Committee Meeting

before

SENATE ENVIRONMENT COMMITTEE

and

ASSEMBLY ENERGY AND HAZARDOUS WASTE COMMITTEE

SENATE BILL NO. 1070 and ASSEMBLY BILL NO. 1727

(Make various changes to ECRA and to other hazardous site remediation programs; impose a surcharge on remediations; establish a loan and grant fund for remediation activities; appropriate bond moneys)

LOCATION: Committee Room 9
Legislative Office Building
Trenton, New Jersey

DATE: September 21, 1992
10:00 a.m.

MEMBERS OF SENATE COMMITTEE PRESENT:

Senator Henry P. McNamara, Chairman
Senator Randy Corman, Vice-Chairman
Senator C. Louis Bassano
Senator Jack C. Sinagra
Senator John H. Adler
Senator Ronald L. Rice

MEMBERS OF ASSEMBLY COMMITTEE PRESENT:

Assemblyman John E. Rooney, Chairman
Assemblyman Ernest L. Oros, Vice-Chairman
Assemblyman Arthur R. Albohn
Assemblyman David C. Russo
Assemblywoman Barbara Wright
Assemblyman Anthony Impreveduto
Assemblyman Robert G. Smith

ALSO PRESENT:

Raymond E. Cantor, Judith L. Horowitz,
and Kevil D. Duhon, Aides
Office of Legislative Services

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, 162 W. State St., CN 068, Trenton, New Jersey 08625-0068

New Jersey State Legislature
ASSEMBLY ENERGY AND HAZARDOUS WASTE COMMITTEE
SENATE ENVIRONMENT COMMITTEE
LEGISLATIVE OFFICE BUILDING, CN-068
TRENTON, NEW JERSEY 08625-0068
(609) 292-7676

JOINT COMMITTEE NOTICE

TO: MEMBERS OF THE SENATE ENVIRONMENT COMMITTEE
MEMBERS OF THE ASSEMBLY ENERGY AND HAZARDOUS WASTE COMMITTEE

FROM: SENATOR HENRY P. McNAMARA, CHAIRMAN
ASSEMBLYMAN JOHN E. ROONEY, CHAIRMAN

SUBJECT: COMMITTEE MEETING - September 21, 1992

The public may address comments and questions to Raymond E. Cantor, Judith L. Horowitz, or Kevil Duhon, Committee Aides, or make bill status and scheduling inquiries to Elva Thomas or Carol Hendryx, secretaries, at (609) 292-7676.

The Senate Environment Committee and the Assembly Energy and Hazardous Waste Committee will meet on **Monday, September 21, 1992 at 10:00 A.M. in Room 9, Legislative Office Building, Trenton, New Jersey** to consider the following bills:

Heed	S-1070 McNamara/Rice	Makes various changes to ECRA and to other hazardous site remediation programs; imposes a surcharge on remediations; establishes a loan and grant fund for remediation activities; appropriates bond moneys.
Heed	A-1727 Albohn/Crecco	

The committees have invited representatives of the environmental, business, consultant, and regulated communities, as well as the Department of Environmental Protection and Energy, to discuss the bills in a panel setting. Due to time constaints, any other members of the public wishing to present testimony should do so in written form. Two panel discussions are scheduled. The panel discussion scheduled from 10:00 to 12:30 will focus on measures necessary to establish administrative predicability in implementing the hazardous discharge site remediation programs. Bill provisions that correspond to this topic include sections 1, 2, 16, 17, 30, and 31. The panel discussion scheduled from 1:30 to 4:00 will focus on measures necessary to streamline the administrative process for ECRA or other hazardous discharge site remediation programs. Bill provisions that correspond to this topic include sections 7, 9 through 13, and 19.

Issued 9/16/92

SENATE, No. 1070

STATE OF NEW JERSEY

INTRODUCED JULY 23, 1992

By Senators McNAMARA, RICE, DiFrancisco and Dorsey

AN ACT concerning the remediation of contaminated property, establishing the "Hazardous Discharge Site Remediation Fund," making an appropriation from the "Hazardous Discharge Bond Act of 1986," amending and supplementing the "Environmental Cleanup Responsibility Act", P.L.1983, c.330, and supplementing Title 58 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 3 of P.L.1983, c.330 (C.13:1K-8) is amended to read as follows:

3. As used in this act:

[a. "Cleanup plan"] "Remedial action workplan" means a plan for the [cleanup of] remedial action to be undertaken at an industrial [establishments, approved by the department] establishment, or at any area to which a discharge originating at the industrial establishment is migrating or has migrated[, which may include a description of the locations, types and quantities of hazardous substances and wastes that will remain on the premises; a description of the types and locations of storage vessels, surface impoundments, or secured landfills containing hazardous substances and wastes; recommendations regarding the most practicable method of cleanup; and]; a description of the remedial action to be used to remediate the industrial establishment; a cost estimate of the [cleanup plan.] implementation of the remedial action workplan; and any other information the department deems necessary;

[The department, upon a finding that the evaluation of a site for cleanup purposes necessitates additional information, may require graphic and narrative descriptions of geographic and hydrogeologic characteristics of the industrial establishment and evaluation of all residual soil, groundwater, and surface water contamination;

b. "Closing, terminating or transferring operations" means the cessation of all operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes, or any temporary cessation for a period of not less than two years, or any other transaction or proceeding through which an industrial establishment becomes nonoperational for health or safety reasons or undergoes change in ownership, except for corporate reorganization not substantially affecting the ownership of the

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

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]

"Closing operations" means:

(1) the cessation of all or substantially all operations of an industrial establishment.

(2) any temporary cessation of operations of an industrial establishment for a period of not less than two years.

(3) any transaction or proceeding through which an industrial establishment becomes nonoperational for health or safety reasons, and

(4) the initiation of bankruptcy proceedings;

"Transferring ownership or operations" means:

(1) any transaction or proceeding through which an industrial establishment undergoes a change in ownership.

(2) the sale or transfer of the controlling share of the assets of an industrial establishment.

(3) the execution of a lease for a period of 99 years or longer for an industrial establishment.

(4) the termination of a lease unless renewed without a disruption in operations of the industrial establishment.

(5) the dissolution of corporate identity, except for any dissolution of an indirect owner of an industrial establishment whose assets would have been unavailable for the remediation of the industrial establishment if the dissolution had not occurred.

(6) the financial reorganization.

(7) any change in operations of an industrial establishment that changes the industrial establishment's Standard Industrial Classification number to one that is not subject to this act;

"Change in ownership" means:

(1) the sale or transfer of the business of an industrial establishment or any of its real property.

(2) the sale or transfer of stock in a corporation resulting in a merger or consolidation involving the direct owner or operator or indirect owner of the industrial establishment.

(3) the sale or transfer of stock in a corporation resulting in a change in the person holding the controlling interest in the direct owner or operator or indirect owner of an industrial establishment.

(4) the sale or transfer of title to an industrial establishment or the real property of an industrial establishment by exercising an option to purchase, or

(5) the sale or transfer of a partnership interest in a partnership that owns or operates an industrial establishment that would reduce by 10% or more, the assets available for a remediation of the industrial establishment;

"Change in ownership" shall not include:

(1) a corporate reorganization not substantially affecting the ownership of the industrial establishment.

(2) a transaction or series of transactions involving the transfer of stock, assets or both, among corporations under common ownership, where the transactions will not result in the aggregate

diminution of the net worth of the corporation that directly owns or operates the industrial establishment, will not result in the aggregate diminution of the net worth of the industrial establishment by more than 10 percent, and an equal or greater amount in assets is available for the remediation of the industrial establishment before and after the transactions,

(3) a transaction or series of transactions involving the transfer of stock, assets or both, resulting in the merger or de facto merger or consolidation of the indirect owner with another entity or change in the person holding the controlling interest of the indirect owner of an industrial establishment, when the indirect owner's assets would have been unavailable for cleanup if the transactions had not occured, or

(4) transfers between members of the same family. "Family" means siblings, spouse, children, grandchildren, parents and grandparents;

[c.] "Department" means the Department of Environmental Protection;

[d.] "Hazardous substances" means those elements and compounds, including petroleum products, which are defined as such by the department, after public hearing, and which shall be consistent to the maximum extent possible with, and which shall include, the list of hazardous substances adopted by the Environmental Protection Agency pursuant to Section 311 of the "Federal Water Pollution Control Act Amendments of 1972" (33 U.S.C.§1321) and the list of toxic pollutants designated by Congress or the Environmental Protection Agency pursuant to Section 307 of that act (33 U.S.C.§1317); except that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of this act;

[e.] "Hazardous waste" means any amount of any waste substances required to be reported to the Department of Environmental Protection on the special waste manifest pursuant to N.J.A.C.7:26-7.4, or as otherwise provided by law;

[f.] "Industrial establishment" means any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or hazardous wastes on-site, above or below ground, having a Standard Industrial Classification number within 22-39 inclusive, 46-49 inclusive, 51 or 76 as designated in the Standard Industrial Classifications Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States. Those facilities or parts of facilities subject to operational closure and post-closure maintenance requirements pursuant to the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.) or the "Solid Waste Disposal Act" (42 U.S.C.§6901 et seq.), or any establishment engaged in the production or distribution of agricultural commodities, shall not be considered industrial establishments for the purposes of this act. The department may, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), exempt certain sub-groups or classes of operations within those

sub-groups within the Standard Industrial Classification major group numbers listed in this subsection upon a finding that the operation of the industrial establishment does not pose a risk to public health and safety;

[g.] "Negative declaration" means a written declaration, submitted by the owner or operator of an industrial establishment [and approved by the department], certifying that there has been no discharge of hazardous substances or hazardous wastes on the site, or that any such discharge on the site or discharge that has migrated or is migrating from the site has been cleaned up in accordance with procedures approved by the department, and there remain no hazardous substances or hazardous wastes at the site of the industrial establishment, and there remain no hazardous substances or hazardous wastes that migrated from the site of the industrial establishment, at levels that are above the applicable cleanup standards established by the department;

"Discharge" means an intentional or unintentional action or omission resulting in the actual or threatened releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a hazardous substance or hazardous waste onto the land or into the waters of the State;

"No further action letter" means a written determination by the department that based upon an evaluation of the historical use of the industrial establishment and the property, and any other investigation or action the department deems necessary, there are no discharged hazardous substances or hazardous wastes present at the site of the industrial establishment, at any other site to which a hazardous discharge originating at the industrial establishment has migrated, or that any discharged hazardous substances or hazardous wastes present at the industrial establishment or that have migrated from the industrial establishment are below the applicable cleanup standards;

"Indirect owner" means a corporation that owns any subsidiary that owns or operates an industrial establishment;

"Direct owner or operator" means a corporation that directly owns or operates an industrial establishment;

"Area of concern" means any existing or former location where hazardous substances or hazardous wastes are or were known or suspected to have been discharged, generated, manufactured, refined, transported, stored, handled, treated, disposed, or where hazardous substances or hazardous wastes have or may have migrated;

"Cleanup standards" means the combination of numeric and narrative standards to which hazardous substances or hazardous waste must be cleaned up as established by the department pursuant to section 30 of P.L. . c. (C.)(now before the Legislature as this bill);

"Feasibility study" means a study to develop and evaluate options for remedial action using data gathered during the remedial investigation to develop possible remedial action alternatives, to evaluate those alternatives and create a list of feasible alternatives, and to analyze the engineering, scientific, institutional, human health, environmental, and cost of each selected alternative;

"Owner" means any person who owns the real property of an industrial establishment or who owns the industrial establishment;

"Operator" means any person, including users, tenants, occupants, or trespassers, having and exercising direct actual control of the operations of an industrial establishment;

"Preliminary assessment" means the first phase in the process of identifying areas of concern and determining whether hazardous substances or hazardous wastes are present at an industrial establishment or have migrated or are migrating from the industrial establishment, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or potential discharge of any hazardous substance or hazardous waste is required by the department;

"Remediation" or "remediate" means all necessary actions to investigate and clean up any known or suspected discharge or threatened discharge of hazardous substances or hazardous wastes, including the preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action;

"Remedial action" means those actions taken at an industrial establishment or offsite of an industrial establishment if hazardous substances or hazardous wastes have migrated or are migrating therefrom, as may be required by the department, including the removal, treatment, containment, transportation securing, or other engineering or treatment measures, whether of a permanent nature or otherwise, designed to ensure that any discharged hazardous substances or hazardous wastes at the site or that have migrated or are migrating offsite, is brought into compliance with the applicable cleanup standards;

"Remedial investigation" means a process to determine the nature and extent of a discharge of hazardous substances or hazardous wastes at an industrial establishment or a discharge of hazardous substances or hazardous wastes that have migrated or are migrating from an industrial establishment and the problems presented by a discharge, and may include data collected, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action including a feasibility study;

"Site investigation" means the collection and evaluation of data adequate to determine whether or not discharged hazardous substances or hazardous wastes exist at the industrial establishment or have migrated or are migrating from the industrial establishment at levels in excess of the applicable cleanup standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment.

(cf: P.L.1983, c.330, s.3)

2. Section 4 of P.L.1983, c.330 (C.13:1K-9) is amended to read as follows:

4. a. The owner or operator of an industrial establishment planning to close operations, or transfer ownership or operations shall [:

(1) Notify] notify the department in writing, no more than five

days subsequent to closing operations or of its public release[,] of its decision to close operations [;] , whichever occurs first, or within five days after the execution of an agreement to transfer ownership or operations, as applicable. The notice to the department shall: identify the subject industrial establishment; describe the transaction requiring compliance with the act; state the date of the closing of operations or the date of the public release of the decision to close operations and a copy of the appropriate public announcement, if applicable; state the date of execution of the agreement to transfer ownership or operations and the name of the parties to the transfer, if applicable; state the proposed date for closing operations or transferring ownership or operations; list the name, address, and telephone number of an authorized agent for the owner or operator; and include any other information the department deems necessary to provide it with sufficient notice of the transaction. The notice shall be transmitted to the department in the manner and form as required by the department.

b. Subsequent to the submittal of the notice required pursuant to subsection a. of this section, the owner or operator of an industrial establishment shall, except as otherwise provided by P.L.1983, c.330 or P.L. , c. (now before the Legislature as this bill), remediate the industrial establishment. The remediation may include, as necessary, a preliminary assessment, site investigation, remedial investigation, feasibility study, and a remedial action of the industrial establishment.

The preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action shall be conducted in accordance with criteria, procedures, and time schedules established by the department. The results of the preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action shall be submitted to the department for its review and approval, except as otherwise provided by P.L.1983, c.330 or P.L. , c. (now before the Legislature as this bill). Submissions shall be in a manner and form as provided by the department.

Upon the submission of the results of either the preliminary assessment, site investigation, or remedial investigation, which results demonstrate that there are no hazardous substances or hazardous wastes at the industrial establishment, or that have migrated from or are migrating from the industrial establishment, at levels or concentrations above the applicable cleanup standards, the owner or operator may submit to the department for approval a proposed negative declaration as provided in subsection c. of this section.

c. The owner or operator of an industrial establishment shall, subsequent to closing operations, or of its public release of its decision to close operations, or prior to transferring ownership or operations, as applicable, submit to the department for approval a proposed negative declaration or proposed remedial action workplan. Except as otherwise provided by P.L.1983, c.330 or P.L. , c. (now before the Legislature as this bill), the owner or operator of an industrial establishment shall not transfer ownership or operations until a negative declaration or a remedial

action workplan has been approved by the department or an administrative consent order has been executed, and until, in cases where a remedial action workplan is required to be approved or an administrative consent order has been executed, a cleanup funding source, as required pursuant to section 21 of P.L. , c. (C.)(now before the Legislature as this bill), has been established.

[(2) Upon closing operations, or 60 days subsequent to public release of its decision to close or transfer operations, whichever is later, the owner or operator shall submit a negative declaration or a copy of a cleanup plan to the department for approval and a surety bond or other financial security for approval by the department guaranteeing performance of the cleanup in an amount equal to the cost estimate for the cleanup plan.

b. The owner or operator of an industrial establishment planning to sell or transfer operations shall:

(1) Notify the department in writing within five days of the execution of an agreement of sale or any option to purchase;

(2) Submit within 60 days prior to transfer of title a negative declaration to the department for approval, or within 60 days prior to transfer of title,] The owner or operator shall attach a copy of any [cleanup plan] approved negative declaration, remedial action workplan, or administrative consent order to the contract or agreement of sale or agreement to transfer or any option to purchase which may be entered into with respect to the transfer of ownership or operations. In the event that any sale or transfer agreements or options have been executed prior to the submission of the plan to the department, the [cleanup plan] approved negative declaration, remedial action workplan, or administrative consent order shall be transmitted by the owner or operator, by certified mail, prior to the transfer of ownership or operations, to all parties to any transaction concerning the transfer of ownership or operations, including purchasers, bankruptcy trustees, mortgagees, sureties, and financiers [;

(3) Obtain, upon approval of the cleanup plan by the department, a surety bond or other financial security approved by the department guaranteeing performance of the cleanup plan in an amount equal to the cost estimate for the cleanup plan.

c.] d. The department, upon application by the owner or operator of an industrial establishment who has submitted a notice to the department pursuant to subsection a. of this section, shall enter into an administrative consent order with the owner or operator in which the owner or operator agrees to perform the necessary remediation at the industrial establishment, as required by this act, pursuant to a schedule established by the department, agrees to establish a cleanup funding source as required pursuant to section 21 of P.L. , c. (C.)(now before the Legislature as this bill), agrees to obtain an approved negative declaration or remedial action workplan, and agrees to perform any necessary remedial actions. The administrative consent order may provide that a purchaser, transferee, mortgagee, or other party to the transfer may perform the remedial action as provided in subsection e. of this section. Upon entering into an administrative consent order the

owner or operator may transfer ownership or operations of the industrial establishment prior to approval of a negative declaration or remedial action workplan.

