> Thousands of requests for non-applicability determinations were registered in that first year.<sup>42</sup> With neither sufficient staffing nor experience to cope with the load or the intricate interpretational difficulties posed by the law, the program was quickly overwhelmed. Only now, four and one half years later, is it approaching recovery.

In the private sector, the array of opposing interests categorized by environmental agencies as "the regulated community," investors and developers who were accustomed to clos-

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39. N.J. Stat. Ann. § 58:10-23.11o(6) (West 1982 & Supp. 1987).

40. Miller Interview, *supra* note 23.

41. *Id.*

42. *Id.*

ing transactions within weeks after signing sale agreements were suddenly faced with critical, sometimes fatal, delays measured in the multiples of months. Requests for determinations by DEP of applicability or non-applicability languished interminably because of agency indecision.

Businesses planning acquisitions and mergers were flabbergasted to find that transactions involving foreign companies with world-wide assets and one piece of industrial real estate in New Jersey were stymied due to ECRA's broad trigger and the DEP's even broader interpretations. Even those who were convinced that ECRA's application to out-of-state transactions violated the Constitution were guided by expedience in turning away from court challenges and toward grudging compliance.

DEP's rules offered no guidance to applicants. The "interim" emergency regulations promulgated at the outset of the program remained in effect for four years and did little more than parrot the imprecise language of the law.<sup>43</sup> Promises to revamp the regulations were forgotten as DEP struggled to organize BISE.

Aside from understaffing and underfunding, the primary problems of the startup period were:

1. Ad hoc, inconsistent and often illogical determinations of applicability or non-applicability of the law, based, among other reasons, upon strained readings of the SIC Manual. For example, DEP used the SIC Manual definition of "auxiliary facility" to apply an industrial operator's subject SIC number to a geographically remote warehouse rented by the operator to store its excess office furniture.

2. Failure of the senior program administrators to delegate authority to field inspectors and lower level operatives for simple questions of applicability, sampling and cleanup. (This was not particularly surprising, since the administrators themselves were uncertain and inconsistent as to what positions they should take.)

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43. The new ECRA rule, N.J. Admin. Code tit. 7, § 26B (1987), supplants the earlier regulations.

3. Lack of definitive sampling and cleanup standards. (The ECRA program is still without such standards.)

4. Use of internal policy decisions, both written and unwritten, which were tantamount to regulatory rule-making, avoided public participation and were generally shielded from the public.

The policies, like the decisions of applicability, were based upon DEP's attempts to interpret the ECRA triggers as broadly, rather than as sensibly, as possible, in order to bring the maximum number of transactions within the ECRA ambit. For example, ECRA Policy No. 11,<sup>44</sup> which was rescinded following prompt protest, declared that a lease for more than twenty years constituted a "sale, transfer or closing" thereby triggering ECRA. Moreover, DEP flatly refused to invoke a provision of the law permitting deferral of cleanup when the use of an industrial establishment was to remain the same following a triggering transaction.<sup>45</sup> Such questionable decisions contributed to BISE's overload and gave the appearance that the ECRA Bureau considered itself the only environmental act in town.

As the program proceeded, BISE developed unofficial and generally applied cleanup levels, though again the information was disseminated primarily by word-of-mouth among the cognoscenti rather than by regulatory fiat. BISE also developed a Draft ECRA Sampling Plan Guide by June of 1986.<sup>46</sup> The guide is still in draft and serves only as general guidance for the regulated community. BISE considers its technical standards independent of those used by other branches of DEP, and BISE cleanup levels tend to be stricter than those applied elsewhere within DEP.

Agency backlogs continued to grow. Applicants went to every length possible to provide complete submissions to

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44. ECRA Policy No. 11, Long Term Leases, Division of Waste Management, Dep't of Env'tl. Protection (June 11, 1986), rescinded by ECRA Policy No. 11A, Division of Hazardous Waste Management, Dep't of Env'tl. Protection (Dec. 15, 1986).

45. N.J. Stat. Ann. § 13:1k-11 (West Supp. 1987).

46. Available upon request from the Industrial Site Evaluation Element, New Jersey Department of Env'tl. Protection, CN-028, Trenton, New Jersey 08625.

DEP, only to have the agency reply that it would take DEP six months to assign a case manager to first review all of the documentation provided.

One stop-gap offered by DEP was the option of an Administrative Consent Order (ACO) whereby DEP permitted the transaction to be completed pending the ECRA audit and any required cleanup. In return the applicant agreed to post an immediate financial assurance, usually in the form of a letter of credit, in the maximum possible amount of cleanup, together with an undertaking that the party proceed with whatever sampling and cleanup requirements were thereafter required by DEP. The right to appeal DEP decisions and penalties had to be waived. In other words, entering into an ACO was tantamount to delivering a blank check to DEP. ACOs, which were never addressed in the legislation, were issued at the sole discretion of DEP.

During the first phase of ACOs, DEP's minimum requirement for financial assurance was \$1,000,000, even if the site in question was of relatively low concern. The agency has, however, reacted to wide-spread criticism by considering financial assurances on a more tailored basis. The agency has also succeeded in streamlining the ACO process, which was a drawn out, frustrating series of events stretching into months. Now DEP churns out the required documents within three weeks to a month from application.

The spring of 1986 saw a major restructuring of DEP, which resulted in a revamped ECRA administration mandated by the DEP Commissioner to address the long-delayed regulation redraft and to cut delays. The Commissioner also engaged the New Jersey Department of Treasury's Office of Management and the Budget (OMB) to analyze the efficiency of the ECRA office and to propose administrative methods by which the agency could operate more efficiently and quickly.