The department shall adopt regulations establishing the terms and conditions for obtaining, amending, and complying with an administrative consent order. The regulations shall include a sample form of the administrative consent order. An administrative consent order may not grant authority to the department beyond that provided to the department by law and may not require an owner or operator to waive any right to appeal a departmental decision involving the substantive requirements of a remediation or an issue of fact. The administrative consent order may require the owner or operator to waive any right to appeal the department's authority to enter into the adminstrative consent order, the obligation of the owner or operator to perform the remediation, or the substantive provisions of the administrative consent order. Entering into an administrative consent order shall not affect an owner's or operator' right to avail itself of the provisions of section 6 of P.L.1983, c.330 (C.13:1K-11) or of sections 9, 10, 12, 13, or 17 of P.L. , c. (C.)(now before the Legislature as this bill).

e. The [cleanup plan and detoxification of] approved remedial action workplan for the [site] industrial establishment shall be implemented by the owner or operator. [provided] except that the purchaser, transferee, mortgagee or other party to the transfer may assume that responsibility pursuant to the provisions of this act.

f. The department shall, within 45 days of submission of a complete and accurate negative declaration, approve the negative declaration, or inform the owner or operator of the industrial establishment that a remedial action workplan shall be submitted.

g. The department shall, in accordance with the schedule contained in an approved remedial action workplan, inspect the premises to determine conformance with the cleanup standards and shall certify that the remedial action workplan has been executed and that the industrial establishment has been remediated in compliance with applicable cleanup standards.

(cf: P.L.1983, c.330, s.4)

3. Section 2 of P.L.1991, c.238 (C.13:1K-9.2) is amended to read as follows:

2. The acquiring of title to an industrial establishment by a municipality pursuant to a foreclosure action pertaining to a certificate of tax sale purchased and held by the municipality shall not relieve the previous owner or operator of the industrial establishment of his duty to [implement a cleanup plan if the implementation is deemed necessary by the Department of Environmental Protection] remediate the industrial establishment as required pursuant to P.L.1983, c.330.

(cf: P.L.1991, c.238, s.2)

4. Section 3 of P.L.1991, c.238 (C.13:1K-9.3) is amended to read as follows:

3. If a municipality undertakes [to clean up hazardous substances and wastes on the site of] a remediation of an

industrial establishment, the title to which the municipality acquired pursuant to a foreclosure action pertaining to a certificate of tax sale, all expenditures incurred in the [cleanup] remediation shall be a debt of the immediate past [owners] owner or operator of the industrial establishment. The debt shall constitute a lien on all property owned by the immediate past owner or operator when a notice of lien, incorporating a description of the property subject to the [cleanup and removal] remediation and an identification of the amount of [cleanup, removal] remediation and related costs expended by the municipality is duly filed with the clerk of the Superior Court. The clerk shall promptly enter upon the civil judgment or order docket the name and address of the immediate past owner or operator and the amount of the lien as set forth in the notice of lien. Upon entry by the clerk, the lien shall attach to the revenues and all real and personal property of the immediate past owner or operator, whether or not he is insolvent. The notice of lien filed pursuant to this section which affects any property of an immediate past owner or operator shall have priority from the day of the filing of the notice of the lien, but shall not affect any valid lien, right, or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien pursuant to this section.

(cf: P.L.1991, c.238, s.3)

5. Section 5 of P.L.1991, c.238 (C.13:1K-9.5) is amended to read as follows:

5. If a municipality undertakes a [cleanup of hazardous substances and wastes on the site] remediation of an industrial establishment, the municipality shall make any submissions required by P.L.1983, c.330 (C.13:1K-6 et seq.) and shall obtain [approval] all approvals of the Department of Environmental Protection [prior to the initiation of the sampling plan and the cleanup plan] as required pursuant to the provisions of P.L.1983, c.330 and any rules or regulations adopted pursuant thereto.

(cf: P.L.1991, c.238, s.5)

6. Section 5 of P.L.1983, c.330 (C.13:1K-10) is amended to read as follows:

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

any other review or approval required by the department; and any other provisions or procedures necessary to implement this act. [Until the minimum standards described herein are adopted, the department shall review, approve or disapprove negative declarations and cleanup plans on a case by case basis.]

b. [The department shall, within 45 days of submission, approve the negative declaration, or inform the industrial establishment that a cleanup plan shall be submitted.

c. The department shall, in accordance with the schedule contained in an approved cleanup plan, inspect the premises to determine conformance with the minimum standards for soil, groundwater and surface water quality and shall certify that the cleanup plan remedial action workplan has been executed and that the site has been detoxified.] The owner or operator shall allow the department reasonable access to the industrial establishment to inspect the premises and to take soil, groundwater, or other samples or measurements as deemed necessary by the department to verify the results of any submission made to the department and to verify the owner's or operator's compliance with the requirements of this act.

(cf: P.L.1983, c.330, s.5)

7. Section 6 of P.L.1983, c.330 (C.13:1K-11) is amended to read as follows:

6. a. [The provisions of any law, rule or regulation to the contrary notwithstanding, the transferring of an industrial establishment is contingent on the implementation of the provisions of this act.

b. If] The owner or operator of an industrial establishment planning to transfer ownership or operations may apply to the department for a deferral of the preparation, approval, and implementation of a remedial action workplan at the industrial establishment. The applicant shall submit to the department:

(1) a certification signed by the purchaser, transferee, mortgagee or other party to the transfer, approved by the department, that [the premises of] the industrial establishment would be subject to substantially the same use by the purchaser, transferee, mortgagee or other party to the transfer, [and upon written certification thereto and approval by the department thereof, the implementation of a cleanup plan and the detoxification of the site]

(2) a certification, approved by the department, that the owner or operator has satisfactorily completed a preliminary assessment, site investigation, remedial investigation, and feasibility study of the industrial establishment,

(3) a cost estimate for the remedial action necessary at the industrial establishment, approved by the department, and

(4) a certification, approved by the department, that the purchaser, transferee, mortgagee or other party to the transfer, has the financial ability to pay for the implementation of the necessary remedial action.

The preparation, approval, and implementation of a remedial action workplan for the industrial establishment may be deferred until the use changes or until the purchaser, transferee, mortgagee or other party to the transfer closes[, terminates or

transfers] operations or transfers ownership or operations.

[(1) Within 60 days of receiving notice of the sale or realty transfer and the certification that the industrial establishment would be subject to substantially the same use, the department shall approve, conditionally approve, or deny the certification.

(2) Upon approval of the certification, the implementation of a cleanup plan and detoxification of the site shall be deferred.

(3) Upon denial of the certification, the cleanup plan and detoxification of the site shall be implemented pursuant to the provisions of this act.]

[c.] b. Upon satisfactory submission of a complete and accurate application, the department shall approve the deferral. Upon approval of the deferral, the preparation, approval, and implementation of remedial action workplan at the industrial establishment shall be deferred. The deferral shall be denied by the department if a complete and accurate application is not submitted to the department or if the department fails to approve any of the components of the application. Upon denial of the deferral, the remediation of the industrial establishment shall be continued pursuant to the provisions of this act.

c. The authority to defer [implementation of the cleanup plan] the preparation, approval, and implementation of a remedial action workplan set forth in subsection [b.] a. of this section shall not be construed to limit, restrict, or prohibit the department from directing site [cleanup] remediation under any other statute, rule, or regulation, but shall be solely applicable to the obligations of the owner or operator of an industrial establishment, pursuant to the provisions of this act, nor shall any other provisions of this act be construed to limit, restrict, or prohibit the department from directing site [cleanup] remediation under any other statute, rule, or regulation.

(cf: P.L.1983, c.330, s.6)

8. Section 8 of P.L.1983, c.330 (C.13:1K-13) is amended to read as follows:

8. a. Failure of the transferor to comply with any of the provisions of this act is grounds for voiding the sale or transfer of an industrial establishment or any real property utilized in connection therewith by the transferee, entitles the transferee to recover damages from the transferor, and renders the owner or operator of the industrial establishment strictly liable, without regard to fault, for all [cleanup and removal] remediation costs and for all direct and indirect damages resulting from the failure to implement the [cleanup plan] remedial action workplan.

b. Failure to submit a valid negative declaration [,] or [cleanup plan] a remedial action workplan pursuant to the provisions of section 4 of [this act] P.L.1983, c.330 (C.13:1K-9) is grounds for voiding the sale by the department.

c. Any person who knowingly gives or causes to be given any false information or who fails to comply with the provisions of this act is liable for a penalty of not more than $25,000.00 for each offense. If the violation is of a continuing nature, each day during which it continues shall constitute an additional and separate offense. Penalties shall be collected in a civil action by a summary proceeding under "the penalty enforcement law"

(N.J.S.2A:58-1 et seq.). Any officer or management official of an industrial establishment who knowingly directs or authorizes the violation of any provisions of this act shall be personally liable for the penalties established in this subsection.
(cf: P.L.1983, c.330, s.8)

9. (New section) a. The owner or operator of an industrial establishment planning to close operations or transfer ownership or operations of an industrial establishment may, in lieu of complying with the provisions of subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9), apply to the department for an expedited review. An application for an expedited review pursuant to this section shall include:

(1) the notice required pursuant to the provisions of subsection a. of section 4 of P.L.1983, c.330 (C.13:1K-9),

(2) a certification that for the industrial establishment, a remedial action workplan has previously been implemented and a no further action letter has been issued pursuant to P.L.1983, c.330, a negative declaration has been previously approved by the department pursuant to P.L.1983, c.330, or the department has previously approved a remediation of the industrial establishment equivalent to that performed pursuant to the provisions of P.L.1983, c.330,

(3) a certification that the owner or operator has performed remediation activities at the industrial establishment, consistent with regulations established by the department, in order to identify areas of concern that are new or have continued in use since the issuance of a no further action letter, negative declaration approval, or remediation approval as described in paragraph (2) of this subsection, and that based on those remediation activities the owner or operator certifies that there has been no discharge of a hazardous substance or hazardous waste at the industrial establishment subsequent to the approval of the negative declaration, the issuance of the no further action letter, or the equivalent remediation; or, if any discharge has occured, a certification listing any discharge, describing the action taken to remediate the discharge, a certification that the remediation was performed in accordance with procedures established by the department, and a certification that the remediation was approved by the department,

(4) a certification that for any underground storage tank covered by the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.), an approved method of secondary containment or a monitoring system as required by P.L.1986, c.102, has been installed,

(5) a copy of the negative declaration or no further action letter, as applicable, last approved by the department for the entire industrial establishment, and

(6) a proposed negative declaration.

b. Upon the submission of a complete and accurate application and after an inspection, if necessary, the department shall approve or disapprove the negative declaration. The department shall approve the negative declaration upon a finding that the information in the certifications submitted pursuant to subsection a. of this section is accurate. Upon a disapproval of the proposed

negative declaration by the department pursuant to this section, the owner or operator shall comply with the provisions of section 4 of P.L.1983, c.330.

10. (New section) a. The owner or operator of an industrial establishment planning to close operations or transfer ownership or operations of the industrial establishment may, in lieu of complying with the provisions of subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9), apply to the department for a limited site review. An application for a limited site review pursuant to this section shall include:

(1) the notice required pursuant to the provisions of subsection a. of section 4 of P.L.1983, c.330 (C.13:1K-9),

(2) a certification that for the industrial establishment, a remedial action workplan has previously been implemented and a no further action letter has been issued pursuant to P.L.1983, c.330, a negative declaration has been previously approved by the department pursuant to P.L.1983, c.330, or the department has previously approved a remediation equivalent to that performed, pursuant to the provisions of P.L.1983, c.330,

(3) a certification that the owner or operator has performed remediation activities at the industrial establishment, consistent with regulations established by the department, in order to identify areas of concern that are new or have continued in use since the issuance of a no further action letter, negative declaration approval, or remediation approval as described in paragraph (2) of this subsection, and that based on those remediation activities the owner or operator certifies that subsequent to the issuance of the negative declaration, no further action letter or remediation approval described in paragraph (2) of this subsection, a discharge has occurred at the industrial establishment that was not remediated in accordance with the procedures established by the department or any remediation performed has not been approved by the department,

(4) the negative declaration or no further action letter, as applicable, last approved by the department for the industrial establishment,

(5) a certification listing any information required to be provided in a preliminary assessment that has changed since the last departmental approval of a negative declaration, issuance of a no further action letter, or remediation approval, as applicable, for the industrial establishment,

(6) a certification that for any underground storage tank covered by the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.), an approved method of secondary containment or a monitoring system as required by P.L.1986, c.102, has been installed, and

(7) a proposed negative declaration, if applicable.

b. Upon the submission of a complete application, and after an inspection if necessary, the department may:

(1) approve the negative declaration upon a finding that any discharge of a hazardous substance or hazardous waste, as certified to pursuant to paragraph (3) of subsection a. of this section, has been remediated to levels that are below the applicable cleanup standards as established by the department, or

(2) require the owner or operator perform the remediation process set forth in subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9) only for those areas of concern identified by the information provided pursuant to paragraphs (3) and (5) of subsection a. of this section upon a finding that further investigation or remediation is necessary to bring the industrial establishment into compliance with the applicable cleanup standards.

c. The owner or operator of an industrial establishment subject to the provisions of this section shall not close operations or transfer ownership or operations until a remedial action workplan, or a negative declaration, as applicable, has been approved by the department or an administrative consent order has been entered into.

11. (New section) a. The owner or operator of an industrial establishment may apply to the department to close operations or transfer ownership or operations at an industrial establishment without obtaining departmental approval of a remedial action workplan or a negative declaration or without entering into an administrative consent order if the industrial establishment is already in the process of a remediation pursuant to subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9). The application shall include:

(1) the notice required pursuant to the provisions of subsection a. of section 4 of P.L.1983, c.330,

(2) a certification that there has been no discharge of any hazardous substance or hazardous waste at the industrial establishment during the applicant's period of operation or ownership or that the remediation of any discharge of a hazardous substance or hazardous waste that occured during the applicant's period of ownership or operation was approved by the department,

(3) a certification by the owner or operator that a cleanup funding source for the cost of the remediation or the implementation of the remedial action workplan at the industrial establishment has been established pursuant to section 21 of P.L. , c. (C.) (now before the Legislature as this bill, and

(4) a certification, as applicable, that any transferee has been notified that the industrial establishment is the subject of a remediation.

b. Upon the submission of a complete application, and upon a finding that the information submitted is accurate, the department shall authorize, in writing, that the applicant may close operations or transfer ownership or operations of the industrial establishment.

12. (New section) a. The owner or operator of an industrial establishment may apply to the department to close operations or transfer ownership or operations at an industrial establishment without obtaining departmental approval of a remedial action workplan or a negative declaration or without entering into an administrative consent order if the only areas of concern or the only discharges at the industrial establishment are from an underground storage tank regulated pursuant to P.L.1986, c.102 (C.58:10A-21 et seq.). The application shall include:

(1) the notice required pursuant to the provisions of subsection a. of section 4 of P.L.1983, c.330,

(2) the submission of a preliminary assessment that shows that the only area of concern at an industrial establishment is an underground storage tank or tanks as defined pursuant to section 2 of P.L.1986, c.102 (C.58:10A-22), or the submission of a site investigation that shows that the only discharged hazardous substances or hazardous wastes at the industrial establishment, or that has migrated offsite, above the applicable cleanup standards are from a leak or discharge from that underground storage tank or tanks, and

(3) a certification that the owner or operator of the industrial establishment is in compliance with the provisions of P.L.1986, c.102 for all underground storage tanks covered by that act, at the industrial establishment.

b. Upon the submission of a complete application, and upon a finding that the information submitted is accurate, the department shall authorize, in writing, the applicant to close operations or transfer ownership or operations of the industrial establishment.

13. (New section) a. The owner or operator of an industrial establishment may apply to the department to close operations or transfer ownership or operations at an industrial establishment without obtaining departmental approval of a remedial action workplan or without entering into an administrative consent order, if the discharge of hazardous substances or hazardous wastes at the industrial establishment is of minimal environmental concern. Upon the completion of a preliminary assessment, site investigation, remedial investigation, and feasibility study for the industrial establishment, conducted pursuant to subsection b. of section 4 of P.L.1983, c.330, any owner or operator may submit to the department an application for a determination that the discharge at an industrial establishment is of minimal environmental concern, which application shall include:

(1) a certification, supported by the submission of data from the preliminary assessment, site investigation, remedial investigation and feasibility study, that there are no more than two areas of concern at the industrial establishment that are contaminated at levels above the applicable cleanup standards, and that remedial action at those areas of concern can be completed pursuant to standards and criteria established by the department within six months of the owner's or operator's receipt of the approval of the application by the department;

(2) a certification that a remedial action workplan shall be prepared pursuant to standards and criteria established by the department;

(3) a certification that the remedial action workplan will be completed pursuant to standards and criteria established by the department within six months of the owner's or operator's receipt of the approval of the application by the department;

(4) a demonstration that the cleanup funding source required pursuant to section 21 of P.L. , c. (C.)(now before the Legislature as this bill) has or will be established;

(5) the payment of all fees or surcharges imposed pursuant to P.L.1983, c.330 and section 28 of P.L. , c. (C.) (now before the Legislature as this bill), and any rules or regulations adopted pursuant thereto; and

(6) documentation establishing that the discharged hazardous substances or hazardous wastes at the particular industrial establishment do not pose a threat to human health because of the proximity of an area of concern to a drinking water source or because of the location, complexity, or the nature of the discharge.

b. Upon the submission of a complete application, and upon a finding that the information submitted is accurate, the department shall approve the application for a determination that the discharge at an industrial establishment is of minimal environmental concern. Prior to making a finding upon the application pursuant to this section, the department may inspect the industrial establishment, as necessary, to verify the information in the application. The decision of the department shall be made within 30 days of the submission of a complete application. In determining the amount of time necessary to complete remedial action, the department shall not include that time in which it takes the department to issue a permit for a discharge to surface water pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.).

c. The owner or operator shall, upon the completion of the remedial action workplan at the subject areas of concern, certify to the department that the remedial action workplan has been implemented in accordance with the standards and criteria established by the department. The certification shall include a copy of the remedial action workplan and the results of any tests performed as part of the remedial action. Within 30 days of receipt of the certification, the department shall issue a no further action letter to the owner or operator. The department may perform an inspection of the industrial establishment prior to issuing the no further action letter.