In November, 1986, OMB, having met with DEP as well as key representatives of the private sector, rendered a report concluding that the ECRA program was understaffed and inefficient, and that administrative fees first implemented by DEP in 1985 were insufficient to fund the needs of the

program.<sup>47</sup>

OMB made several helpful recommendations. It proposed that ECRA cases be divided into those of low and high environmental concern, and that matters of low concern be steered onto a "fast track" for DEP review and sign-off within a four month period.<sup>48</sup> OMB also recommended an increase in staffing<sup>49</sup> to a level which only now, more than a year later, is being achieved.<sup>50</sup>

As the ECRA office, now known as the Industrial Site Evaluation Element, or ISEE, struggled with its twin goals of promulgating regulations and improving efficiency, the New Jersey Legislature commenced hearings on amendments to the law.<sup>51</sup> The hearings, spurred by the continued outcry of the regulated community to ECRA's problems, were intended initially to address technical amendments only. However, the project blossomed during hearings before Assemblyman Arthur R. Albohn's Regulatory Efficiency and Oversight Committee into a wholesale re-evaluation of the merits, goals, successes and shortcomings of the law and its administration. Lobbying was heavy on both sides of the fence, with the clearest signals being a sense of mutual mistrust between DEP and the regulated community and the absence of a perceivable middle ground. Given DEP's concurrent preparation of new regulations, DEP requested legislative deference to its administrative expertise. The business community insisted, on the other hand, that given the record of delay and inconsistency by DEP, stricter guidance was necessary through legislation.

The result, Assembly Bill 4151 (A.4151), was introduced on May 21, 1987 and passed by the Assembly with floor

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47. Office of Management and Budget, N.J. Dep't of the Treasury, *The Environmental Cleanup Responsibility Act (ECRA) Program: An Analysis with Recommended Efficiency Improvements and Staffing Levels and an Evaluation of Fee Charges* (November, 1986) [hereinafter OMB Analysis].

48. *Id.* at 31-32.

49. *Id.* at 29, 44.

50. It must be acknowledged, however, that one difficulty DEP has had in achieving the recommended staffing level is that of brain drain; many of the best and brightest personnel are lured away by the regulated community once their period of public service has rendered them an extremely valuable commodity.

51. Hearings commenced October 27, 1986.

amendments in September 1987. It not only clarified the series of events which constitute ECRA triggers, but also integrated a number of the policies developed by DEP, imposed "bright line" tests for transaction triggers, set time deadlines for DEP responses and instituted an arbitration process for disputing DEP determinations.

However, after the bill passed the Assembly by a resounding vote of 58 to 12, it proceeded to the Senate where it languished through the balance of the legislative session and thereafter died. In the 1988 session, Assemblyman Albohn's reconstituted committee, now called the Assembly Governmental Efficiency and Oversight Committee, promptly reconsidered the bill, now labelled A.59, and reported it on February 1, 1988 for reconsideration by the Assembly as a whole, which passed it again, this time by a 60-15 majority. The bill is now before the Senate Energy and Environment Committee.

Meanwhile, DEP finally published a proposed new rule on May 4, 1987,<sup>52</sup> after the bulk of debate had been completed in the legislature and prior to passage of A.4151. While DEP cast much of the redraft in terms similar to those pounded out as compromise language in the course of the legislative hearings, DEP adhered to its own positions and interpretations in nearly every substantive area of its proposal. As a consequence, the proposed rule was subjected to exhaustive commentary by the public, so much so that final publication of the rule, originally scheduled for August, 1987, was delayed for four months while DEP prepared responses to the copious commentaries.<sup>53</sup> The new rule was adopted on December 21, 1987.<sup>54</sup> While DEP's responses constitute a treasure-trove of DEP dicta, the adopted rule affirmed DEP's positions in its proposed rule and went even further in certain crucial areas to expand DEP powers.

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52. 19 N.J. Reg. 681(a) (1987).

53. Of the sixty-two pages of text in the rule promulgation, thirty-six pages constitute a summary of public comment with DEP responses to each comment. 19 N.J. Reg. 2435-97 (1987).

54. *Id.*



The regulations feature an array of new definitional obscurities which, instead of clarifying the set of ECRA triggers, will only result in fresh uncertainties in structuring transactions as well as continued unpredictability in DEP's application of the law. Many of these inconsistencies and ambiguities were highlighted and solutions proposed in public comments to the rule. However, most of the issues were explained away by DEP in its responses, with the text of the regulation left basically intact.

There are several positive achievements of the new rule. At last, one document incorporates all the policies of ISEE, which claims it will no longer operate under separate written policies.<sup>55</sup> Other achievements include a subchapter on Administrative Consent Orders<sup>56</sup> (although DEP retains its full discretion in determining whether or not it will grant one) and a provision for exemption where minimal amounts of hazardous substances are used.<sup>57</sup> (There is a question, however, as to how useful the provision will be, given the tough guidelines which must be met). There is also a new provision for limited conveyance approvals permitting transfer of up to twenty percent of the appraised value of real property and permitting such conveyances to occur without an environmental audit of the entire premises, but only where the parcel to be conveyed has never been involved in the generation, manufacture or other use of hazardous substances and wastes.<sup>58</sup> How an owner will be able to certify such a fact is not explained. New operational subgroup exemptions were also carved out from the Standard Industrial Classification Major Groups covered by ECRA.<sup>59</sup>

The impact of the new regulations is almost exclusively on the interpretation of ECRA triggers and the limited exceptions to ECRA applicability. Still absent from the regulations are the ground rules to be followed by both DEP and appli-

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55. Miller Interview, *supra* note 23.