The department may refuse to issue the no further action letter pursuant to this section only upon a finding that hazardous substances or hazardous wastes remain at the relevant areas of concern at levels or concentrations in excess of, the applicable cleanup standards.

d. Upon the failure of an owner or operator to complete the implementation of a remedial action workplan within the six month period as provided in subsection a. of this section, the owner or operator shall so notify the department in writing and the reasons therefor. The owner or operator shall have no more than 120 additional days to complete the implementation of the remedial action workplan. If the implementation of the remedial action workplan is not completed within this additional time, the department may rescind its determination that the industrial establishment is of minimal environmental concern and may require that a remedial action workplan be submitted and implemented by the owner or operator in a manner and under the terms and conditions provided in its general regulations for remedial action workplan submissions and implementation.

14. (New section) a. The owner of an industrial establishment may transfer a portion of the real property on which an industrial establishment is situated without conducting a remediation of the entire industrial establishment pursuant to the provisions of P.L.1983, c.330 and this act, if, upon application by the owner, the department issues a certificate of limited conveyance.

b. An application for a certificate of limited conveyance shall be in the form of a certification by the owner which shall include a description of the real property to be transferred, an appraisal of the real property to be transferred, the sale price or market value of the real property to be transferred, an appraisal of the entire industrial establishment, and an appraisal of the remaining property if the certificate of limited conveyance were issued, as well as any other information the department deems necessary to make the findings required in subsection c. of this section.

c. The department shall issue a certificate of limited conveyance for a portion of the real property on which an industrial establishment is situated after the submission of a complete and accurate application and upon a finding that the sales price or market value of the real property to be conveyed, together with any additional diminution in value to the remaining property as a result of the conveyance is not more than one third of the total appraised value of the industrial establishment prior to the transfer, and that the remaining real property is an industrial establishment subject to the provisions of P.L.1983, c.330. The appraisals shall be made no more than one year prior to the submission of application for a certificate of limited conveyance. Conveyances made pursuant to this section shall not exceed one third of the value of the industrial establishment during the period of ownership of the applicant.

d. Upon issuance of the certificate of limited conveyance, the owner or operator shall, prior to the conveyance, comply with the provisions of section 4 of P.L.1983, c.330 for that portion of the real property certified for conveyance. The remediation that may be required on the real property subject to the certificate of limited conveyance shall include any hazardous substances or hazardous wastes that are migrating from the remaining portion of the industrial establishment onto the real property being conveyed. The remaining portion of the industrial establishment, upon closing, terminating or transferring operations shall be subject to the provisions of P.L.1983, c.330 and this act.

e. A certificate of limited conveyance shall be valid for three years from the date of issuance.

15. (New section) a. When a portion of an industrial establishment is the subject of a condemnation proceeding initiated pursuant to the "Eminent Domain Act of 1971," P.L.1971, c.361 (C.20:3-1 et seq.) the provisions of section 4 of P.L.1983, c.330 shall apply only to that portion of the industrial establishment to be transferred pursuant to the condemnation proceeding, except as provided in subsections b. and c. of this section. The remaining portion of the industrial establishment, upon closing operations or transferring ownership or operations, shall be subject to the provisions of P.L.1983, c.330 notwithstanding that at the time of the closure of operations or

the transfer of ownership or operations, the remaining portion may not be an industrial establishment as defined pursuant to section 2 of P.L.1983, c.330. (C.13:1K-7).

b. In the case where the owner or operator closes operations or transfers ownership or operations of the entire industrial establishment as a result of the condemnation of a portion of the industrial establishment, the entire industrial establishment shall be subject to the provisions of P.L.1983, c.330 at the time of the transfer of the portion of the real property that is the subject of a condemnation proceeding.

c. The entire industrial establishment shall be subject to the provisions of P.L.1983, c.330 at the time of the transfer of the portion of the real property that is the subject of a condemnation proceeding, if the value of the real property to be conveyed pursuant to the condemnation proceeding, together with any additional diminution in value to the remaining property as a result of the conveyance, is two thirds or more of the total appraised value of the entire industrial establishment.

16. (New section) Where the closure of operations or the transfer of ownership or operations of an industrial establishment by an owner or operator who is a tenant requires compliance with P.L.1983, c.330, the area of the industrial establishment subject to the provisions of P.L.1983, c.330 shall be limited to that area under the exclusive current control of the tenant. The area under exclusive current control of the tenant shall not include any area of common use among more than one tenant. The area under exclusive current control of the tenant may include areas in which the landlord has access in the capacity as a landlord. In the event that an owner or operator of an industrial establishment receives a negative declaration or remedial action workplan approval for the area under the tenant's exclusive current control pursuant to this section, those areas of the industrial establishment not under the tenant's exclusive current control but that were once used by that tenant or that were used by that tenant and were subject to common use by other tenants, shall be subject to all of the requirements of P.L.1983, c.330 (C.13:1E-9), at the time of closure of operations or transfer of ownership or operations by the owner, notwithstanding that at the time of the closure of operations or transfer or ownership or operations by the owner, the subject real property may not be an industrial establishment as defined pursuant to section 2 of P.L.1983, c.330 (C.13:1K-7).

17. (New section) The owner or operator of an industrial establishment, who has submitted a notice to the department pursuant to subsection a. of section 4 of P.L.1983, c.330 (C.13:1K-9), may implement an interim response action prior to departmental approval of that action. The interim response action may be implemented when the expeditious temporary or partial remediation of a discharged hazardous substance or hazardous waste is necessary to contain or stabilize a discharge prior to implementation of an approved remedial action workplan in order to prevent, minimize, or mitigate damage to public health or safety or to the environment which may otherwise result from a discharge. The interim response action shall be

implemented in compliance with the procedures and standards established by the department. The department may require submission of a notice of intent to implement an interim response action and may require, subsequent to completion of the interim response action, a report detailing the actions taken and a certification that the interim response action was implemented in accordance with all applicable laws and regulations. The department shall review these submissions to verify whether the interim response action was implemented in accordance with applicable laws and regulations. The department shall not require that additional remediation be undertaken at an area of concern subject to the interim response action except in instances when further remediation is necessary to bring that area of concern into compliance with the applicable cleanup standards, when the actions taken were temporary in nature requiring additional long-term remedial action take place, or when the department determines that the interim response action was not performed in substantial compliance with applicable laws or regulations.

18. (New section). Any person who, prior to July 1, 1992, violated the provisions of P.L.1983, c.330 by closing operations or transferring ownership or operations of an industrial establishment without receiving departmental approval of a cleanup plan or a negative declaration pursuant to the provisions of P.L.1983, c.330, or without entering into an administrative consent order that allows the closure of operations or transfer of ownership or operations, shall not be subject to a penalty for that violation if the person notifies the department of the closure of operations or of the transfer of ownership or operations of the industrial establishment, and enters into an administrative consent order with the department to initiate a remediation of the industrial establishment pursuant to the provisions of P.L.1983, c.330 and any rules or regulations adopted pursuant thereto, within one year of the effective date of this section.

19. (New section) a. Within one year of the effective date of this act, the Department of Environmental Protection shall conduct an audit of the negative declarations and remedial action workplans that have been submitted to the department pursuant to P.L.1983, c.330. On the basis of this audit the department shall adopt regulations identifying, within the Standard Industrial Classification major group numbers listed in the definition of "industrial establishment," all industries designated by Standard Industrial Classification number subgroups, or classes of operations within those subgroups, that do not pose a risk to public health and safety or to the environment by their normal operation. The audit shall distinguish between hazardous substances or hazardous wastes at an industrial establishment caused by a particular type of industry and hazardous substances or hazardous wastes that exists as a result of activities at an industrial establishment unrelated to the activities of that industry.

b. An industrial establishment for which a remedial action workplan was previously implemented and a no further action letter was received pursuant to P.L.1983, c.330, a negative declaration was previously approved by the department pursuant

to P.L.1983, c.330, or for which the department has previously approved a remediation equivalent to that performed pursuant to the provisions of P.L.1983, c.330, and which industrial establishment is designated by a Standard Industrial Classification subgroup or class of operations that does not pose a risk to public health and safety or to the environment by its normal operations as identified in subsection a. of this section, shall not be considered an industrial establishment for the purposes of P.L.1983, c.330.

20. (New section) As used in sections 20 through 33 of P.L. , c. (C.)(now before the Legislature as this bill):

"Authority" means the New Jersey Economic Development Authority established pursuant to P.L.1974, c.80 (C.34:1B-1 et seq.);

"Cleanup funding source" means the methods of financing the remediation of a discharge required to be established by the person performing the remediation pursuant to section 21 of P.L. , c. (C.)(now before the Legislature as this bill);

"Cleanup standards" means the combination of numeric and narrative standards to which contaminants must be cleaned up as provided by the department pursuant to section 30 of P.L. , c. (C.)(now before the Legislature as this bill);

"Contamination" or "contaminant" means any discharged hazardous substance as defined pursuant to section 3 of P.L.1976, c.141 (C.58:10-23.11b), hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c.74 (C.58:10A-3);

"Department" means the Department of Environmental Protection;

"Discharge" means an intentional or unintentional action or omission resulting in the actual or threatened releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a contaminant onto the land or into the waters of the State or into the waters outside the jurisdiction of the State which contaminant enters the waters of the State;

"No further action letter" means a written determination by the department that at a particular site, based upon an evaluation of the historical use of the site, and any other investigation or action the department deems necessary, there are no discharged contaminants present, or any discharged contaminants present are below the applicable cleanup standards;

"Remediation" or "remediate" means all necessary actions to investigate and cleanup any known or suspected discharge or threatened discharge of contaminants, including, without limitation, a preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action;

"Remediation fund" means the Hazardous Discharge Site Remediation Fund established pursuant to section 22 of P.L. , c. (C.)(now before the Legislature as this bill);

"Special ecological receptors" means all natural resources that are protected, managed, or otherwise regulated by federal or state law, pursuant to the "Comprehensive Response, Compensation, and Liability Act of 1980," 42 U.S.C.§9601 et seq.; the "Delaware and Raritan Canal State Park Law of 1974,"

P.L.1974, c.118, (C.13:13A-1 et seq.); the "Federal Endangered Species Act of 1973," 16 U.S.C.§1531 et seq.; the "Federal Water Pollution Control Act," 33 U.S.C.§§ 1251 et seq.; Title 23 of the Revised Statutes, Fish and Game, Wild Birds and Animals; the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et seq.); the "Marine Mammal Protection Act of 1972," 16 U.S.C. §1361; the "Natural Areas System Act," P.L.1975 c.363 (C.13:1B-15.12a et seq.); Chapter 8A of Title 13 of the Revised Statutes, Green Acres; the "New Jersey Natural Lands Trust," P.L.1968, c.425 (C.13:1B-15.119); the "Pinelands Protection Act," P.L.1979, c.111 (C.13:18A-1 et seq.); the "New Jersey Wild and Scenic Rivers Act," P.L.1977, c.236 (C.13:8-45 et seq.); the "State Park and Forestry Resources Act," P.L.1983, c.324, (C.13:1L-1 et seq.); the "Spill Compensation and Control Act," P.L.1976, c.141, (C.58:10-23.11 et seq.); the "Water Pollution Control Act," P.L.1977, 74 (C.58:10A-1 et seq.); the "Wetlands Act of 1970," P.L.1970, c.272, (C.13:9A-1 et seq.); and the "Wildlife Sanctuaries Act," P.L.1982, c.167, (C.13:8-64 et seq.).

21. (New section) a. The owner or operator of an industrial establishment required to perform remediation activities pursuant to P.L.1983, c.330 (C.13:1K-6 et seq.), or a discharger or person in any way responsible for a hazardous substance who has been issued a directive or an order, who has entered into an administrative consent order, or who has been ordered by a court to clean up and remove a hazardous substance discharge pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.), shall, no more than 14 days after approval by the department of a remedial action workplan or as a condition in an administrative consent order with the department for the remediation of a contaminated site, establish and maintain a cleanup funding source in the amount necessary to pay the cost of the required remediation. A person required to establish a cleanup funding source pursuant to this section shall provide to the department satisfactory documentation that the requirement has been met. The provisions of this section shall not apply to the remediation of a discharge at a business having a Standard Industrial Classification Number 5541 as designated in the Standard Industrial Classification Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States.

b. The person responsible for the remediation may use the cleanup funding source to pay the cost of remediation. The department may not require any other financial assurance by the person responsible for the remediation other than that provided in this section. In the case of a remediation performed pursuant to P.L.1983, c.330, the cleanup funding source shall be established no more than 14 days after the approval by the department of a remedial action workplan or as provided in an administrative consent order entered into pursuant to section 4 of P.L.1983, c.330 (C.13:1K-9). In the case of a remediation performed pursuant to P.L.1976, c.141, the cleanup funding source shall be established as provided in an administrative consent order signed by the parties, as provided by a court, or as directed by the

department. The cleanup funding source shall be evidenced by the establishment and maintenance of (1) a fully funded trust account, (2) a line of credit, or (3) a self guarantee, or by any combination thereof. Where it can be demonstrated that a person cannot establish and maintain a cleanup funding source for the full cost of the remediation by a method specified in this subsection, that person may establish the cleanup funding source by securing a loan for the estimated costs of the remediation from the Hazardous Discharge Site Remediation Fund as provided in section 23 of P.L. , c. (C)(now before the Legislature as this bill).

c. A fully funded trust shall be established pursuant to the provisions of this subsection. An originally signed duplicate of the trust agreement shall be delivered to the department by certified mail within 14 days of receipt of notice from the department that the remedial action workplan is approved or as specified in an administrative consent order, civil order, or order of the department, as applicable. The fully funded trust agreement shall conform to a model trust agreement as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department. The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or New Jersey agency.

The trust shall be established in an amount equal to or greater than (1) the cost estimate of the implementation of the remedial action workplan as approved by the department, (2) as provided in an administrative consent order, (3) as stated in a departmental order or directive, or (4) as agreed to by a court, and shall be in effect or a term not less than the actual time necessary to perform the remediation at the site. Whenever the remediation or remedial action workplan cost estimate increases, the person required to establish the cleanup funding source shall, within 60 days after the increase, cause the amount of the fully funded trust to be increased to an amount at least equal to the new estimate, establish a new cleanup funding source pursuant to subsection b. of this section in an amount at least equal to the new estimate, or obtain an additional cleanup funding source as specified in this section in an amount at least equal to the increase. Whenever the remediation or remedial action workplan cost estimate decreases, the person required to obtain the cleanup funding source may file a written request to the department to decrease the amount in the fully funded trust. The fully funded trust may be decreased to the amount of the new estimate only upon written approval by the department to the trustee.

The trust agreement shall provide that the fully funded trust may not be revoked or terminated by the person required to establish the cleanup funding source or by the trustee without the written consent of the department. The trustee shall release to the person required to establish the cleanup funding source, or to the department or transferee of the property, as appropriate, only those funds as the department authorizes, in writing, to be

released. The person entitled to draw upon the fully funded trust shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination by the department that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement of moneys from the fully funded trust in the amount of the documented costs.

The department shall return the original fully funded trust agreement to the trustee for termination after the person required to establish the cleanup funding source substitutes an alternative cleanup funding source as specified in this section or the department notifies the person that that person is no longer required to maintain a cleanup funding source for remediation of the contaminated site.

d. A line of credit shall be established in a manner pursuant to the provisions of this subsection. An originally signed duplicate of the line of credit agreement shall be delivered to the department by certified mail within 14 days of receipt of notice from the department that the remedial action workplan is approved, or as specified in an administrative consent order, civil order, or order of the department, as applicable. The line of credit agreement shall conform to a model agreement as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department.

The line of credit shall be established in an amount equal to or greater than (1) the cost estimate of the implementation of the remedial action workplan as approved by the department, (2) as provided in an administrative consent order, (3) as stated in a departmental order or directive, or (4) as agreed to by a court, and shall be in effect for a term not less than the actual time necessary to perform the remediation at the site. Whenever the remediation or remedial action workplan cost estimate increases, the person required to establish the cleanup funding source shall, within 60 days after the increase, cause the amount of the line of credit to be increased to an amount at least equal to the new estimate, establish a new cleanup funding source pursuant to subsection b. of this section in an amount at least equal to the new estimate, or obtain an additional cleanup funding source as specified in this section in an amount at least equal to the increase. Whenever the remediation or remedial action workplan cost estimate decreases, the person required to establish the cleanup funding source may file a written request to the department to decrease the amount in the line of credit. The line of credit may be decreased to the amount of the new estimate only upon written approval by the department to the person or institution who provides the line of credit.

A line of credit agreement shall provide that the line of credit may not be revoked or terminated by the person required to obtain the cleanup funding source or the person or institution providing the line of credit without the written consent of the department. The person or institution providing the line of credit shall release to the person required to establish the cleanup funding source, or to the department or transferee of the

property as appropriate, only those funds as the department authorizes, in writing, to be released. The person entitled to draw upon the line of credit shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement from the line of credit in the amount of the documented costs.

The department shall return the original line of credit agreement to the person or institution providing the line of credit for termination after the person required to establish the cleanup funding source substitutes an alternative cleanup funding source as specified in this section, or after the department notifies the person that that person is no longer required to maintain a cleanup funding source for remediation of the contaminated site.

e. A person may self-guarantee a cleanup funding source upon the submittal of documentation to the department demonstrating that the cost of the remediation as estimated in the remedial action workplan or in the administrative consent order would not exceed one-third the tangible net worth of the person required to establish cleanup funding source, and that the person has a net cash flow and liabilities sufficient to assure the availability of sufficient moneys for the remediation during the time necessary for the remediation. The department may establish requirements and reporting obligations to ensure that the person proposing to self guarantee a cleanup funding source meets the criteria for self guaranteeing prior to the initiation of remedial action and until completion of the remediation.

f. (1) Following a written determination that the person required to obtain the cleanup funding source has failed to perform the remediation as required, the department may make disbursements from the fully funded trust or the line of credit. A copy of the determination by the department shall be delivered to the person required to establish the cleanup funding source and, in the case of a remediation conducted pursuant to P.L.1983, c.330 (C.15:1K-6 et seq.), to any transferee of the property.

(2) The transferee of property subject to a remediation conducted pursuant to P.L.1983, c.330 (C.13:1K-6 et seq.), may, at any time after the department's determination of nonperformance by the owner or operator required to establish the cleanup funding source, petition the department, in writing, with a copy being sent to the owner and operator, for authority to perform the remediation at the industrial establishment. The department, upon a determination that the transferee is competent to do so, shall grant that petition which shall authorize the transferee to perform the remediation as specified in an approved remedial action workplan, or to perform the activities as required in an administrative consent order, and to avail itself of the moneys in the fully funded trust or line of credit for these purposes unless the owner or operator continues or begins to perform its obligations within 14 days of the petition being filed with the department.

(3) After the department has begun to perform the remediation in the place of the person required to establish the

cleanup funding source or has granted the petition of the transferee to perform the remediation, the person required to establish the cleanup funding source shall not be permitted by the department to continue its performance obligations except upon the agreement of the department or the transferee, as applicable, or except upon a determination by the department that the transferee is not adequately performing the remediation.

22. (New section) a. There is established in the New Jersey Economic Development Authority a special, revolving fund to be known as the Hazardous Discharge Site Remediation Fund. Moneys in the remediation fund shall be dedicated for the provision of loans and grants to municipal governmental entities and individuals, corporations, partnerships, and other private business entities for the purpose of financing remediation activities at sites that are, or are suspected of being, contaminated by hazardous substances or hazardous wastes that have been or may be discharged into the environment.

b. The remediation fund shall be credited with:

(1) moneys as are appropriated by the Legislature;

(2) moneys deposited into the fund as repayment of principal and interest on outstanding loans made from the fund;

(3) any return on investment of moneys deposited in the fund;

(4) cleanup funding source surcharges imposed pursuant to section 28 of P.L. , c. (C.)(now before the Legislature as this bill);

(5) moneys made available to the authority for the purposes of the fund.

23. (New section) a. Loans may be made from the remediation fund to (1) owners or operators of industrial establishments that are required to perform remediation activities pursuant to the "Environmental Cleanup Responsibility Act," P.L.1983, c.330 (C.13:1K-6 et seq.), as a condition of a closure, transfer, or termination of operations of an industrial establishment and (2) persons who have discharged a hazardous substance or who are in any way responsible for a hazardous substance pursuant to the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.) and (3) persons who voluntarily undertake the remediation of a discharge of a hazardous substance or hazardous waste. No loans may be made from the remediation fund for the remediation of a discharge from an underground storage tank at a place of business that has a Standard Industrial Classification Number 5541 as designated in the Standard Industrial Classification Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States. Loans and grants may be made from the remediation fund to municipal governmental entities that own real property on which there has been a discharge or there is a suspected discharge of a hazardous substance or hazardous waste.

b. Loans and grants of moneys from the remediation fund shall be made for the following purposes and, on an annual basis, obligated in the following percentages:

(1) at least 20% of the moneys shall be allocated for loans to persons, other than governmental entities for remediation of real property located in a qualifying municipality as defined in section 1 of P.L.1978, c.14 (C.52:27D-178);

(2) at least 15% of the moneys shall be allocated for loans and grants to municipal governmental entities. Grants shall be used for performing preliminary assessments and site investigations on property owned by a municipal governmental entity in order to determine the existence or extent of any hazardous substance or hazardous waste on those properties. A municipal governmental entity that has performed a preliminary assessment and site investigation on its property may obtain a loan for the purpose of continuing the remediation on those properties as necessary to be in compliance with the applicable cleanup standards adopted by the department;

(3) at least 20% of the moneys shall be allocated for loans for remediation activities at sites that have been contaminated by a discharge of a hazardous substance or hazardous waste, or at which there is an imminent and significant threat of a discharge of a hazardous substance or hazardous waste, and the discharge or threatened discharge poses or would pose an imminent and significant threat to a drinking water source, to human health, or to a sensitive or significant ecological area;

(4) at least 10% of the moneys shall be allocated for loans to persons, other than government entities, who voluntarily undertake the remediation of a hazardous substance or hazardous waste discharge, and who have not been ordered to undertake the remediation by the department, or by a court,

(5) at least 20% of the moneys shall be allocated for loans to persons, other than governmental entities, who are required to perform remediation activities at an industrial establishment pursuant to P.L.1983, c.330 (C.13:1K-6 et seq.), as a condition of the closure, transfer, or termination of operations at that industrial establishment; and

(6) the remainder of the moneys in the remediation fund shall be allocated for loans and grants to municipal governmental entities or loans to individuals, corporations, partnerships and other private business entities for the purposes enumerated in paragraphs (1) through (5) of this subsection, except that where moneys in the fund are insufficient to fund all the applications in any calendar year that would otherwise qualify for a loan or grant pursuant this paragraph, the authority shall give priority to loan applications that meet the criteria enumerated in paragraph (3) of this subsection.

c. Loans issued from the remediation fund shall be for a term not to exceed ten years, except that upon the transfer of ownership of any real property for which the loan was made, the unpaid balance of the loan shall become immediately payable in full. Loans shall bear an interest rate of 2%. Loans and grants, upon request of the applicant, shall be issued for up to 100% of the estimated applicable remediation cost, except that no loan or grant may be issued to any applicant in any calendar year, for one or more properties, in an amount that exceeds $1,000,000. Repayments of principal and interest on the loans issued from the remediation fund shall be paid to the authority and shall be deposited into the remediation fund.

d. No person, other than a municipal governmental entity, shall be eligible for a loan from the remediation fund if that

person is capable of establishing a cleanup funding source for the remediation as required pursuant to section 21 of P.L. , c. (C.)(now before the Legislature as this bill), by any means other than a loan from the remediation fund.

e. The authority may use a sum that represents up to 2% of the moneys issued as loans or grants from the remediation fund each year for administrative expenses incurred in connection with the operation of the fund and the issuance of loans and grants.

f. Prior to March 1 of each year, the authority shall submit to the Senate Environment Committee and the Assembly Energy and Hazardous Waste Committee, or their successors, a report detailing the amount of money that was available for loans and grants from the remediation fund for the previous calendar year, the amount of money available for loans and grants for the current calendar year, the amount of loans and grants issued for the previous calendar year and the catagory for which each loan and grant was made, and any suggestions for legislative action the authority deems advisable to further the legislative intent to facilitate remediation and promote redevelopment and use of existing industrial establishments.

24. (New section) a. A qualified applicant for a loan or grant from the remediation fund shall be awarded a loan or grant by the authority upon the availability of sufficient moneys in the remediation fund for the purpose of the loan or grant. Priority for awarding loans and grants from the remediation fund shall be based upon the date of receipt by the authority of a complete application from the applicant. If an application is determined to be incomplete by the authority, an applicant shall have 30 days from receipt of written notice of incompleteness to file any additional information as may be required by the authority for a completed application. If an applicant fails to file the additional information within 30 days, the filing date for that application shall be the date that the additional information is received by the authority. An application shall be deemed complete when all the information required by the authority has been received in the required form.

b. Within 90 days, for a private entity, or 180 days for a municipal government entity, of notice of approval of a loan or grant application, an applicant shall submit to the authority an executed contract for the remediation activities for which the loan or grant application was made. The contract shall be consistent with the terms and conditions for which the loan or grant was made. Failure to submit an executed contract within the time provided, without good cause, shall constitute grounds for the alteration of an applicant's priority ranking for the awarding of a loan or grant.

25. (New section) a. The authority, in consultation with the Department of Environmental Protection, shall, by rule or regulation:

(1) prescribe forms for, and procedures for the filing of, loan and grant applications;

(2) require a person applying for a loan who is not the owner of the subject property to provide a copy of the contract or lease between the operator and owner, and certification that the owner approves of the loan;

(3) require, if the applicant is an owner who is not the operator of the subject property, the owner to provide a copy of the contract or lease between the owner and the operator;

(4) prohibit the assignment or encumbrance of a loan or loan payment;

(5) require a loan or grant recipient to provide to the authority, as necessary or upon request, evidence that loan or grant moneys are being spent for the purposes for which the loan or grant was made, and that the applicant is adhering to all of the terms and conditions of the loan or grant agreement;

(6) provide that moneys from the approved loan or grant shall be released by the authority to the applicant in only those amounts that represent work completed;

(7) require the loan or grant recipient to provide access at reasonable times to the subject property to determine compliance with the terms and conditions of the loan or grant;

(8) require that, during the life of the loan, the applicant will comply with all environmental laws, and pay all required taxes or other governmental assessments due on the subject property for which a loan application is made, or on the loan collateral;

(9) reserve the right to suspend or terminate a loan or grant or declare a loan in default if any term or condition of the loan or grant is violated by a loan or grant recipient, and take any necessary action to secure repayment of the loan or grant;

(10) reserve the right to modify, as necessary and by mutual consent, the terms or conditions of a loan or grant, which modification shall, however, not be inconsistent with regulations of the Department of Environment Protection concerning the performance of remediation of contaminated property;

(11) establish a priority system for making loans or grants for remediations involving an imminent and significant threat to a public water source, human health, or to a sensitive or significant ecological area pursuant to paragraph (6) of subsection b. of section 23 of P.L. , c. (C.)(now before the Legislature as this bill);

(12) provide that payment of a grant to a municipal government entity shall be conditioned upon the subrogation to the authority of all rights of the municipal government entity to recover remediation costs from the discharger or other responsible party; and

(13) adopt such other requirements as shall be deemed necessary or appropriate in carrying out the legislative purposes for which the Hazardous Discharge Site Remediation Fund was created.

b. An applicant for a loan or grant shall be required to:

(1) provide proof, as determined sufficient by the authority, that the applicant, other than a municipal governmental entity, where applicable, could not establish a cleanup funding source, other than a loan from the remediation fund, as required by section 21 of P.L. , c. (C.)(now before the Legislature as this bill);

(2) submit documentation on the nature and scope of the remediation to be performed, costs estimates thereon, and, as available, proofs of the actual cost of all work performed;

(3) submit copies of all court orders, administrative consent orders or directives issued by the Department of Environmental Protection and, if deemed necessary by the authority, any reports, plans, or results of any preliminary assessment, site investigation, remedial investigation, feasibility study, remedial action workplan, remedial action, or other documentation required to be prepared or submitted to the department; and

(4) demonstrate the ability to repay the amount of the loan and interest, and, if necessary, to provide adequate collateral to secure the loan amount.

c. Information submitted as part of a loan or grant application or agreement shall be deemed a public record subject to the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.). An applicant may, however, request the authority to maintain the confidentiality of any information relating to the personal or business finances of the applicant, and the authority shall establish procedures for safeguarding information determined to be of a confidential nature.

d. In establishing requirements for loan or grant applications and loan or grant agreements, the authority:

(1) shall minimize the complexity and costs to applicants or recipients of complying with such requirements;

(2) may not require loan or grant conditions that interfere with the everyday normal operations of a loan or grant recipient's business activities, except to the extent necessary to prevent intentional actions designed to avoid repayment of the loan, or that significantly affect the value of the loan collateral; and

(3) shall expeditiously process all loan or grant applications in accordance with a schedule established by the authority for the review and the taking of final action on the application, which schedule shall reflect the degree of complexity of a loan or grant application.

26. (New section) No loan or grant from the remediation fund shall be made to a person who is currently in violation of an administrative or judicial order, judgment, or consent agreement regarding violation or threatened violation of an environmental law regarding the subject property, unless the violation, fee, penalty or assessment is currently being contested by the person in a manner prescribed by law or unless the violation resulted from a lack of sufficient money to perform required remediation activities.

27. (New section) a. The lack of sufficient moneys in the remediation fund to satisfy all loan or grant applications shall not affect in any way an applicant's legal responsibility to comply with the requirements of P.L.1983, c.330 (C.13:1K-6 et seq.), P.L.1976, 141 (C.58:10-23.11 et seq.), or any other applicable provision of law.

b. Nothing in sections 20 through 32 of P.L. , c. (C.) (now before the Legislature as this bill) shall be construed to:

(1) impose any obligation on the State for any loan or grant commitments made by the authority, and the authority's obligations shall be limited to the amount of otherwise unobligated moneys available in the fund therefor; or

(2) impose any obligation on the authority for the quality of

any work performed pursuant to a remediation undertaken with a loan or grant made pursuant section 23 of that act.

28. (New section) a. There is imposed upon every person who is required to establish a cleanup funding source pursuant to section 21 of P.L. , c. (C.)(now before the Legislature as this bill) a cleanup funding source surcharge. The cleanup funding source surcharge shall be in an amount equal to 1% of the required amount of the cleanup funding source required by the department. The surcharge shall be paid on an annual basis as long as the remediation continues and until the Department of Environmental Protection issues a no further action letter for the property subject to the remediation. The cleanup funding source surcharge shall be due and payable within 14 days of the time of the department's approval of a remedial action workplan or signing an administrative consent order or as otherwise provided by law. The cleanup funding source surcharge shall not be imposed upon any person who voluntarily undertakes a remediation without being so ordered or directed by the department or by a court or pursuant to an administrative consent order.

The department shall collect the surcharge and shall remit all moneys collected to the Economic Development Authority for deposit into the Hazardous Discharge Site Remediation Fund.

b. By February 1 of each year, the department shall issue a report to the Senate Environment Committee and to the Assembly Energy and Hazardous Waste Committee listing, for the prior calendar year, each person who paid the cleanup funding source surcharge, the amount of the surcharge paid, and the total amount collected.

29. (New section) There is appropriated from the "Hazardous Discharge Fund of 1986," created pursuant to "Hazardous Discharge Bond Act of 1986," P.L.1986, c.113, the sum of $100,000,000 to the New Jersey Economic Development Authority for deposit in the Hazardous Discharge Site Remediation Fund, created pursuant to section 22 of P.L. , c. (C.)(now before the Legislature as this bill) for the purposes of issuing loans and grants for the investigation of property suspected of being contaminated by hazardous substance or hazardous waste discharge or for remediation of property contaminated by a hazardous substance or hazardous waste discharge in accordance with the provisions of section 23 of P.L. , c. (C.) (now before the Legislature as this bill).

30. (New section) a. The Department of Environmental Protection shall adopt minimum cleanup standards for soil, groundwater, and surface water quality necessary for the remediation of contamination of real property, including, for remediations conducted pursuant to P.L.1983, c.330, buildings and equipment. Where feasible the cleanup standards shall be established as numeric or narrative standards for particular contaminants. The standards shall apply to remediation activities required pursuant to the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), P.L.1986, c.102 (C.58:10A-21 et seq.), the "Environmental

Cleanup Responsibility Act," P.L.1983, c.330 (C.13:1K-6 et seq.), the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.), the "Comprehensive Regulated Medical Waste Management Act," P.L.1989, c.34 (C.13:1E-48.1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.), the "Sanitary Landfill Facility Closure and Contingency Fund Act," P.L.1981, c.306 (C.13:1E-100 et seq.), the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," P.L.1987, c.333 (C.13:1E-177 et seq.), or any other law or regulation by which the State may compel a person to perform remediation activities on contaminated property.

The cleanup standards shall be developed to ensure that the potential for harm to public health and safety and to the continued viability of special ecological receptors is minimized to the maximum extent practicable, taking into consideration the location, surroundings, the intended use of the property, the potential exposure to the discharge, and the surrounding ambient conditions, whether naturally occurring or man made. Until the minimum standards described herein are adopted, the department shall establish cleanup standards for contaminants at a site on a case by case basis.

The department shall not propose or adopt cleanup standards protective of special ecological receptors pursuant to this subsection until two years following the effective date of this act or until recommendations are made by the Ecology Advisory Task Force pursuant to section 31 of P.L. , as (C.)(now before the Legislature as this bill).

b. The Department of Environmental Protection may provide for differential cleanup standards pursuant to subsection a. of this section based upon the intended use of a property or an area of a property. The department may not, however, as a condition of allowing a differential cleanup standard based on intended use, require the owner of that property to restrict the use of that property through the filing of a deed covenant, condition, or other similar restriction. Where the department provides for a differential cleanup standard based on the intended use of the property, it shall, as a condition of permitting a remediation to occur that would leave contamination at the property at levels or concentrations above the most protective standards established by the department:

(1) require the owner or operator, discharger, person in any way responsible, or other relevant person, to take any remedial action reasonably necessary to prevent exposure to the contaminants, to maintain, as necessary, those remedial measures, and to agree to restrict the use of the property in a manner that prevents exposure;

(2) require the recording with the office of the county recording officer in the county in which the property is located, a notice designed to inform prospective holders of an interest in the property that contamination exists on the property at a level that may restrict certain uses of all or part of that property, and a delineation of those restrictions and a description of all specific engineering or other controls at the property that exist and that need to be maintained in order to prevent exposure to

contaminants remaining on the property; and

(3) require a notice to the governing body of each municipality in which the property is located that contaminants exist at the property and specifying the restrictions on the use of the property.

c. Where restrictive use conditions of a property as provided in subsection b. of this section are no longer required, or where the restrictive use conditions have varied, because of the performance of subsequent remedial activities, a change in conditions at the site, or the adoption of revised cleanup standards, the department shall, upon written application by the owner or operator of that property, record with the office of the county recording officer a notice that the use of the property is no longer restricted or delineating the new restrictions. The department shall also notify, in writing, the municipality in which the property is located of the removal or change of the restrictive use conditions.

d. Upon receipt of the notification sent pursuant to subsection b. or c. of this section, a municipality shall send a copy of the notification to the construction official for the municipality. The construction official shall maintain the notification in a manner whereby it will be known and available to the construction official prior to issuing a construction permit for the construction or alteration of a building or structure at the subject property. The construction official shall not issue a construction permit for the construction or alteration of a building or structure at the subject property if the construction or alteration would be in conflict with any of the restrictions contained in the notification. The provisions of this subsection shall not apply if a notification received pursuant to subsection c. of this section authorizes all restrictions to be removed from the subject property.

e. Notwithstanding the provisions of any other law, or any rule, regulation, or order adopted pursuant thereto to the contrary, upon the adoption of the cleanup standards pursuant to subsection a. of this section, whenever contamination at a property is remediated in compliance with the cleanup standards that were in effect at the completion of the remediation, the owner or operator of the property, the discharger, or any other person in any way responsible for any containment shall not be liable for the cost of any additional remediation that may be required by a subsequent adoption by the department of a more stringent cleanup standard for a particular contaminant. However, if the department adopts a new cleanup standard for a contaminant based upon a finding that the new standard is necessary to prevent a substantial risk to human health or safety or to special ecological receptors, a person who is liable to clean up that contamination pursuant to section 8 of P.L.1976, c.141 (C.58:10-23.11g) shall be liable for any additional remediation costs necessary to bring the property into compliance with the new cleanup standards.