56. N.J. Admin. Code tit. 7, § 26B-7 (1987).

57. *Id.* § 26B-10.

58. *Id.* § 26B-13.

59. *Id.* § 26B-1.8.

cants in the process central to the law, that is, the sampling and cleanup standards to be used in undertaking and expediting the environmental audits and cleanups which are, after all, the ultimate goals of ECRA and other transaction-triggered environmental laws.

The chronic problem of ambiguity in the interpretation and application of ECRA is inextricably bound up with the fact that ECRA is an environmental law, regulated by an environmental agency, but triggered by specific events taking place in the world of real estate, business and commerce. Thus, the agency is thrust into the position of interpreting and judging events and transactions entirely outside of its area of expertise, without the benefit of counsel from experts in the field. Not one position within ISEE is now held by an individual with substantial business or real estate experience. Instead, valuable talent is turned away from its proper focus of environmental regulation and into the alien workings of real estate and business transactions. Other states considering transaction-triggered environmental laws would be well-advised to assure not only that the law is written with input from business and real estate experts, but that the programs themselves include expert personnel qualified to make quick and accurate decisions as to the applicability or non-applicability of the law to certain transactions and businesses.

So, too, should others learn from New Jersey ECRA to avoid the backlogs which have been a focal point of program criticism. Having previously divided ECRA applications between those of low and high environmental concern (in line with the OMB audit recommendations), ISEE has now created a new category of ECRA case, that of medium environmental concern (MEC's).<sup>60</sup>

MEC cases will be those involving a single targeted issue which lends itself to relatively quick delineation and cleanup plan development.<sup>61</sup> DEP estimates that MEC's will consti-

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60. Interview with Joseph Fallon, Chief of Industrial Site Evaluation Element, Bureau of Environmental Evaluation, Cleanup and Responsibility Assessment, December 22, 1987 [hereinafter Fallon Interview].

61. *Id.*

tute half of the thirty percent of ECRA submissions currently deemed of high environmental concern.<sup>62</sup> With the addition of MEC's to the ECRA stable, ISEE seeks to proceed beyond eliminating the assignment backlog to shortening the internal review process as well.<sup>63</sup> MEC's should take a substantially shorter in-house review time than matters of high environmental concern before approval of sampling and cleanup plans.<sup>64</sup>

DEP's current goal is to reach the stage of cleanup plan approval on matters of high environmental concern in no more than a year from the applicant's initial filing.<sup>65</sup> MEC's should take a maximum of six months from initial filing to cleanup plan approval.<sup>66</sup> Matters of low environmental concern, which for the most part will require only limited sampling plans and little or no cleanup, should take no more than three months from the initial filing to final DEP sign-off.<sup>67</sup>

DEP's latest goal was to eliminate the backlog by the spring of 1988.<sup>68</sup> That goal is finally being approached. It has taken four and a half years for the agency to gain control over a program which imposes restraints on transactions in the real estate and business world. The lesson should be learned by others considering ECRA-type legislation. Sampling and cleanup guidelines and levels should be determined before hand. Management and budget considerations should be developed in the planning stages of such wide-ranging legislation. While the mutual mistrust between regulators and the regulated may be unavoidable, it militates even more strongly for careful legislation and for assurances that there are representatives within the agency who have a keen grasp of the non-environmental issues at stake.

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Fallon Interview, *supra* note 60; Interview with Lance R. Miller, December 22, 1987.

### V. Transactions and Litigation

In its public relations effort, DEP is fond of referring to ECRA as a buyer protection program. However, businesses committed to transferring operations into, out of, and around New Jersey, and which may face financial ruin when ECRA audits delay their transactions, are not so fast to agree; nor are corporations involved in acquisitions and mergers affecting nation-wide and world-wide sites and assets. What cannot be disputed is that ECRA has had an immense impact on the negotiation of commercial agreements of all varieties. Sellers and buyers, landlords and tenants, and lenders and borrowers are now careful to delineate in excruciating detail the relative environmental duties and liabilities of the parties. Environmental provisions are often pages long.

The courts have become the forum of disputes between DEP and the regulated community, as well as between private parties. The only constitutional challenge to ECRA to date was *McGraw-Edison Co. v. Edwards*,<sup>69</sup> 1985 litigation between DEP and Cooper Industries. The case highlighted not only constitutional concerns but also problems with the administration of the program. The suit involved a friendly tender offer in March, 1985, by Cooper Industries (Cooper) for the shares of McGraw-Edison Company (McGraw), an international company with 118 manufacturing facilities, only four of which were in New Jersey. By May, 1985, Cooper had acquired ninety-five percent of McGraw's stock. Cooper intended to merge McGraw with a wholly-owned Cooper subsidiary, with McGraw emerging as the successor corporation. McGraw was to continue its operations unimpeded.

In May, 1985, DEP notified Cooper and McGraw that the tender offer violated ECRA, because the successful completion of the tender offer had occurred without first initiating ECRA compliance and the parties did not delay consummation of the transaction pending ECRA clearance. DEP threatened substantial penalties (including potential voiding of the tender offer) and demanded that Cooper and McGraw

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69. *McGraw-Edison Co. v. Edwards*, No. 85-2430-A (D.N.J., filed May 23, 1985).

enter into an ACO with a \$5,000,000 financial assurance.