31. (New section) a. There is established, in but not of the Department of Environmental Protection, an Ecology Advisory Task Force. The Task Force shall consist of 15 members as

follows: the Commissioner of Environmental Protection, or a designee, and two representatives each from industrial businesses, the environmental consulting profession, the real estate industry, the environmental science academic community, public interest environmental organizations, the legal community, and from municipal government. The members on the Task Force shall be selected by the Commissioner of Environmental Protection, to the extent possible, from a list of names provided by the represented interests or from names of persons who have testified before the department on previously proposed cleanup standards. The Ecology Advisory Task Force shall, within two years, make recommendations to the department on the development of standards protective of special ecological receptors.

b. The Ecology Advisory Task Force shall:

(1) review the scientific literature to identify existing sources of information and data necessary for the development of cleanup standards protective of special ecological receptors and to determine the current state-of-the-science in the identification of adverse impacts of contamination on these receptors and the establishment of containment concentration levels necessary to protect these receptors;

(2) review scientific literature on the methods, procedures, data input needs, limitations, interpretation, and uses of ecological risk assessments;

(3) collect information on public and private activities concerning the development and uses of ecological risk assessments and cleanup standards protective of special ecological receptors;

(4) evaluate the ecological components which should be protected through the application of cleanup standards protective of special ecological receptors;

(5) identify public policy issues involved in the development of cleanup standards protective of special ecological receptors;

(6) suggest an approach and methodology for the development of cleanup standards protective of special ecological receptors;

(7) evaluate the social, economic and environmental impacts of regulations which would incorporate state-of-the science ecological risk assessment methodologies;

(8) recommend necessary changes in statutes and regulations necessary to implement the advise of the Ecology Advisory Task Force; and

(9) review and make recommendations on any other aspect of the adoption of these cleanup standards the department determines is necessary for a complete evaluation of these issues.

c. Upon submittal of its recommendations to the department concerning the adoption of cleanup standards protective of special ecological receptors, the Ecology Advisory Task Force may, at the discretion of the commissioner, continue in existence in order to continue to research these issues and advise the department on the matters specified in this section.

32. (New section) Any person who, before July 1, 1992, has discharged a hazardous substance in violation of P.L.1976, c.141, and prior to July 1, 1992:

(1) has not been issued a directive to remove or arrange for the removal of the discharge pursuant to section of P.L.1976, c.141 (C.58:10-23.11f), or

(2) has not been assessed a civil penalty, a civil administrative penalty, or is not the subject of an action pursuant to the provisions of section of P.L.1976, c.141 (C.58:10-23.11u),

(3) has not entered in an administrative consent order to clean up and remove the discharge, or

(4) has not been ordered by a court to clean up and remove the discharge,

shall not be subject to a monetary penalty for the failure to report the discharge or for any civil violation of P.L.1976, c.141 (C.58:10-23.11 et seq.) or P.L.1977, c.74 (C.58:10A-1 et seq.) that resulted in the discharge if the person notifies the department of the discharge and enters into an administrative consent order with the department to remediate the discharge in accordance with the provisions of P.L.1976, c.141 (C.58:10-23.11 et seq.), or any rules or regulations adopted pursuant thereto, within one year of the effective date of this act. Any person who notifies the department of the discharge pursuant to this section shall be liable for all cleanup and removal costs as provided in section 8 of P.L.1976, c.141 (C.58:10-23.11g).

33. (New section) The Attorney General, in consultation with the Department of Environmental Protection, shall prepare, and the department shall distribute, for the cost of reproduction and postage, to any interested person, informational materials that set forth criteria that may be used to evaluate the qualifications of environmental consultants, environmental consulting firms, engineers, geologists or any other consultant, other than attorneys, whose expertise or training may be required by a person to comply with the provisions of P.L.1986, c.102, P.L.1983, c.330, P.L.1976, c.141, and P.L. , c. (now before the Legislature as this bill). The materials may describe the expertise or training necessary to address specific types of environmental cleanups, sites or contamination, the significance and availability of various types of liability insurance, the average cost of services and tests commonly performed by consultants, the significance of available accreditations or certifications and any other relevant factor that may be used to evaluate the qualifications and expertise of environmental consultants.

34. (New section) Notwithstanding the provisions of Executive Order 66 of 1978, the regulations adopted by the Department of Environmental Protection pursuant to P.L.1983, c.330 (C.13:1K-6 et seq.) and allocated in the New Jersey Administrative Code as Chapter 26B of Title 7, shall not expire as provided in that Executive Order but shall remain in effect until that time the department adopts new regulations revising the existing regulations to conform with the provisions of P.L. , c. (now before the Legislature as this bill).

35. This act shall take effect immediately.

STATEMENT

This bill would substantially amend the "Environmental Cleanup Responsibility Act" (ECRA) and the State's other hazardous discharge remediation programs in order to encourage cleanups, reduce costs of compliance, provide financial resources for cleanups, encourage the redevelopment of the State's industrialized areas, and protect the public health and environment. It is also the intent of this bill to begin a change in the perception of New Jersey from that of a State antagonistic toward business concerns to a State that seeks to work with businesses and property owners to solve environmental problems in a manner beneficial to all and to the economic future of the State.

The original intent of ECRA was that contaminated industrial property should be cleaned up as a precondition to its closure or transfer. The cleanup would thus occur when private money was available, thereby avoiding the abandonment of contaminated property that would require publicly funded remediation. Because ECRA compelled the owner or operator to perform the cleanup no matter who caused the contamination, cleanups would occur without lengthy litigation to determine responsibility. The owner or operator could seek reimbursement from the responsible parties after the cleanup.

The act also protected a buyer from acquiring contaminated property and the commensurate liability. A purchaser of property in New Jersey, as well as the lending institution, would thus feel reasonably assured that the acquired property would be free of contamination.

Despite the laudable goals of ECRA, neither the Legislature nor the Department of Environmental Protection anticipated the law's impact on commercial and industrial real estate transactions in the State. At the time of the enactment of ECRA the hazardous waste cleanup industry was in its infancy, and thus the act provided only broad directives concerning the cleanup of contaminated sites, which in effect required the Department of Environmental Protectionto adopt the technical rules and regulations necessary to implement the act. Because of the general nature of the act, confusion arose as to which industrial establishments were subject to the act, when the act was triggered, and what was expected of the owner or operator of the industrial establishment performing an ECRA cleanup. The answer to these questions was crucial, because ECRA not only imposed high monetary penalties for noncompliance, but allowed the department to void the transfer of property undertaken in violation of the act. Additionally, because transfers were conditioned on certain departmental approvals, property transfers and stock transactions were delayed while all parties wrangled with a vague and cumbersome law. The initial confusion, backlogs, and problems of the early years of ECRA's implementation have only recently been resolved.

In the eight years since ECRA was enacted, the department, environmental attorneys and consultants, and the business community have acquired extensive knowledge of the manner in

which remedial activities should occur. The ECRA and other site remediation programs have evolved, establishing new procedures and terminology not reflected in existing statutory law. Additionally, both the federal and State liability laws for hazardous substance discharges have made the public and the real estate community aware of the dangers and liabilities of contaminated properties. Also, since the enactment of ECRA, the State has enacted a number of other laws that overlap with ECRA.

In the light of the experience and events of the last eight years, this bill would amend ECRA, as well as certain other hazardous discharge site remediation laws, to reflect the current state of scientific and regulatory knowledge and public policy priorities.

This bill does not remove the requirement that contaminated industrial establishments be cleaned up when they are closed or transfered, nor does it privatize the remediation of these sites. Rather the bill attempts to carefully draw a balance between the public's interest in ensuring that hazardous contamination is cleaned up so that it poses no threat to public health or to the environment with the interest of businesses in performing expeditious and cost effective cleanups and with transfering property in a timely fashion.

The bill also provides loan and grant moneys for cleanups, promotes the redevelopment of industrial areas, and clarifies the intent and operation of the law.

This bill balances the various interests by taking certain properties out of the ECRA process and by allowing the privitization of the remediation process under certain circumstances. This bill defines the various stages of a remediation - preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action - and recognizes that the State's interest in overseeing a particular type of cleanup may vary depending on the stage of a cleanup.

This bill provides that the owner or operator of an industrial establishment previously subject to an ECRA or similar full site remediation can close or transfer the industrial establishment without going through the ECRA process by submitting a certification. The bill also allows properties that are of minimal environmental concern to be cleaned without departmental oversight and approval and for properties where underground storage tanks are the only environmental problem to be transfered without the necessity of a negative declaration or a remedial action workplan approval. The bill provides that up to one third of a property may be conveyed, even if contaminated, without triggering ECRA for the remaining parcel and that a condemnation of less than two thirds of an industrial establishment will not trigger ECRA review on the remaining parcel.

This bill provides that when a tenant closes or transfers operations, ECRA will be triggered for only the property in the tenant's exclusive control. The areas in common control will be subject to ECRA when ECRA is triggered by the landlord.

This bill provides that certain transfers between subsidiaries would not be subject to ECRA. Also, deferrals of cleanups, currently permissive by law, shall be approved by the department once a preliminary assessment, site investigation, remedial investigation, and feasibility study are performed. This bill removes from ECRA compliance, owners or operators who close or transfer an industrial establishment while that property is still in a prior ECRA review process.

This bill also would allow a person, pursuant to ECRA or otherwise, to perform an emergency cleanup to prevent the spread of contamination without the risk of having to redo the cleanup as long as the measures were taken in compliance with department requirements and standards. This provision should help speed up cleanups and reduce environmental risks to the public. In order to balance the needs of the public to be protected from risks caused by hazardous discharges, and the need of businesses to have finality of a cleanup action, the bill provides that if a discharge is remediated to the cleanup standards in effect, the person liable for the original discharge can not be compelled to further clean that site if the cleanup standards change absent a substantial threat to the public health or to the environment.

This bill codifies the ability of the department to adopt cleanup standards for all site remediation activities performed pursuant to the State's various environmental laws, and allows differential standards to be established based on exposure risk. This bill provides that the department cannot adopt ecologically based cleanup standards until after an Ecology Advisory Task Force offers input. This bill also codifies the natural resources that can be protected so as to avoid uncertainty in future rulemaking.

This bill deliniates these natural resources to include those natural resources which either federal or State law has identified as needing protection, management, or regulation in order to ensure that the State's discharge remediation program complements the State's natural resource protection and management programs.

This bill precludes the department from requiring a deed restriction on the property if the property is cleaned to a standard less then the most protective. Rather, notice to subsequent owners or operators will be provided by a deed notice. Enforcement of the restrictions will be by the local construction official in the building permit process.

This bill codifies a recent State Supreme Court decision, In Re Adoption of N.J.A.C.7:26B, by stating affirmatively that offsite contamination is required as part of an ECRA cleanup. This bill also codifies the issuing of administrative consent orders under ECRA and states what these orders may provide. This bill provides that a pamphlet on how to select an environmental consultant will be prepared by the Department of Law and Public Safety.

This bill seeks to lower the cost of remediation by eliminating the requirement for financial assurance that is currently required in addition to paying for the remediation activities. In its place is a requirement that a person undertaking a cleanup establish

and maintain a cleanup funding source by establishing a fully funded trust, a line of credit, or being able to fund the operations out of working capital. The bill allows the department, or the transferee in an ECRA process, to use the moneys in the cleanup funding source guarantee to complete the cleanup in the event of a stoppage in the remediation activities.

The person providing the cleanup funding source will be assessed a 1% surcharge on the amount of the cleanup costs. The moneys collected by the surcharge will be placed into a Hazardous Discharge Site Remediation Fund. The fund would be used to give low interest loans to persons performing ECRA or other cleanups. Moneys would be targeted for urban areas, municipally owned properties, voluntary cleanups, ECRA cleanups, and for emergency cleanups. Additionally, muncipalities would be able to obtain grants for the identification of municipally owned contaminated property. Only those persons, other than municipalities, who could not otherwise provide a cleanup funding source would qualify for a loan.

The fund would be administered by the New Jersey Economic Development Authority and would be funded by a $100 million appropriation from the "Hazardous Discharge Bond Act of 1986," by the surcharges, interest, loan repayments, legislative appropriations, and by any moneys placed into the fund by the authority.

Finally, the bill seeks to encourage the cleanups of sites by providing a one year amnesty from all ECRA or other discharge penalties for any person who agrees to comply with the relevant law within that one year period.

Makes various changes to ECRA and to other hazardous discharge site remediation programs; imposes a surcharge on remediations; establishes a loan and grant fund for remediation activities; appropriates bond moneys.

ASSEMBLY, No. 1727

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 14, 1992

By Assemblyman ALBOHN and Assemblywoman CRECCO

AN ACT concerning the remediation of contaminated property, establishing the "Hazardous Discharge Site Remediation Fund," making an appropriation from the "Hazardous Discharge Bond Act of 1986," amending and supplementing the "Environmental Cleanup Responsibility Act", P.L.1983, c.330, and supplementing Title 58 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 3 of P.L.1983, c.330 (C.13:1K-8) is amended to read as follows:

3. As used in this act:

[a. "Cleanup plan"] "Remedial action workplan" means a plan for the [cleanup of] remedial action to be undertaken at an industrial [establishments, approved by the department] establishment, or at any area to which a discharge originating at the industrial establishment is migrating or has migrated[, which may include a description of the locations, types and quantities of hazardous substances and wastes that will remain on the premises; a description of the types and locations of storage vessels, surface impoundments, or secured landfills containing hazardous substances and wastes; recommendations regarding the most practicable method of cleanup; and]; a description of the remedial action to be used to remediate the industrial establishment; a cost estimate of the [cleanup plan.] implementation of the remedial action workplan; and any other information the department deems necessary;

[The department, upon a finding that the evaluation of a site for cleanup purposes necessitates additional information, may require graphic and narrative descriptions of geographic and hydrogeologic characteristics of the industrial establishment and evaluation of all residual soil, groundwater, and surface water contamination;

b. "Closing, terminating or transferring operations" means the cessation of all operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes, or any temporary cessation for a period of not less than two years, or any other transaction or proceeding through which an industrial establishment becomes nonoperational 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

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

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]

"Closing operations" means:

(1) the cessation of all or substantially all operations of an industrial establishment,

(2) any temporary cessation of operations of an industrial establishment for a period of not less than two years,

(3) any transaction or proceeding through which an industrial establishment becomes nonoperational for health or safety reasons, and

(4) the initiation of bankruptcy proceedings;

"Transferring ownership or operations" means:

(1) any transaction or proceeding through which an industrial establishment undergoes a change in ownership,

(2) the sale or transfer of the controlling share of the assets of an industrial establishment,

(3) the execution of a lease for a period of 99 years or longer for an industrial establishment,

(4) the termination of a lease unless renewed without a disruption in operations of the industrial establishment,

(5) the dissolution of corporate identity, except for any dissolution of an indirect owner of an industrial establishment whose assets would have been unavailable for the remediation of the industrial establishment if the dissolution had not occurred,

(6) the financial reorganization,

(7) any change in operations of an industrial establishment that changes the industrial establishment's Standard Industrial Classification number to one that is not subject to this act;

"Change in ownership" means:

(1) the sale or transfer of the business of an industrial establishment or any of its real property,

(2) the sale or transfer of stock in a corporation resulting in a merger or consolidation involving the direct owner or operator or indirect owner of the industrial establishment,

(3) the sale or transfer of stock in a corporation resulting in a change in the person holding the controlling interest in the direct owner or operator or indirect owner of an industrial establishment,

(4) the sale or transfer of title to an industrial establishment or the real property of an industrial establishment by exercising an option to purchase, or

(5) the sale or transfer of a partnership interest in a partnership that owns or operates an industrial establishment that would reduce by 10% or more, the assets available for a remediation of the industrial establishment;

"Change in ownership" shall not include:

(1) a corporate reorganization not substantially affecting the ownership of the industrial establishment,

(2) a transaction or series of transactions involving the transfer of stock, assets or both, among corporations under common ownership, where the transactions will not result in the aggregate diminution of the net worth of the corporation that

directly owns or operates the industrial establishment, will not result in the aggregate diminution of the net worth of the industrial establishment by more than 10 percent, and an equal or greater amount in assets is available for the remediation of the industrial establishment before and after the transactions,

(3) a transaction or series of transactions involving the transfer of stock, assets or both, resulting in the merger or de facto merger or consolidation of the indirect owner with another entity or change in the person holding the controlling interest of the indirect owner of an industrial establishment, when the indirect owner's assets would have been unavailable for cleanup if the transactions had not occured, or

(4) transfers between members of the same family. "Family" means siblings, spouse, children, grandchildren, parents and grandparents;

[c.] "Department" means the Department of Environmental Protection;

[d.] "Hazardous substances" means those elements and compounds, including petroleum products, which are defined as such by the department, after public hearing, and which shall be consistent to the maximum extent possible with, and which shall include, the list of hazardous substances adopted by the Environmental Protection Agency pursuant to Section 311 of the "Federal Water Pollution Control Act Amendments of 1972" (33 U.S.C. §1321) and the list of toxic pollutants designated by Congress or the Environmental Protection Agency pursuant to Section 307 of that act (33 U.S.C. §1317); except that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of this act;

[e.] "Hazardous waste" means any amount of any waste substances required to be reported to the Department of Environmental Protection on the special waste manifest pursuant to N.J.A.C.7:26-7.4, or as otherwise provided by law;

[f.] "Industrial establishment" means any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or hazardous wastes on-site, above or below ground, having a Standard Industrial Classification number within 22-39 inclusive, 46-49 inclusive, 51 or 76 as designated in the Standard Industrial Classifications Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States. Those facilities or parts of facilities subject to operational closure and post-closure maintenance requirements pursuant to the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.) or the "Solid Waste Disposal Act" (42 U.S.C. §6901 et seq.), or any establishment engaged in the production or distribution of agricultural commodities, shall not be considered industrial establishments for the purposes of this act. The department may, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), exempt certain sub-groups or classes of operations within those sub-groups within the Standard Industrial Classification major group numbers

listed in this subsection upon a finding that the operation of the industrial establishment does not pose a risk to public health and safety;

[g.] "Negative declaration" means a written declaration, submitted by the owner or operator of an industrial establishment [and approved by the department], certifying that there has been no discharge of hazardous substances or hazardous wastes on the site, or that any such discharge on the site or discharge that has migrated or is migrating from the site has been cleaned up in accordance with procedures approved by the department, and there remain no hazardous substances or hazardous wastes at the site of the industrial establishment, and there remain no hazardous substances or hazardous wastes that migrated from the site of the industrial establishment, at levels that are above the applicable cleanup standards established by the department;

"Discharge" means an intentional or unintentional action or omission resulting in the actual or threatened releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a hazardous substance or hazardous waste onto the land or into the waters of the State;

"No further action letter" means a written determination by the department that based upon an evaluation of the historical use of the industrial establishment and the property, and any other investigation or action the department deems necessary, there are no discharged hazardous substances or hazardous wastes present at the site of the industrial establishment, at any other site to which a hazardous discharge originating at the industrial establishment has migrated, or that any discharged hazardous substances or hazardous wastes present at the industrial establishment or that have migrated from the industrial establishment are below the applicable cleanup standards;

"Indirect owner" means a corporation that owns any subsidiary that owns or operates an industrial establishment;

"Direct owner or operator" means a corporation that directly owns or operates an industrial establishment;

"Area of concern" means any existing or former location where hazardous substances or hazardous wastes are or were known or suspected to have been discharged, generated, manufactured, refined, transported, stored, handled, treated, disposed, or where hazardous substances or hazardous wastes have or may have migrated;

"Cleanup standards" means the combination of numeric and narrative standards to which hazardous substances or hazardous waste must be cleaned up as established by the department pursuant to section 30 of P.L. , c. (C.) (now before the Legislature as this bill);

"Feasibility study" means a study to develop and evaluate options for remedial action using data gathered during the remedial investigation to develop possible remedial action alternatives, to evaluate those alternatives and create a list of feasible alternatives, and to analyze the engineering, scientific, institutional, human health, environmental, and cost of each selected alternative;

"Owner" means any person who owns the real property of an

industrial establishment or who owns the industrial establishment;

"Operator" means any person, including users, tenants, occupants, or trespassers, having and exercising direct actual control of the operations of an industrial establishment;

"Preliminary assessment" means the first phase in the process of identifying areas of concern and determining whether hazardous substances or hazardous wastes are present at an industrial establishment or have migrated or are migrating from the industrial establishment, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or potential discharge of any hazardous substance or hazardous waste is required by the department;

"Remediation" or "remediate" means all necessary actions to investigate and clean up any known or suspected discharge or threatened discharge of hazardous substances or hazardous wastes, including the preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action;

"Remedial action" means those actions taken at an industrial establishment or offsite of an industrial establishment if hazardous substances or hazardous wastes have migrated or are migrating therefrom, as may be required by the department, including the removal, treatment, containment, transportation securing, or other engineering or treatment measures, whether of a permanent nature or otherwise, designed to ensure that any discharged hazardous substances or hazardous wastes at the site or that have migrated or are migrating offsite, is brought into compliance with the applicable cleanup standards;

"Remedial investigation" means a process to determine the nature and extent of a discharge of hazardous substances or hazardous wastes at an industrial establishment or a discharge of hazardous substances or hazardous wastes that have migrated or are migrating from an industrial establishment and the problems presented by a discharge, and may include data collected, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action including a feasibility study;

"Site investigation" means the collection and evaluation of data adequate to determine whether or not discharged hazardous substances or hazardous wastes exist at the industrial establishment or have migrated or are migrating from the industrial establishment at levels in excess of the applicable cleanup standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment.

(cf: P.L.1983, c.330, s.3)

2. Section 4 of P.L.1983, c.330 (C.13:1K-9) is amended to read as follows:

4. a. The owner or operator of an industrial establishment planning to close operations, or transfer ownership or operations shall [:

(1) Notify] notify the department in writing, no more than five days subsequent to closing operations or of its public release[,] of

its decision to close operations [;] , whichever occurs first, or within five days after the execution of an agreement to transfer ownership or operations, as applicable. The notice to the department shall: identify the subject industrial establishment; describe the transaction requiring compliance with the act; state the date of the closing of operations or the date of the public release of the decision to close operations and a copy of the appropriate public announcement, if applicable; state the date of execution of the agreement to transfer ownership or operations and the name of the parties to the transfer, if applicable; state the proposed date for closing operations or transferring ownership or operations; list the name, address, and telephone number of an authorized agent for the owner or operator; and include any other information the department deems necessary to provide it with sufficient notice of the transaction. The notice shall be transmitted to the department in the manner and form as required by the department.

b. Subsequent to the submittal of the notice required pursuant to subsection a. of this section, the owner or operator of an industrial establishment shall, except as otherwise provided by P.L. 1983, c.330 or P.L. , c. (now before the Legislature as this bill), remediate the industrial establishment. The remediation may include, as necessary, a preliminary assessment, site investigation, remedial investigation, feasibility study, and a remedial action of the industrial establishment.

The preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action shall be conducted in accordance with criteria, procedures, and time schedules established by the department. The results of the preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action shall be submitted to the department for its review and approval, except as otherwise provided by P.L.1983, c.330 or P.L. , c. (now before the Legislature as this bill). Submissions shall be in a manner and form as provided by the department.

Upon the submission of the results of either the preliminary assessment, site investigation, or remedial investigation, which results demonstrate that there are no hazardous substances or hazardous wastes at the industrial establishment, or that have migrated from or are migrating from the industrial establishment, at levels or concentrations above the applicable cleanup standards, the owner or operator may submit to the department for approval a proposed negative declaration as provided in subsection c. of this section.

c. The owner or operator of an industrial establishment shall, subsequent to closing operations, or of its public release of its decision to close operations, or prior to transferring ownership or operations, as applicable, submit to the department for approval a proposed negative declaration or proposed remedial action workplan. Except as otherwise provided by P.L.1983, c.330 or P.L. , c. (now before the Legislature as this bill), the owner or operator of an industrial establishment shall not transfer ownership or operations until a negative declaration or a remedial action workplan has been approved by the department or an

administrative consent order has been executed, and until, in cases where a remedial action workplan is required to be approved or an administrative consent order has been executed, a cleanup funding source, as required pursuant to section 21 of P.L. , c. (C.) (now before the Legislature as this bill), has been established.

[(2) Upon closing operations, or 60 days subsequent to public release of its decision to close or transfer operations, whichever is later, the owner or operator shall submit a negative declaration or a copy of a cleanup plan to the department for approval and a surety bond or other financial security for approval by the department guaranteeing performance of the cleanup in an amount equal to the cost estimate for the cleanup plan.

b. The owner or operator of an industrial establishment planning to sell or transfer operations shall:

(1) Notify the department in writing within five days of the execution of an agreement of sale or any option to purchase;

(2) Submit within 60 days prior to transfer of title a negative declaration to the department for approval, or within 60 days prior to transfer of title,] The owner or operator shall attach a copy of any [cleanup plan] approved negative declaration, remedial action workplan, or administrative consent order to the contract or agreement of sale or agreement to transfer or any option to purchase which may be entered into with respect to the transfer of ownership or operations. In the event that any sale or transfer agreements or options have been executed prior to the submission of the plan to the department, the [cleanup plan] approved negative declaration, remedial action workplan, or administrative consent order shall be transmitted by the owner or operator, by certified mail, prior to the transfer of ownership or operations, to all parties to any transaction concerning the transfer of ownership or operations, including purchasers, bankruptcy trustees, mortgagees, sureties, and financiers [;

(3) Obtain, upon approval of the cleanup plan by the department, a surety bond or other financial security approved by the department guaranteeing performance of the cleanup plan in an amount equal to the cost estimate for the cleanup plan.

c.] d. The department, upon application by the owner or operator of an industrial establishment who has submitted a notice to the department pursuant to subsection a. of this section, shall enter into an administrative consent order with the owner or operator in which the owner or operator agrees to perform the necessary remediation at the industrial establishment, as required by this act, pursuant to a schedule established by the department, agrees to establish a cleanup funding source as required pursuant to section 21 of P.L. , c. (C.) (now before the Legislature as this bill), agrees to obtain an approved negative declaration or remedial action workplan, and agrees to perform any necessary remedial actions. The administrative consent order may provide that a purchaser, transferee, mortgagee, or other party to the transfer may perform the remedial action as provided in subsection e. of this section. Upon entering into an administrative consent order the owner or operator may transfer ownership or operations of the

industrial establishment prior to approval of a negative declaration or remedial action workplan.

The department shall adopt regulations establishing the terms and conditions for obtaining, amending, and complying with an administrative consent order. The regulations shall include a sample form of the administrative consent order. An administrative consent order may not grant authority to the department beyond that provided to the department by law and may not require an owner or operator to waive any right to appeal a departmental decision involving the substantive requirements of a remediation or an issue of fact. The administrative consent order may require the owner or operator to waive any right to appeal the department's authority to enter into the adminstrative consent order, the obligation of the owner or operator to perform the remediation, or the substantive provisions of the administrative consent order. Entering into an administrative consent order shall not affect an owner's or operator' right to avail itself of the provisions of section 6 of P.L.1983, c.330 (C.13:1K-11) or of sections 9, 10, 12, 13, or 17 of P.L. , c. (C.)(now before the Legislature as this bill).

e. The [cleanup plan and detoxification of] approved remedial action workplan for the [site] industrial establishment shall be implemented by the owner or operator, [provided] except that the purchaser, transferee, mortgagee or other party to the transfer may assume that responsibility pursuant to the provisions of this act.

f. The department shall, within 45 days of submission of a complete and accurate negative declaration, approve the negative declaration, or inform the owner or operator of the industrial establishment that a remedial action workplan shall be submitted.

g. The department shall, in accordance with the schedule contained in an approved remedial action workplan, inspect the premises to determine conformance with the cleanup standards and shall certify that the remedial action workplan has been executed and that the industrial establishment has been remediated in compliance with applicable cleanup standards.

(cf: P.L.1983, c.330, s.4)

3. Section 2 of P.L.1991, c.238 (C.13:1K-9.2) is amended to read as follows:

2. The acquiring of title to an industrial establishment by a municipality pursuant to a foreclosure action pertaining to a certificate of tax sale purchased and held by the municipality shall not relieve the previous owner or operator of the industrial establishment of his duty to [implement a cleanup plan if the implementation is deemed necessary by the Department of Environmental Protection] remediate the industrial establishment as required pursuant to P.L. 1983, c.330.

(cf: P.L.1991, c.238, s.2)

4. Section 3 of P.L.1991, c.238 (C.13:1K-9.3) is amended to read as follows:

3. If a municipality undertakes [to clean up hazardous substances and wastes on the site of] a remediation of an industrial establishment, the title to which the municipality

acquired pursuant to a foreclosure action pertaining to a certificate of tax sale, all expenditures incurred in the [cleanup] remediation shall be a debt of the immediate past [owners] owner or operator of the industrial establishment. The debt shall constitute a lien on all property owned by the immediate past owner or operator when a notice of lien, incorporating a description of the property subject to the [cleanup and removal] remediation and an identification of the amount of [cleanup, removal] remediation and related costs expended by the municipality is duly filed with the clerk of the Superior Court. The clerk shall promptly enter upon the civil judgment or order docket the name and address of the immediate past owner or operator and the amount of the lien as set forth in the notice of lien. Upon entry by the clerk, the lien shall attach to the revenues and all real and personal property of the immediate past owner or operator, whether or not he is insolvent. The notice of lien filed pursuant to this section which affects any property of an immediate past owner or operator shall have priority from the day of the filing of the notice of the lien, but shall not affect any valid lien, right, or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien pursuant to this section.

(cf: P.L.1991, c.238, s.3)

5. Section 5 of P.L.1991, c.238 (C.13:1K-9.5) is amended to read as follows:

5. If a municipality undertakes a [cleanup of hazardous substances and wastes on the site] remediation of an industrial establishment, the municipality shall make any submissions required by P.L.1983, c.330 (C.13:1K-6 et seq.) and shall obtain [approval] all approvals of the Department of Environmental Protection [prior to the initiation of the sampling plan and the cleanup plan] as required pursuant to the provisions of P.L.1983, c.330 and any rules or regulations adopted pursuant thereto.

(cf: P.L.1991, c.238, s.5)

6. Section 5 of P.L.1983, c.330 (C.13:1K-10) is amended to read as follows:

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

other provisions or procedures necessary to implement this act. [Until the minimum standards described herein are adopted, the department shall review, approve or disapprove negative declarations and cleanup plans on a case by case basis.]

b. [The department shall, within 45 days of submission, approve the negative declaration, or inform the industrial establishment that a cleanup plan shall be submitted.

c. The department shall, in accordance with the schedule contained in an approved cleanup plan, inspect the premises to determine conformance with the minimum standards for soil, groundwater and surface water quality and shall certify that the cleanup plan remedial action workplan has been executed and that the site has been detoxified.] The owner or operator shall allow the department reasonable access to the industrial establishment to inspect the premises and to take soil, groundwater, or other samples or measurements as deemed necessary by the department to verify the results of any submission made to the department and to verify the owner's or operator's compliance with the requirements of this act.

(cf: P.L.1983, c.330, s.5)

7. Section 6 of P.L.1983, c.330 (C.13:1K-11) is amended to read as follows:

6. a. [The provisions of any law, rule or regulation to the contrary notwithstanding, the transferring of an industrial establishment is contingent on the implementation of the provisions of this act.

b. If] The owner or operator of an industrial establishment planning to transfer ownership or operations may apply to the department for a deferral of the preparation, approval, and implementation of a remedial action workplan at the industrial establishment. The applicant shall submit to the department:

(1) a certification signed by the purchaser, transferee, mortgagee or other party to the transfer, approved by the department, that [the premises of] the industrial establishment would be subject to substantially the same use by the purchaser, transferee, mortgagee or other party to the transfer, [and upon written certification thereto and approval by the department thereof, the implementation of a cleanup plan and the detoxification of the site]

(2) a certification, approved by the department, that the owner or operator has satisfactorily completed a preliminary assessment, site investigation, remedial investigation, and feasibility study of the industrial establishment,

(3) a cost estimate for the remedial action necessary at the industrial establishment, approved by the department, and

(4) a certification, approved by the department, that the purchaser, transferee, mortgagee or other party to the transfer, has the financial ability to pay for the implementation of the necessary remedial action.

The preparation, approval, and implementation of a remedial action workplan for the industrial establishment may be deferred until the use changes or until the purchaser, transferee, mortgagee or other party to the transfer closes[, terminates or transfers] operations or transfers ownership or operations.

[(1) Within 60 days of receiving notice of the sale or realty transfer and the certification that the industrial establishment would be subject to substantially the same use, the department shall approve, conditionally approve, or deny the certification.

(2) Upon approval of the certification, the implementation of a cleanup plan and detoxification of the site shall be deferred.

(3) Upon denial of the certification, the cleanup plan and detoxification of the site shall be implemented pursuant to the provisions of this act.]

[c.] b. Upon satisfactory submission of a complete and accurate application, the department shall approve the deferral. Upon approval of the deferral, the preparation, approval, and implementation of remedial action workplan at the industrial establishment shall be deferred. The deferral shall be denied by the department if a complete and accurate application is not submitted to the department or if the department fails to approve any of the components of the application. Upon denial of the deferral, the remediation of the industrial establishment shall be continued pursuant to the provisions of this act.

c. The authority to defer [implementation of the cleanup plan] the preparation, approval, and implementation of a remedial action workplan set forth in subsection [b.] a. of this section shall not be construed to limit, restrict, or prohibit the department from directing site [cleanup] remediation under any other statute, rule, or regulation, but shall be solely applicable to the obligations of the owner or operator of an industrial establishment, pursuant to the provisions of this act, nor shall any other provisions of this act be construed to limit, restrict, or prohibit the department from directing site [cleanup] remediation under any other statute, rule, or regulation.

(cf: P.L.1983, c.330, s.6)

8. Section 8 of P.L.1983, c.330 (C.13:1K-13) is amended to read as follows:

8. a. Failure of the transferor to comply with any of the provisions of this act is grounds for voiding the sale or transfer of an industrial establishment or any real property utilized in connection therewith by the transferee, entitles the transferee to recover damages from the transferor, and renders the owner or operator of the industrial establishment strictly liable, without regard to fault, for all [cleanup and removal] remediation costs and for all direct and indirect damages resulting from the failure to implement the [cleanup plan] remedial action workplan.

b. Failure to submit a valid negative declaration [,] or [cleanup plan] a remedial action workplan pursuant to the provisions of section 4 of [this act] P.L.1983, c.330 (C.13:1K-9) is grounds for voiding the sale by the department.

c. Any person who knowingly gives or causes to be given any false information or who fails to comply with the provisions of this act is liable for a penalty of not more than $25,000.00 for each offense. If the violation is of a continuing nature, each day during which it continues shall constitute an additional and separate offense. Penalties shall be collected in a civil action by a summary proceeding under "the penalty enforcement law" (N.J.S.2A:58-1 et seq.). Any officer or management official of

an industrial establishment who knowingly directs or authorizes the violation of any provisions of this act shall be personally liable for the penalties established in this subsection.