After preliminary negotiations through which DEP maintained its position, Cooper and McGraw brought suit, claiming, among other things, that ECRA's transactional precondition is in conflict with the Williams Act Amendment of the Securities Exchange Act, thereby violating the Supremacy Clause of the United States Constitution; that the preconditions of, and the undue and unreasonable delays under ECRA, are violative of the Commerce Clause, and that ECRA constitutes a deprivation of property without due process of law.<sup>70</sup> The case highlighted the impossibility of pre-transaction compliance in tender offers and other exchanges involving publicly traded stock and revealed that DEP's position in this regard was insupportable.

The matter had proceeded to the deposition stage, with motions for summary judgment filed, when the matter came to an abrupt conclusion by way of settlement in October, 1986. Cooper and McGraw agreed to drop the suit and undertake ECRA compliance in return for DEP's agreement to forego penalties and acknowledge that the transaction had not violated ECRA.<sup>71</sup> The settlement illustrated the conflict between the ECRA trigger and realities of the market where the "controlling interest" in a particular company may continually shift through market transactions, and where unsuspecting parties may buy and sell shares of stock to dramatic ECRA effect.

DEP, both in the settlement and its subsequent policy, recognized the impracticality of demanding pre-transfer compliance with ECRA in tender offer and other market transactions. DEP now acknowledges the validity of such transactions while requiring that ECRA compliance begin promptly upon the occurrence of such events. So far, a court determination as to the constitutional validity of the wide-ranging law has been avoided.

Another important case resulted in a decision confirming

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70. *Id.*

71. *McGraw-Edison Co. v. Edwards*, No. 85-2430-A (Consent Order, Oct. 14, 1986).

the no fault, strict liability basis of the law. In *Superior Air Products Co. v. NL Industries, Inc.*,<sup>72</sup> the issue was the relationship between ECRA, the Spill Act and New Jersey's Environmental Rights Act (ERA),<sup>73</sup> which gives private parties standing to assert state environmental causes of action when DEP, upon notice, fails to enforce its own laws.

The operative facts as accepted by New Jersey's Appellate Division were as follows: NL Industries, Inc. (NL) sold toluene-contaminated property to Superior Air Products Co. (Superior) in a pre-ECRA transaction. Superior carried on a manufacturing operation at the premises. In October, 1984, Superior entered into a lease and purchase option agreement for the premises. ECRA compliance was triggered and Superior duly commenced an ECRA submission, including a sampling plan.

Sampling revealed toluene contamination and Superior so notified its predecessor in title, as well as the ECRA Bureau. NL took no action. The ECRA Bureau mandated that a cleanup was necessary and set a deadline for Superior to submit another sampling plan to delineate the nature and extent of contamination. Further communications between Superior and NL did not prove fruitful.

Superior commenced suit in New Jersey's Chancery Division (the equity-based trial court) against NL and DEP. The claims against NL included a demand pursuant to ERA that NL perform a cleanup as required by the Spill Act. Superior also sought to compel DEP to take enforcement actions against NL under the Spill Act. DEP counterclaimed for an order that Superior comply with ECRA. Both NL and DEP moved to dismiss.

The Chancery Court denied NL's motion, granted DEP's, but then remanded the matter to DEP for an investigation to determine the responsible party. The court reasoned that the responsible party should pay for the remediation notwithstanding ECRA, that Superior should be permitted to enforce the Spill Act prior to being put in the burdensome position of

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72. 216 N.J. Super. 46, 522 A.2d 1025 (App. Div. 1987).

73. N.J. Stat. Ann. § 2A:35A-1 to -14 (West 1987).

paying for remediation, and that ERA compelled the court to remand Superior and NL to administrative proceedings before the DEP to determine the legality of NL's conduct.<sup>74</sup>

The Chancery Court did not accept DEP's position that given ECRA's standard of strict liability without regard to fault, the cleanup should proceed without a delay for determination of liability and responsibility. The court specifically rejected DEP's argument that ERA proceedings would consist solely of DEP enforcing ECRA, which it claimed it was already doing.<sup>75</sup>

In a unanimous decision, the Appellate Court set aside the remand to DEP and affirmed the denial of NL's motion to dismiss. The court held that once ECRA proceedings are pending, there are no mandatory administrative remands under ERA, and that given ECRA's standard of strict liability, an ECRA-mandated cleanup must proceed without the delay of a pre-cleanup determination of liability.<sup>76</sup>

Given the active ECRA case, the court reasoned that it was improper for the lower court to refer the matter to DEP for determination of liability, since "an ECRA proceeding is not a proceeding 'required or available to determine the legality' of conduct for purposes of an authorized remand to DEP under Section 8 of ERA."<sup>77</sup> The court noted, however, that the ECRA proceedings were not dispositive of the issue of responsibility and that Superior would still be able to proceed against NL for a judicial determination of liability.<sup>78</sup>

In making its decision, the Appellate Court ascribed great weight to DEP's argument that ECRA was intended to assure prompt cleanup without the time-consuming task of first determining responsibility.<sup>79</sup> The court also suggested that since Superior had been placed in the unenviable position of having immediately to undertake a costly remediation program, the trial judge should proceed swiftly to determine liability as be-

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74. *Superior Air Products*, 216 N.J. Super. at 53-54, 522 A.2d at 1028-29.

75. *Id.* at 54, 522 A.2d at 1029.

76. *Id.* at 55-66, 522 A.2d at 1030-36.

77. *Id.* at 56, 522 A.2d at 1030.

78. *Id.* at 65, 522 A.2d at 1035.

79. *Id.* at 63, 522 A.2d at 1035.

tween Superior and NL.<sup>80</sup> The Superior Air Products decision has been a great boost to DEP's ego, which has otherwise been in a chronically bruised state from consistent criticism of the ECRA program.

One non-ECRA case which has nevertheless affected ECRA compliance was the January, 1986, *Quanta Resources* decision by the United States Supreme Court.<sup>81</sup> There, Quanta Resources Corporation (Quanta) declared bankruptcy and the trustee sought to abandon, as burdensome and of no value, PCB-contaminated properties operated by Quanta in New Jersey and New York. The anticipated cleanup ordered by DEP alone far exceeded the available assets. The bankruptcy court authorized abandonment under traditional bankruptcy theories.<sup>82</sup> New Jersey and New York pressed the case. On appeal, the Court of Appeals reversed under public interest theories.<sup>83</sup> The United States Supreme Court consolidated these cases and granted certiorari.<sup>84</sup>

The Supreme Court affirmed the Court of Appeals decision overturning the bankruptcy court edict, declaring that where state laws or regulations are reasonably calculated to protect the public health and safety from "identified hazards," the trustee may not abandon property in contravention of those laws or regulations.<sup>85</sup> In so finding, the Court cited the Resource Conservation and Recovery Act, which authorizes the United States to seek restraints on activities involving hazardous wastes that "may present an imminent and substantial endangerment to health or the environment."<sup>86</sup>

The Quanta Resources case struck a blow to the argument that ECRA's bankruptcy trigger is preempted by federal bankruptcy law. Since the decision, however, the Circuits have

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80. *Id.* at 65, 522 A.2d at 1036.

81. *Midlantic National Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986).

82. *In Re Quanta Resources Corp.*, No. 81-05967 (Bankr. D.N.J. May 20, 1983).

83. *In Re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984); *In Re Quanta Resources Corp.*, 739 F.2d 927 (3d Cir. 1984).

84. *Midlantic National Bank v. New Jersey Dep't of Env'tl. Protection*, 469 U.S. 1207 (1985).

85. *Midlantic*, 474 U.S. at 507.

86. *Id.* at 506 (citing 42 U.S.C. § 6973 (1982 & Supp. III 1985)).



differed as to what constitutes "imminent and substantial endangerment." An ECRA-related bankruptcy case on point has yet to emerge.

The most recent ECRA-related decision was handed down by New Jersey's Appellate Division on March 1, 1988, *In Re Applicability of ECRA to the Robert C. Mitchell Technical Center*.<sup>87</sup> There, Celanese Corporation (Celanese) appealed a DEP determination that a Celanese Research and Development (R&D) facility in Summit, New Jersey, is subject to ECRA. While independent R&D facilities, SIC number 7391, are not among those covered by ECRA, DEP applied the SIC manual's auxiliary facility rule in determining that the Celanese Summit facility, which sought to develop new materials, processes and designs for Celanese production, constituted an auxiliary support facility which must be assigned Celanese's ECRA-subject primary SIC number.

Celanese argued, *inter alia*, that it is an unconstitutional denial of equal protection for the Celanese R&D facility to be ECRA-subject while independent R&D facilities escape ECRA jurisdiction, and that the use of the auxiliary facility rule constitutes a denial of due process because of statutory vagueness.<sup>88</sup> The Appellate Division rejected the Celanese arguments, holding that incorporation of the SIC Manual and its various rules and tests by reference is clear from the statute, that ECRA is entitled to liberal construction, and that the constitutional arguments raised were without merit.<sup>89</sup>

## VI. ECRA's Influence

One of ECRA's successes has been in spawning offshoot legislation. In 1985, Connecticut implemented "An Act Concerning the Disposal of Recycled Hazardous Waste Residue,"

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87. No. A-5451-86T7 (N.J. Super. 1988). The decision has not yet been approved for publication and has no precedential value pursuant to New Jersey Rule of Court 1:36-3 (West 1987) until such time as it is published.

88. *In re Applicability of ECRA to Robert C. Mitchell Technical Center*, No. A-5451-86T7 at 5, 6.

89. *Id.* at 6-10.

commonly referred to as the "Transfer Act."<sup>90</sup> The law requires that prior to transfer of subject properties and establishments, the owner or operator must submit to the transferee a prescribed, notarized certification stating that there has been no discharge of hazardous wastes at the premises or that any such discharge has been cleaned up in accordance with state law, and that any remaining hazardous wastes are being properly managed.<sup>91</sup> Within fifteen days after the transfer, a copy of the document must be filed with the state.<sup>92</sup>

If the owner or operator cannot submit such a certification, then prior to the transfer the transferee or another party to the transfer must certify to the state environmental agency that it will take whatever actions the agency deems necessary to mitigate or control on-site hazardous wastes.<sup>93</sup> Subject establishments are those which generate more than 100 kilograms of hazardous wastes per month, or which handle, use, transport or dispose of hazardous wastes generated by others.<sup>94</sup> There is no reference to SIC codes.

The definition of "transfer" tracks ECRA's troublesome "change of ownership" language while avoiding the class of ECRA triggers constituting cessation of operations.<sup>95</sup> There is no right, either of the state or the transferee, to void transactions. However, failure to comply renders the transferor strictly liable to the transferee, who is entitled to all damages incurred.<sup>96</sup> Any person who knowingly renders false information is liable to fines of up to \$100,000.<sup>97</sup>

Other than the certification process, there are no preconditions to transfer, no pre-transfer and cleanup plan requirements, no state oversight, and consequently no state-instigated delays. Nor is there a provision in the law for determinations of applicability or non-applicability.

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90. Conn. Gen. Stat. Ann. § 22a-454(b) (West 1985).

91. *Id.* § 22a-134a.