(cf: P.L.1983, c.330, s.8)

9. (New section) a. The owner or operator of an industrial establishment planning to close operations or transfer ownership or operations of an industrial establishment may, in lieu of complying with the provisions of subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9), apply to the department for an expedited review. An application for an expedited review pursuant to this section shall include:

(1) the notice required pursuant to the provisions of subsection a. of section 4 of P.L.1983, c.330 (C.13:1K-9),

(2) a certification that for the industrial establishment, a remedial action workplan has previously been implemented and a no further action letter has been issued pursuant to P.L.1983, c.330, a negative declaration has been previously approved by the department pursuant to P.L.1983, c.330, or the department has previously approved a remediation of the industrial establishment equivalent to that performed pursuant to the provisions of P.L.1983, c.330,

(3) a certification that the owner or operator has performed remediation activities at the industrial establishment, consistent with regulations established by the department, in order to identify areas of concern that are new or have continued in use since the issuance of a no further action letter, negative declaration approval, or remediation approval as described in paragraph (2) of this subsection, and that based on those remediation activities the owner or operator certifies that there has been no discharge of a hazardous substance or hazardous waste at the industrial establishment subsequent to the approval of the negative declaration, the issuance of the no further action letter, or the equivalent remediation; or, if any discharge has occured, a certification listing any discharge, describing the action taken to remediate the discharge, a certification that the remediation was performed in accordance with procedures established by the department, and a certification that the remediation was approved by the department,

(4) a certification that for any underground storage tank covered by the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.), an approved method of secondary containment or a monitoring system as required by P.L.1986, c.102, has been installed,

(5) a copy of the negative declaration or no further action letter, as applicable, last approved by the department for the entire industrial establishment, and

(6) a proposed negative declaration.

b. Upon the submission of a complete and accurate application and after an inspection, if necessary, the department shall approve or disapprove the negative declaration. The department shall approve the negative declaration upon a finding that the information in the certifications submitted pursuant to subsection a. of this section is accurate. Upon a disapproval of the proposed negative declaration by the department pursuant to this section,

the owner or operator shall comply with the provisions of section 4 of P.L.1983, c.330.

10. (New section) a. The owner or operator of an industrial establishment planning to close operations or transfer ownership or operations of the industrial establishment may, in lieu of complying with the provisions of subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9), apply to the department for a limited site review. An application for a limited site review pursuant to this section shall include:

(1) the notice required pursuant to the provisions of subsection a. of section 4 of P.L.1983, c.330 (C.13:1K-9),

(2) a certification that for the industrial establishment, a remedial action workplan has previously been implemented and a no further action letter has been issued pursuant to P.L.1983, c.330, a negative declaration has been previously approved by the department pursuant to P.L.1983, c.330, or the department has previously approved a remediation equivalent to that performed, pursuant to the provisions of P.L. 1983, c.330,

(3) a certification that the owner or operator has performed remediation activities at the industrial establishment, consistent with regulations established by the department, in order to identify areas of concern that are new or have continued in use since the issuance of a no further action letter, negative declaration approval, or remediation approval as described in paragraph (2) of this subsection, and that based on those remediation activities the owner or operator certifies that subsequent to the issuance of the negative declaration, no further action letter or remediation approval described in paragraph (2) of this subsection, a discharge has occurred at the industrial establishment that was not remediated in accordance with the procedures established by the department or any remediation performed has not been approved by the department,

(4) the negative declaration or no further action letter, as applicable, last approved by the department for the industrial establishment,

(5) a certification listing any information required to be provided in a preliminary assessment that has changed since the last departmental approval of a negative declaration, issuance of a no further action letter, or remediation approval, as applicable, for the industrial establishment,

(6) a certification that for any underground storage tank covered by the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.), an approved method of secondary containment or a monitoring system as required by P.L.1986, c.102, has been installed, and

(7) a proposed negative declaration, if applicable.

b. Upon the submission of a complete application, and after an inspection if necessary, the department may:

(1) approve the negative declaration upon a finding that any discharge of a hazardous substance or hazardous waste, as certified to pursuant to paragraph (3) of subsection a. of this section, has been remediated to levels that are below the applicable cleanup standards as established by the department, or

(2) require the owner or operator perform the remediation

process set forth in subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9) only for those areas of concern identified by the information provided pursuant to paragraphs (3) and (5) of subsection a. of this section upon a finding that further investigation or remediation is necessary to bring the industrial establishment into compliance with the applicable cleanup standards.

c. The owner or operator of an industrial establishment subject to the provisions of this section shall not close operations or transfer ownership or operations until a remedial action workplan, or a negative declaration, as applicable, has been approved by the department or an administrative consent order has been entered into.

11. (New section) a. The owner or operator of an industrial establishment may apply to the department to close operations or transfer ownership or operations at an industrial establishment without obtaining departmental approval of a remedial action workplan or a negative declaration or without entering into an administrative consent order if the industrial establishment is already in the process of a remediation pursuant to subsection b. of section 4 of P.L.1983, c.330 (C.13:1K-9). The application shall include:

(1) the notice required pursuant to the provisions of subsection a. of section 4 of P.L.1983, c.330,

(2) a certification that there has been no discharge of any hazardous substance or hazardous waste at the industrial establishment during the applicant's period of operation or ownership or that the remediation of any discharge of a hazardous substance or hazardous waste that occured during the applicant's period of ownership or operation was approved by the department,

(3) a certification by the owner or operator that a cleanup funding source for the cost of the remediation or the implementation of the remedial action workplan at the industrial establishment has been established pursuant to section 21 of P.L. , c. (C.) (now before the Legislature as this bill, and

(4) a certification, as applicable, that any transferee has been notified that the industrial establishment is the subject of a remediation.

b. Upon the submission of a complete application, and upon a finding that the information submitted is accurate, the department shall authorize, in writing, that the applicant may close operations or transfer ownership or operations of the industrial establishment.

12. (New section) a. The owner or operator of an industrial establishment may apply to the department to close operations or transfer ownership or operations at an industrial establishment without obtaining departmental approval of a remedial action workplan or a negative declaration or without entering into an administrative consent order if the only areas of concern or the only discharges at the industrial establishment are from an underground storage tank regulated pursuant to P.L. 1986, c.102 (C.58:10A-21 et seq.). The application shall include:

(1) the notice required pursuant to the provisions of subsection

a. of section 4 of P.L.1983, c.330,

(2) the submission of a preliminary assessment that shows that the only area of concern at an industrial establishment is an underground storage tank or tanks as defined pursuant to section 2 of P.L.1986, c.102 (C.58:10A-22), or the submission of a site investigation that shows that the only discharged hazardous substances or hazardous wastes at the industrial establishment, or that has migrated offsite, above the applicable cleanup standards are from a leak or discharge from that underground storage tank or tanks, and

(3) a certification that the owner or operator of the industrial establishment is in compliance with the provisions of P.L.1986, c.102 for all underground storage tanks covered by that act, at the industrial establishment.

b. Upon the submission of a complete application, and upon a finding that the information submitted is accurate, the department shall authorize, in writing, the applicant to close operations or transfer ownership or operations of the industrial establishment.

13. (New section) a. The owner or operator of an industrial establishment may apply to the department to close operations or transfer ownership or operations at an industrial establishment without obtaining departmental approval of a remedial action workplan or without entering into an administrative consent order, if the discharge of hazardous substances or hazardous wastes at the industrial establishment is of minimal environmental concern. Upon the completion of a preliminary assessment, site investigation, remedial investigation, and feasibility study for the industrial establishment, conducted pursuant to subsection b. of section 4 of P.L.1983, c. 330, any owner or operator may submit to the department an application for a determination that the discharge at an industrial establishment is of minimal environmental concern, which application shall include:

(1) a certification, supported by the submission of data from the preliminary assessment, site investigation, remedial investigation and feasibility study, that there are no more than two areas of concern at the industrial establishment that are contaminated at levels above the applicable cleanup standards, and that remedial action at those areas of concern can be completed pursuant to standards and criteria established by the department within six months of the owner's or operator's receipt of the approval of the application by the department;

(2) a certification that a remedial action workplan shall be prepared pursuant to standards and criteria established by the department;

(3) a certification that the remedial action workplan will be completed pursuant to standards and criteria established by the department within six months of the owner's or operator's receipt of the approval of the application by the department;

(4) a demonstration that the cleanup funding source required pursuant to section 21 of P.L. , c. (C.) (now before the Legislature as this bill) has or will be established;

(5) the payment of all fees or surcharges imposed pursuant to

P.L.1983, c.330 and section 28 of P.L. , c. (C.) (now before the Legislature as this bill), and any rules or regulations adopted pursuant thereto; and

(6) documentation establishing that the discharged hazardous substances or hazardous wastes at the particular industrial establishment do not pose a threat to human health because of the proximity of an area of concern to a drinking water source or because of the location, complexity, or the nature of the discharge.

b. Upon the submission of a complete application, and upon a finding that the information submitted is accurate, the department shall approve the application for a determination that the discharge at an industrial establishment is of minimal environmental concern. Prior to making a finding upon the application pursuant to this section, the department may inspect the industrial establishment, as necessary, to verify the information in the application. The decision of the department shall be made within 30 days of the submission of a complete application. In determining the amount of time necessary to complete remedial action, the department shall not include that time in which it takes the department to issue a permit for a discharge to surface water pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.).

c. The owner or operator shall, upon the completion of the remedial action workplan at the subject areas of concern, certify to the department that the remedial action workplan has been implemented in accordance with the standards and criteria established by the department. The certification shall include a copy of the remedial action workplan and the results of any tests performed as part of the remedial action. Within 30 days of receipt of the certification, the department shall issue a no further action letter to the owner or operator. The department may perform an inspection of the industrial establishment prior to issuing the no further action letter.

The department may refuse to issue the no further action letter pursuant to this section only upon a finding that hazardous substances or hazardous wastes remain at the relevant areas of concern at levels or concentrations in excess of, the applicable cleanup standards.

d. Upon the failure of an owner or operator to complete the implementation of a remedial action workplan within the six month period as provided in subsection a. of this section, the owner or operator shall so notify the department in writing and the reasons therefor. The owner or operator shall have no more than 120 additional days to complete the implementation of the remedial action workplan. If the implementation of the remedial action workplan is not completed within this additional time, the department may rescind its determination that the industrial establishment is of minimal environmental concern and may require that a remedial action workplan be submitted and implemented by the owner or operator in a manner and under the terms and conditions provided in its general regulations for remedial action workplan submissions and implementation.

14. (New section) a. The owner of an industrial establishment

may transfer a portion of the real property on which an industrial establishment is situated without conducting a remediation of the entire industrial establishment pursuant to the provisions of P.L.1983, c.330 and this act, if, upon application by the owner, the department issues a certificate of limited conveyance.

b. An application for a certificate of limited conveyance shall be in the form of a certification by the owner which shall include a description of the real property to be transferred, an appraisal of the real property to be transferred, the sale price or market value of the real property to be transferred, an appraisal of the entire industrial establishment, and an appraisal of the remaining property if the certificate of limited conveyance were issued, as well as any other information the department deems necessary to make the findings required in subsection c. of this section.

c. The department shall issue a certificate of limited conveyance for a portion of the real property on which an industrial establishment is situated after the submission of a complete and accurate application and upon a finding that the sales price or market value of the real property to be conveyed, together with any additional diminution in value to the remaining property as a result of the conveyance is not more than one third of the total appraised value of the industrial establishment prior to the transfer, and that the remaining real property is an industrial establishment subject to the provisions of P.L.1983, c.330. The appraisals shall be made no more than one year prior to the submission of application for a certificate of limited conveyance. Conveyances made pursuant to this section shall not exceed one third of the value of the industrial establishment during the period of ownership of the applicant.

d. Upon issuance of the certificate of limited conveyance, the owner or operator shall, prior to the conveyance, comply with the provisions of section 4 of P.L.1983, c.330 for that portion of the real property certified for conveyance. The remediation that may be required on the real property subject to the certificate of limited conveyance shall include any hazardous substances or hazardous wastes that are migrating from the remaining portion of the industrial establishment onto the real property being conveyed. The remaining portion of the industrial establishment, upon closing, terminating or transferring operations shall be subject to the provisions of P.L.1983, c.330 and this act.

e. A certificate of limited conveyance shall be valid for three years from the date of issuance.

15. (New section) a. When a portion of an industrial establishment is the subject of a condemnation proceeding initiated pursuant to the "Eminent Domain Act of 1971," P.L.1971, c.361 (C.20:3-1 et seq.) the provisions of section 4 of P.L.1983, c.330 shall apply only to that portion of the industrial establishment to be transferred pursuant to the condemnation proceeding, except as provided in subsections b. and c. of this section. The remaining portion of the industrial establishment, upon closing operations or transferring ownership or operations, shall be subject to the provisions of P.L.1983, c.330 notwithstanding that at the time of the closure of operations or the transfer of ownership or operations, the remaining portion

may not be an industrial establishment as defined pursuant to section 2 of P.L.1983, c.330. (C.13:1K-7).

b. In the case where the owner or operator closes operations or transfers ownership or operations of the entire industrial establishment as a result of the condemnation of a portion of the industrial establishment, the entire industrial establishment shall be subject to the provisions of P.L.1983, c.330 at the time of the transfer of the portion of the real property that is the subject of a condemnation proceeding.

c. The entire industrial establishment shall be subject to the provisions of P.L.1983, c.330 at the time of the transfer of the portion of the real property that is the subject of a condemnation proceeding, if the value of the real property to be conveyed pursuant to the condemnation proceeding, together with any additional diminution in value to the remaining property as a result of the conveyance, is two thirds or more of the total appraised value of the entire industrial establishment.

16. (New section) Where the closure of operations or the transfer of ownership or operations of an industrial establishment by an owner or operator who is a tenant requires compliance with P.L.1983, c.330, the area of the industrial establishment subject to the provisions of P.L.1983, c.330 shall be limited to that area under the exclusive current control of the tenant. The area under exclusive current control of the tenant shall not include any area of common use among more than one tenant. The area under exclusive current control of the tenant may include areas in which the landlord has access in the capacity as a landlord. In the event that an owner or operator of an industrial establishment receives a negative declaration or remedial action workplan approval for the area under the tenant's exclusive current control pursuant to this section, those areas of the industrial establishment not under the tenant's exclusive current control but that were once used by that tenant or that were used by that tenant and were subject to common use by other tenants, shall be subject to all of the requirements of P.L.1983, c.330 (C.13:1E-9), at the time of closure of operations or transfer of ownership or operations by the owner, notwithstanding that at the time of the closure of operations or transfer or ownership or operations by the owner, the subject real property may not be an industrial establishment as defined pursuant to section 2 of P.L.1983, c.330 (C.13:1K-7).

17. (New section) The owner or operator of an industrial establishment, who has submitted a notice to the department pursuant to subsection a. of section 4 of P.L.1983, c.330 (C.13:1K-9), may implement an interim response action prior to departmental approval of that action. The interim response action may be implemented when the expeditious temporary or partial remediation of a discharged hazardous substance or hazardous waste is necessary to contain or stabilize a discharge prior to implementation of an approved remedial action workplan in order to prevent, minimize, or mitigate damage to public health or safety or to the environment which may otherwise result from a discharge. The interim response action shall be implemented in compliance with the procedures and standards

established by the department. The department may require submission of a notice of intent to implement an interim response action and may require, subsequent to completion of the interim response action, a report detailing the actions taken and a certification that the interim response action was implemented in accordance with all applicable laws and regulations. The department shall review these submissions to verify whether the interim response action was implemented in accordance with applicable laws and regulations. The department shall not require that additional remediation be undertaken at an area of concern subject to the interim response action except in instances when further remediation is necessary to bring that area of concern into compliance with the applicable cleanup standards, when the actions taken were temporary in nature requiring additional long-term remedial action take place, or when the department determines that the interim response action was not performed in substantial compliance with applicable laws or regulations.

18. (New section) Any person who, prior to July 1, 1992, violated the provisions of P.L.1983, c.330 by closing operations or transferring ownership or operations of an industrial establishment without receiving departmental approval of a cleanup plan or a negative declaration pursuant to the provisions of P.L.1983, c.330, or without entering into an administrative consent order that allows the closure of operations or transfer of ownership or operations, shall not be subject to a penalty for that violation if the person notifies the department of the closure of operations or of the transfer of ownership or operations of the industrial establishment, and enters into an administrative consent order with the department to initiate a remediation of the industrial establishment pursuant to the provisions of P.L.1983, c.330 and any rules or regulations adopted pursuant thereto, within one year of the effective date of this section.

19. (New section) a. Within one year of the effective date of this act, the Department of Environmental Protection shall conduct an audit of the negative declarations and remedial action workplans that have been submitted to the department pursuant to P.L.1983, c.330. On the basis of this audit the department shall adopt regulations identifying, within the Standard Industrial Classification major group numbers listed in the definition of "industrial establishment," all industries designated by Standard Industrial Classification number subgroups, or classes of operations within those subgroups, that do not pose a risk to public health and safety or to the environment by their normal operation. The audit shall distinguish between hazardous substances or hazardous wastes at an industrial establishment caused by a particular type of industry and hazardous substances or hazardous wastes that exists as a result of activities at an industrial establishment unrelated to the activities of that industry.

b. An industrial establishment for which a remedial action workplan was previously implemented and a no further action letter was received pursuant to P.L.1983, c.330, a negative declaration was previously approved by the department pursuant to P.L.1983, c.330, or for which the department has previously

approved a remediation equivalent to that performed pursuant to the provisions of P.L.1983, c.330, and which industrial establishment is designated by a Standard Industrial Classification subgroup or class of operations that does not pose a risk to public health and safety or to the environment by its normal operations as identified in subsection a. of this section, shall not be considered an industrial establishment for the purposes of P.L. 1983, c.330.