92. *Id.* § 22a-134a(b).

93. *Id.* § 22a-134a(c).

94. *Id.* § 22a-134(3).

95. *Id.* § 22a-134(1).

96. *Id.* § 22a-134b.

97. *Id.* § 22a-134d.

In 1986, the City and County of San Francisco passed Ordinance 253-86, requiring that applicants for building permits undertake site histories and soil sampling for hazardous wastes where the permit sought is for a construction project involving disturbance of at least fifty cubic yards of soil.<sup>98</sup> Affected sites are those bayward of the high tide line, as well as any other sites designated by the Director of Public Works through regulations.<sup>99</sup>

Once sampling results are submitted, the Director may either approve or disapprove the application, but no permit may be issued until the applicant completes a certification process.<sup>100</sup> If no hazardous wastes are found, the Director provides the applicant with a certificate of compliance.<sup>101</sup> If hazardous wastes are present for which there are no quantitative state or federal standards, the applicant must apply to the appropriate agencies to determine whether cleanup is necessary.<sup>102</sup> If quantitative standards are available, the applicant must perform whatever cleanup the state or federal agency requires.<sup>103</sup> If neither the state nor federal agency determines whether cleanup is necessary within six months of application, the City Attorney may institute legal proceedings against the property owner and the applicant seeking declaratory relief that hazardous wastes are present at the property, thereby constituting a public nuisance.<sup>104</sup>

Once cleanup is completed, the applicant must certify to the city that it has performed all necessary work and that it will remain liable for any failure to comply with the required cleanup plan.<sup>105</sup> Sellers and sellers' agents involved in the sale or transfer of *any* San Francisco real property must provide a copy of Ordinance 253-86 to buyers, and must obtain receipts

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98. San Francisco, Cal. Public Works Code, art. 20, §§ 1001-14 (1986).

99. *Id.* § 1001.

100. *Id.* § 1004.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

from the buyers acknowledging the copies.<sup>106</sup>

In New York, a 1986 Governor's Program Bill has advanced to Assembly Bill 1474-B, the Hazardous Substance Remediation Responsibility Act, currently under study by the Assembly Ways and Means Committee.<sup>107</sup> The statement in support of the bill, set forth in the Memorandum of the Governor's Program Bill, acknowledges that the proposal is patterned on New Jersey ECRA and cites certain statistics of the New Jersey program.<sup>108</sup>

The bill closely follows the New Jersey text. The transaction verbiage incorporates much of the problematic New Jersey trigger, though there are specific exclusions for mortgages and for transfers by death and incompetency.<sup>109</sup> (While mortgages do not constitute transfers of real property, New Jersey lenders have been adamant in requiring non-applicability determinations as a condition to taking back a mortgage as security for a loan.) Subject facilities are defined by the same unfortunate New Jersey reference to SIC Major Groups.<sup>110</sup>

The proposal does, however, integrate a procedure for obtaining non-applicability determinations, which would have to be granted or denied within thirty days from application.<sup>111</sup> It also provides that where cleanup plans are required but cannot be implemented prior to closure, transfer or termination of operations, owners and transferees could enter into consent orders with the state agency agreeing to a strict timetable and assuming all responsibility and liability for the undertakings.<sup>112</sup> This provision, though, should not be mistaken for an ACO process permitting transfers prior to cleanup plan approvals. Where the agency is backlogged and has not had the opportunity to review sampling results and an applicant's

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106. *Id.* § 1010.

107. N.Y. Bill A. 1474-B, 1987-1988 Regular Session, which if passed will amend Article 27 of the N.Y. Env'tl. Conserv. Law [hereinafter N.Y. Assembly Bill].

108. Governor's Program Bill 1986, Memorandum in Support of Assembly Bill No. 1474-B, 1987-1988 Regular Sessions at 3.

109. N.Y. Assembly Bill, *supra* note 107, § 27-1505(4).

110. *Id.* § 27-1505(1).

111. *Id.* § 27-1507.

112. *Id.* § 27-1509(4).

cleanup plan, the New York proposal would not offer any relief.

As with ECRA, either the transferee or the state could seek to void a non-complying transfer, although there would be a three-year statute of limitations for the commencement of a rescission action.<sup>113</sup> Violations would also carry civil and criminal sanctions, including \$25,000 per day penalties and imprisonment.<sup>114</sup> There are no threshold amounts of hazardous substances or wastes, nor are there any bright line tests for triggering transactions. While the agency would be empowered to assess fees, an appropriation of only \$192,000 is proposed by the legislature, a figure well below the disastrously low \$400,000 New Jersey appropriation.<sup>115</sup>

In Massachusetts, during the 1987 Session, the House of Representatives considered House Bill No. 2130, a multi-faceted law including an ECRA-inspired proposal (Section 6) with a number of twists.<sup>116</sup> The Section 6 legislation divides property into two classes. Class I would include all real property which, based on its use from 1880 to the present, is "likely to contain oil or hazardous materials in amounts or concentrations sufficient to require a response action to protect the public health, safety, or welfare or the environment," including petrochemical industries, primary metal industries and gas stations.<sup>117</sup> Class II would include all other property, except that one to four family residences are entirely exempt from either class.<sup>118</sup> Several of the specifically covered industries are named according to SIC designations, and the implementing agency would be directed to use SIC subgroups in determining a particular subject industry.<sup>119</sup>

Pursuant to the proposed legislation, Class I real property

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113. *Id.* § 27-1513.

114. *Id.* § 27-1515.

115. *Id.*

116. An Act Providing for Timely and Effective Clean-up and Emergency Relief at Oil and Hazardous Material Sites in the Commonwealth, Mass. H. Bill No. 2130, 1987. Section 6 proposes amending Chapter 21E of the Mass. Gen. Laws by adding new Subsections 4A-4H. References here are to the 4A-4H subsections.

117. Mass. H. Bill No. 2130, section 6, § 4A.

118. *Id.*

119. *Id.*

could not be transferred until a site history and audit report is filed with the environmental agency and the agency has reviewed and acted on the report.<sup>120</sup> If the audit showed no contamination, the agency would be bound either to accept or reject the report within thirty days.<sup>121</sup> If the agency failed to act within thirty days, the owner could appeal to the Commissioner of the agency, who would have to respond within five days.<sup>122</sup>

If the agency were not satisfied, the property could not be transferred until the agency approved a cleanup plan and the plan approval was recorded in the Registry of Deeds.<sup>123</sup> The response plan would have to include a provision that the person responsible for the response action would reimburse the agency for all costs, including fringe benefits and other costs incurred by the agency in reviewing, overseeing and insuring completion of the actions.<sup>124</sup> The agency could also require, as a condition of approval of the plan, that either the seller or buyer post evidence of financial responsibility.<sup>125</sup> Once a response plan is approved and a copy recorded in the Registry of Deeds, the property could then be transferred.<sup>126</sup> The proposal deems that the transferee would be liable to complete the plan.<sup>127</sup>

Prior to approval of a response plan, transactions could be completed only if (a) a cleanup plan including a cost estimate is filed, (b) the transferee provides financial security sufficient to cover either the estimated cleanup cost or the fair market value of the property (at the agency's discretion), (c) the transferee assumes liability, and (d) the transferee is not already targeted as unacceptable under other sections of the law.<sup>128</sup>

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120. *Id.* § 4B.

121. *Id.*

122. *Id.*

123. *Id.* § 4E.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

While Class I owners would have to apply prior to transfers, Class II owners could apply for clearance at any time, even absent a transfer trigger.<sup>129</sup> If contamination is found, the property could not be transferred until a cleanup plan is approved.<sup>130</sup> Once the agency certified compliance or certified completion of a cleanup, either class of property would be eligible for state-funded environmental security insurance.<sup>131</sup> The agency would have to act on the transferee's application within ninety days if the property proved clean.<sup>132</sup>

The owner, upon payment of a premium and upon proving that the property complies with requirements of the law, would be protected against any liability for costs incurred by the agency in responding to environmental problems at the site.<sup>133</sup> The legislation would also require that the state agency specify threshold amounts of hazardous substances by regulation.<sup>134</sup> The definition of "transfer of real property" found in the definitional section at the beginning of House Bill No. 2130 includes closure or abandonment of a facility, merger or acquisition of the owner or operator of the premises, and bankruptcy.<sup>135</sup> Thus, the transaction trigger is similar in its breadth to the ECRA trigger.

The Pennsylvania General Assembly introduced House Bill No. 1574 during its 1985 session.<sup>136</sup> The proposal, little more than a cut and paste version of ECRA, did not improve upon the vague trigger language, nor did the legislation feature any of the innovations found in other spin-off proposals. No action was taken on the bill, which is on hold.

## VII. Verdict

ECRA was enacted to insure privately funded and bonded cleanups of contaminated industrial property. Since

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129. *Id.* § 4C.

130. *Id.*

131. *Id.* § 4G.

132. *Id.* § 4B.

133. *Id.* § 4G.

134. *Id.* § 4B.

135. Mass. H. Bill No. 2130, Section 1.

136. Pa. H. Bill No. 1574, Session of 1985, Printer's No. 2008.

the program commenced on the last day of 1983, sixty cleanups have been completed pursuant to DEP-approved cleanup plans, at a total cost of \$7.6 million.<sup>137</sup>

In addition, 265 cleanups have been completed to the satisfaction of DEP at a total cost of \$3.6 million, by applicants who proceeded before or during ECRA submissions on an "at peril" basis (where DEP reserves the right to declare itself unsatisfied with the extent of sampling and cleanup undertaken and may order further work).<sup>138</sup> In these cases, DEP has approved "Negative Declarations" (affidavits which state that the premises are clean or has been cleaned up to DEP standards), rather than cleanup plans.<sup>139</sup>

Eighty DEP-approved cleanup plans are in progress at an estimated total cost of forty million dollars and DEP holds that amount in the form of financial assurances.<sup>140</sup> Four hundred eighty-two transactions completed under ACO's, pursuant to which DEP holds a total of \$500 million in financial assurances, have yet to receive cleanup approvals or Negative Declaration approvals.<sup>141</sup> Seventeen hundred sixteen thousand Negative Declaration approvals have been granted thus far, and over sixteen thousand non-applicability letters have been issued.<sup>142</sup> Based on these figures, one can hardly call ECRA a failure, especially in comparison with other major programs such as the federal superfund law.

Nor can one deny the effectiveness of the law in its contribution to increased environmental awareness. ECRA has inspired other states to consider transaction-triggered legislation. The legislation has taken its place alongside other environmental laws, including superlien and superfund statutes and the SARA innocent purchaser defense,<sup>143</sup> as instru-

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137. Miller Interview, *supra* note 23.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Superfund Amendments and Reauthorization Act of 1986, P.L. 90-499 (SARA). Section 101(f) of SARA establishes an "innocent purchaser" defense to CERCLA liability. A subsequent purchaser may be able to escape the strict liability hammer of a superfund cleanup by establishing that at the time it acquired the prop-



mental in establishing environmental audits as a crucial element of buyers' due diligence inquiries.

Furthermore, while cleanup standards and action levels for contaminants are still in a state of flux, ECRA and ECRA-inspired audits and cleanups provide a base line standard for owners and operators who will themselves have to comply with transaction-triggered cleanup responsibility laws in the future. ECRA succeeds, too, in shifting the enforcement mechanism from selective investigation and oversight by governmental authorities to the self-policing mode of compliance, with buyers and mortgagees acting as the Guardian Angels.

Innocent purchasers and owners (such as absentee landlords who find themselves footing cleanup bills because wrongdoer tenants disappeared or because the properties were contaminated long ago) protest that the law unfairly targets them as responsible parties. The architects and supporters of ECRA are ready with the response that ECRA is in good company with other environmental laws which stop the buck at current owners and operators.

Critics of ECRA have been rebuffed, too, by the muscular language which the courts are employing in affirming the strict, joint and several liability standards of the current crop of environmental laws. The New Jersey courts, for example, have expanded the concept of responsibility under New Jersey's Spill Act to encompass not only the wrongful discharger (a tenant, for example, who causes a discharge of hazardous substances), but also the owner of the property at that time, by way of the Spill Act's allocation of responsibility to "any person who has discharged a hazardous substance *or in any way responsible* for any hazardous substance which the

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erty it "did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." The law goes on to define "had reason to know" as requiring the owner to show that it undertook appropriate inquiries prior to purchase as to the previous ownership and operations at the premises "consistent with good commercial or customary practice," taking into account such facts as the relative sophistication on the part of the buyer, the relationship of the purchase price to the property value, the availability of information about the premises, and the ability to discover contamination "by appropriate inspection." *Id.* § 101(f).

department has removed or is removing."<sup>144</sup>

As to the aspect of the program subject to the loudest public outcry, delay, DEP is finally, after four and one half years, achieving an essential element of control over its program. The confusion of the new regulations, however, only promises to unleash fresh uncertainties in structuring transactions and continued unpredictability in DEP's application of the law. On the positive side, DEP has agreed to work with the ECRA Committee of the New Jersey State Bar Association's Corporate and Business Law section in publishing important applicability and nonapplicability determinations in order to provide guidance to the regulated community.<sup>145</sup>

Staffing and funding problems are being addressed. Administrative fees required of applicants have been increased in line with the OMB audit guidelines for achieving the necessary level of staff and equipment.<sup>146</sup> Yet, while performance at ISEE has improved substantially and authority is being more usefully delegated to lower level staff, the program continues to suffer from turnover and the consequent need for supervisors to resume managerial control over everyday decisions.

DEP has yet to acquire the necessary expertise to properly judge the nature and effect of particular business and real estate transactions and occurrences. Nor has DEP moved to diffuse the polarized atmosphere of mistrust between it and the regulated community. Instead, DEP squandered its recent opportunity to improve relations and widened the chasm by rejecting all but the most insignificant of the private sector's suggestions concerning the proposed (and now promulgated) regulations. Court challenges to the convoluted rule will almost certainly follow.

The chronic problems lead back to the legislation itself. For states considering transaction-triggered environmental laws, the following recommendations are offered in order that

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144. N.J. Stat. Ann. § 58:10-23:11g(c) (West 1982)(emphasis added). *See also*, Department of Env'tl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983).

145. The ECRA Committee, of which the author is chairman, plans to publish abstracts of important DEP decisions in the New Jersey Law Journal.

146. OMB Analysis, *supra* note 47.

other legislatures confront and resolve the different issues identified in New Jersey:

1. Defer to the environmental agency's expertise in developing sampling requirements and cleanup levels, but require that those guidelines and threshold levels be promulgated in rule form before the law goes into effect.

2. Create benchmark tests for triggering events (for example, acquisition of fifty-one percent of shares as constituting a controlling interest in a corporation for purposes of the trigger) in order that both the agency and the regulated community may be properly guided.

3. Require that particular positions within the agency be filled by individuals with sufficient real property and business experience to properly judge whether particular events or transactions constitute triggers.

4. Prepare a management and budget study prior to establishing the law and its funding level, to determine the requisite levels of funding, staffing and preparation so that the program will be implemented expediently and properly.

5. Legislate a mechanism whereby parties subject to the law may, at their discretion, rather than the discretion of the agency, enter into binding agreements and sliding-scale financial assurances with the agency so that subject transactions may proceed on a sensible and orderly basis while the goal of environmental audits and cleanups is achieved.

6. In determining which businesses will be subject to the transaction-triggered law, be specific rather than general in determining precise industry descriptions. Do not leave it to the environmental agency to sort through hundreds of Standard Industrial Classification subgroups to determine who should or should not be subject to the law.

7. Assure that the law provides for a mechanism whereby decisions on applicability of the law may be rendered swiftly by the implementing agency.

8. Impose time deadlines for agency action and a prompt appeal method for disposing of disputes between agency and applicants.

9. Consider insurance schemes for purchasers or similar

methods whereby a transferee may rely on the agency sign off as assuring protection of the transferee or subsequent owners or operators from continuing liability.

10. Consider deed registration requirements.

The law itself must be clear. The legislature cannot be content to paint a transaction-triggered law with broad strokes and then expect an environmental agency, lacking the requisite business expertise, to tailor the law in a fair and equitable manner. Even if the agency intends to do so, it will not have the resources.

Four years of New Jersey's ECRA experience translate into a wealth of guidance which should be helpful to other jurisdictions in molding their own transaction-triggered laws, in order to fairly achieve the necessary goal of a cleaner, safer environment.