20. (New section) As used in sections 20 through 33 of P.L. , c. (C.) (now before the Legislature as this bill):

"Authority" means the New Jersey Economic Development Authority established pursuant to P.L.1974, c.80 (C.34:1B-1 et seq.);

"Cleanup funding source" means the methods of financing the remediation of a discharge required to be established by the person performing the remediation pursuant to section 21 of P.L. , c. (C.) (now before the Legislature as this bill);

"Cleanup standards" means the combination of numeric and narrative standards to which contaminants must be cleaned up as provided by the department pursuant to section 30 of P.L. , c. (C.) (now before the Legislature as this bill);

"Contamination" or "contaminant" means any discharged hazardous substance as defined pursuant to section 3 of P.L.1976, c.141 (C.58:10-23.11b), hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c. 74 (C.58:10A-3);

"Department" means the Department of Environmental Protection;

"Discharge" means an intentional or unintentional action or omission resulting in the actual or threatened releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a contaminant onto the land or into the waters of the State or into the waters outside the jurisdiction of the State which contaminant enters the waters of the State;

"No further action letter" means a written determination by the department that at a particular site, based upon an evaluation of the historical use of the site, and any other investigation or action the department deems necessary, there are no discharged contaminants present, or any discharged contaminants present are below the applicable cleanup standards;

"Remediation" or "remediate" means all necessary actions to investigate and cleanup any known or suspected discharge or threatened discharge of contaminants, including, without limitation, a preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action;

"Remediation fund" means the Hazardous Discharge Site Remediation Fund established pursuant to section 22 of P.L. c. (C.) (now before the Legislature as this bill);

"Special ecological receptors" means all natural resources that are protected, managed, or otherwise regulated by federal or state law, pursuant to the "Comprehensive Response, Compensation, and Liability Act of 1980," 42 U.S.C. §9601 et seq.; the "Delaware and Raritan Canal State Park Law of 1974," P.L.1974, c.118, (C.13:13A-1 et seq.); the "Federal Endangered

Species Act of 1973," 16 U.S.C. §1531 et seq.; the "Federal Water Pollution Control Act," 33 U.S.C. §§ 1251 et seq.; Title 23 of the Revised Statutes, Fish and Game, Wild Birds and Animals; the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et seq.); the "Marine Mammal Protection Act of 1972," 16 U.S.C. §1361; the "Natural Areas System Act," P.L.1975 c. 363 (C.13:1B-15.12a et seq.); Chapter 8A of Title 13 of the Revised Statutes, Green Acres; the "New Jersey Natural Lands Trust," P.L.1968, c.425 (C.13:1B-15.119); the "Pinelands Protection Act," P.L.1979, c.111 (C.13:18A-1 et seq.); the "New Jersey Wild and Scenic Rivers Act," P.L.1977, c.236 (C.13:8-45 et seq.); the "State Park and Forestry Resources Act," P.L.1983, c.324, (C.13:1L-1 et seq.); the "Spill Compensation and Control Act," P.L.1976, c.141, (C.58:10-23.11 et seq.); the "Water Pollution Control Act," P.L.1977, 74 (C.58:10A-1 et seq.); the "Wetlands Act of 1970," P.L.1970, c.272, (C.13:9A-1 et seq.); and the "Wildlife Sanctuaries Act," P.L.1982, c.167, (C.13:8-64 et seq.).

21. (New section) a. The owner or operator of an industrial establishment required to perform remediation activities pursuant to P.L.1983, c.330 (C.13:1K-6 et seq.), or a discharger or person in any way responsible for a hazardous substance who has been issued a directive or an order, who has entered into an administrative consent order, or who has been ordered by a court to clean up and remove a hazardous substance discharge pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.), shall, no more than 14 days after approval by the department of a remedial action workplan or as a condition in an administrative consent order with the department for the remediation of a contaminated site, establish and maintain a cleanup funding source in the amount necessary to pay the cost of the required remediation. A person required to establish a cleanup funding source pursuant to this section shall provide to the department satisfactory documentation that the requirement has been met. The provisions of this section shall not apply to the remediation of a discharge at a business having a Standard Industrial Classification Number 5541 as designated in the Standard Industrial Classification Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States.

b. The person responsible for the remediation may use the cleanup funding source to pay the cost of remediation. The department may not require any other financial assurance by the person responsible for the remediation other than that provided in this section. In the case of a remediation performed pursuant to P.L.1983, c.330, the cleanup funding source shall be established no more than 14 days after the approval by the department of a remedial action workplan or as provided in an administrative consent order entered into pursuant to section 4 of P.L.1983, c.330 (C.13:1K-9). In the case of a remediation performed pursuant to P.L.1976, c.141, the cleanup funding source shall be established as provided in an administrative consent order signed by the parties, as provided by a court, or as directed by the department. The cleanup funding source shall be evidenced by

the establishment and maintenance of (1) a fully funded trust account, (2) a line of credit, or (3) a self guarantee, or by any combination thereof. Where it can be demonstrated that a person cannot establish and maintain a cleanup funding source for the full cost of the remediation by a method specified in this subsection, that person may establish the cleanup funding source by securing a loan for the estimated costs of the remediation from the Hazardous Discharge Site Remediation Fund as provided in section 23 of P.L. c. (C) (now before the Legislature as this bill).

c. A fully funded trust shall be established pursuant to the provisions of this subsection. An originally signed duplicate of the trust agreement shall be delivered to the department by certified mail within 14 days of receipt of notice from the department that the remedial action workplan is approved or as specified in an administrative consent order, civil order, or order of the department, as applicable. The fully funded trust agreement shall conform to a model trust agreement as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department. The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or New Jersey agency.

The trust shall be established in an amount equal to or greater than (1) the cost estimate of the implementation of the remedial action workplan as approved by the department, (2) as provided in an administrative consent order, (3) as stated in a departmental order or directive, or (4) as agreed to by a court, and shall be in effect or a term not less than the actual time necessary to perform the remediation at the site. Whenever the remediation or remedial action workplan cost estimate increases, the person required to establish the cleanup funding source shall, within 60 days after the increase, cause the amount of the fully funded trust to be increased to an amount at least equal to the new estimate, establish a new cleanup funding source pursuant to subsection b. of this section in an amount at least equal to the new estimate, or obtain an additional cleanup funding source as specified in this section in an amount at least equal to the increase. Whenever the remediation or remedial action workplan cost estimate decreases, the person required to obtain the cleanup funding source may file a written request to the department to decrease the amount in the fully funded trust. The fully funded trust may be decreased to the amount of the new estimate only upon written approval by the department to the trustee.

The trust agreement shall provide that the fully funded trust may not be revoked or terminated by the person required to establish the cleanup funding source or by the trustee without the written consent of the department. The trustee shall release to the person required to establish the cleanup funding source, or to the department or transferee of the property, as appropriate, only those funds as the department authorizes, in writing, to be released. The person entitled to draw upon the fully funded trust

shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination by the department that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement of moneys from the fully funded trust in the amount of the documented costs.

The department shall return the original fully funded trust agreement to the trustee for termination after the person required to establish the cleanup funding source substitutes an alternative cleanup funding source as specified in this section or the department notifies the person that that person is no longer required to maintain a cleanup funding source for remediation of the contaminated site.

d. A line of credit shall be established in a manner pursuant to the provisions of this subsection. An originally signed duplicate of the line of credit agreement shall be delivered to the department by certified mail within 14 days of receipt of notice from the department that the remedial action workplan is approved, or as specified in an administrative consent order, civil order, or order of the department, as applicable. The line of credit agreement shall conform to a model agreement as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department.

The line of credit shall be established in an amount equal to or greater than (1) the cost estimate of the implementation of the remedial action workplan as approved by the department, (2) as provided in an administrative consent order, (3) as stated in a departmental order or directive, or (4) as agreed to by a court, and shall be in effect for a term not less than the actual time necessary to perform the remediation at the site. Whenever the remediation or remedial action workplan cost estimate increases, the person required to establish the cleanup funding source shall, within 60 days after the increase, cause the amount of the line of credit to be increased to an amount at least equal to the new estimate, establish a new cleanup funding source pursuant to subsection b. of this section in an amount at least equal to the new estimate, or obtain an additional cleanup funding source as specified in this section in an amount at least equal to the increase. Whenever the remediation or remedial action workplan cost estimate decreases, the person required to establish the cleanup funding source may file a written request to the department to decrease the amount in the line of credit. The line of credit may be decreased to the amount of the new estimate only upon written approval by the department to the person or institution who provides the line of credit.

A line of credit agreement shall provide that the line of credit may not be revoked or terminated by the person required to obtain the cleanup funding source or the person or institution providing the line of credit without the written consent of the department. The person or institution providing the line of credit shall release to the person required to establish the cleanup funding source, or to the department or transferee of the property as appropriate, only those funds as the department

authorizes, in writing, to be released. The person entitled to draw upon the line of credit shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement from the line of credit in the amount of the documented costs.

The department shall return the original line of credit agreement to the person or institution providing the line of credit for termination after the person required to establish the cleanup funding source substitutes an alternative cleanup funding source as specified in this section, or after the department notifies the person that that person is no longer required to maintain a cleanup funding source for remediation of the contaminated site.

e. A person may self-guarantee a cleanup funding source upon the submittal of documentation to the department demonstrating that the cost of the remediation as estimated in the remedial action workplan or in the administrative consent order would not exceed one-third the tangible net worth of the person required to establish cleanup funding source, and that the person has a net cash flow and liabilities sufficient to assure the availability of sufficient moneys for the remediation during the time necessary for the remediation. The department may establish requirements and reporting obligations to ensure that the person proposing to self guarantee a cleanup funding source meets the criteria for self guaranteeing prior to the initiation of remedial action and until completion of the remediation.

f. (1) Following a written determination that the person required to obtain the cleanup funding source has failed to perform the remediation as required, the department may make disbursements from the fully funded trust or the line of credit. A copy of the determination by the department shall be delivered to the person required to establish the cleanup funding source and, in the case of a remediation conducted pursuant to P.L.1983, c.330 (C.15:1K-6 et seq.), to any transferee of the property.

(2) The transferee of property, subject to a remediation conducted pursuant to P.L.1983, c.330 (C.13:1K-6 et seq.), may, at any time after the department's determination of nonperformance by the owner or operator required to establish the cleanup funding source, petition the department, in writing, with a copy being sent to the owner and operator, for authority to perform the remediation at the industrial establishment. The department, upon a determination that the transferee is competent to do so, shall grant that petition which shall authorize the transferee to perform the remediation as specified in an approved remedial action workplan, or to perform the activities as required in an administrative consent order, and to avail itself of the moneys in the fully funded trust or line of credit for these purposes unless the owner or operator continues or begins to perform its obligations within 14 days of the petition being filed with the department.

(3) After the department has begun to perform the remediation in the place of the person required to establish the cleanup funding source or has granted the petition of the

transferee to perform the remediation, the person required to establish the cleanup funding source shall not be permitted by the department to continue its performance obligations except upon the agreement of the department or the transferee, as applicable, or except upon a determination by the department that the transferee is not adequately performing the remediation.

22. (New section) a. There is established in the New Jersey Economic Development Authority a special, revolving fund to be known as the Hazardous Discharge Site Remediation Fund. Moneys in the remediation fund shall be dedicated for the provision of loans and grants to municipal governmental entities and individuals, corporations, partnerships, and other private business entities for the purpose of financing remediation activities at sites that are, or are suspected of being, contaminated by hazardous substances or hazardous wastes that have been or may be discharged into the environment.

b. The remediation fund shall be credited with:

(1) moneys as are appropriated by the Legislature;

(2) moneys deposited into the fund as repayment of principal and interest on outstanding loans made from the fund;

(3) any return on investment of moneys deposited in the fund;

(4) cleanup funding source surcharges imposed pursuant to section 28 of P.L. , c. (C.) (now before the Legislature as this bill);

(5) moneys made available to the authority for the purposes of the fund.

23. (New section) a. Loans may be made from the remediation fund to (1) owners or operators of industrial establishments that are required to perform remediation activities pursuant to the "Environmental Cleanup Responsibility Act," P.L.1983, c.330 (C.13:1K-6 et seq.), as a condition of a closure, transfer, or termination of operations of an industrial establishment and (2) persons who have discharged a hazardous substance or who are in any way responsible for a hazardous substance pursuant to the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.) and (3) persons who voluntarily undertake the remediation of a discharge of a hazardous substance or hazardous waste. No loans may be made from the remediation fund for the remediation of a discharge from an underground storage tank at a place of business that has a Standard Industrial Classification Number 5541 as designated in the Standard Industrial Classification Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States. Loans and grants may be made from the remediation fund to municipal governmental entities that own real property on which there has been a discharge or there is a suspected discharge of a hazardous substance or hazardous waste.

b. Loans and grants of moneys from the remediation fund shall be made for the following purposes and, on an annual basis, obligated in the following percentages:

(1) at least 20% of the moneys shall be allocated for loans to persons, other than governmental entities for remediation of real property located in a qualifying municipality as defined in section

1 of P.L.1978, c.14 (C.52:27D-178);

(2) at least 15% of the moneys shall be allocated for loans and grants to municipal governmental entities. Grants shall be used for performing preliminary assessments and site investigations on property owned by a municipal governmental entity in order to determine the existence or extent of any hazardous substance or hazardous waste on those properties. A municipal governmental entity that has performed a preliminary assessment and site investigation on its property may obtain a loan for the purpose of continuing the remediation on those properties as necessary to be in compliance with the applicable cleanup standards adopted by the department;

(3) at least 20% of the moneys shall be allocated for loans for remediation activities at sites that have been contaminated by a discharge of a hazardous substance or hazardous waste, or at which there is an imminent and significant threat of a discharge of a hazardous substance or hazardous waste, and the discharge or threatened discharge poses or would pose an imminent and significant threat to a drinking water source, to human health, or to a sensitive or significant ecological area;

(4) at least 10% of the moneys shall be allocated for loans to persons, other than government entities, who voluntarily undertake the remediation of a hazardous substance or hazardous waste discharge, and who have not been ordered to undertake the remediation by the department, or by a court,

(5) at least 20% of the moneys shall be allocated for loans to persons, other than governmental entities, who are required to perform remediation activities at an industrial establishment pursuant to P.L. 1983, c.330 (C.13:1K-6 et seq.), as a condition of the closure, transfer, or termination of operations at that industrial establishment; and

(6) the remainder of the moneys in the remediation fund shall be allocated for loans and grants to municipal governmental entities or loans to individuals, corporations, partnerships and other private business entities for the purposes enumerated in paragraphs (1) through (5) of this subsection, except that where moneys in the fund are insufficient to fund all the applications in any calendar year that would otherwise qualify for a loan or grant pursuant this paragraph, the authority shall give priority to loan applications that meet the criteria enumerated in paragraph (3) of this subsection.

c. Loans issued from the remediation fund shall be for a term not to exceed ten years, except that upon the transfer of ownership of any real property for which the loan was made, the unpaid balance of the loan shall become immediately payable in full. Loans shall bear an interest rate of 2%. Loans and grants, upon request of the applicant, shall be issued for up to 100% of the estimated applicable remediation cost, except that no loan or grant may be issued to any applicant in any calendar year, for one or more properties, in an amount that exceeds $1,000,000. Repayments of principal and interest on the loans issued from the remediation fund shall be paid to the authority and shall be deposited into the remediation fund.

d. No person, other than a municipal governmental entity,

shall be eligible for a loan from the remediation fund if that person is capable of establishing a cleanup funding source for the remediation as required pursuant to section 21 of P.L. , c. (C.) (now before the Legislature as this bill), by any means other than a loan from the remediation fund.

e. The authority may use a sum that represents up to 2% of the moneys issued as loans or grants from the remediation fund each year for administrative expenses incurred in connection with the operation of the fund and the issuance of loans and grants.

f. Prior to March 1 of each year, the authority shall submit to the Senate Environment Committee and the Assembly Energy and Hazardous Waste Committee, or their successors, a report detailing the amount of money that was available for loans and grants from the remediation fund for the previous calendar year, the amount of money available for loans and grants for the current calendar year, the amount of loans and grants issued for the previous calendar year and the catagory for which each loan and grant was made, and any suggestions for legislative action the authority deems advisable to further the legislative intent to facilitate remediation and promote redevelopment and use of existing industrial establishments.

24. (New section) a. A qualified applicant for a loan or grant from the remediation fund shall be awarded a loan or grant by the authority upon the availability of sufficient moneys in the remediation fund for the purpose of the loan or grant. Priority for awarding loans and grants from the remediation fund shall be based upon the date of receipt by the authority of a complete application from the applicant. If an application is determined to be incomplete by the authority, an applicant shall have 30 days from receipt of written notice of incompleteness to file any additional information as may be required by the authority for a completed application. If an applicant fails to file the additional information within 30 days, the filing date for that application shall be the date that the additional information is received by the authority. An application shall be deemed complete when all the information required by the authority has been received in the required form.

b. Within 90 days, for a private entity, or 180 days for a municipal government entity, of notice of approval of a loan or grant application, an applicant shall submit to the authority an executed contract for the remediation activities for which the loan or grant application was made. The contract shall be consistent with the terms and conditions for which the loan or grant was made. Failure to submit an executed contract within the time provided, without good cause, shall constitute grounds for the alteration of an applicant's priority ranking for the awarding of a loan or grant.

25. (New section) a. The authority, in consultation with the Department of Environmental Protection, shall, by rule or regulation:

(1) prescribe forms for, and procedures for the filing of, loan and grant applications;

(2) require a person applying for a loan who is not the owner of the subject property to provide a copy of the contract or lease

between the operator and owner, and certification that the owner approves of the loan;

(3) require, if the applicant is an owner who is not the operator of the subject property, the owner to provide a copy of the contract or lease between the owner and the operator;

(4) prohibit the assignment or encumbrance of a loan or loan payment;

(5) require a loan or grant recipient to provide to the authority, as necessary or upon request, evidence that loan or grant moneys are being spent for the purposes for which the loan or grant was made, and that the applicant is adhering to all of the terms and conditions of the loan or grant agreement;

(6) provide that moneys from the approved loan or grant shall be released by the authority to the applicant in only those amounts that represent work completed;

(7) require the loan or grant recipient to provide access at reasonable times to the subject property to determine compliance with the terms and conditions of the loan or grant;

(8) require that, during the life of the loan, the applicant will comply with all environmental laws, and pay all required taxes or other governmental assessments due on the subject property for which a loan application is made, or on the loan collateral;

(9) reserve the right to suspend or terminate a loan or grant or declare a loan in default if any term or condition of the loan or grant is violated by a loan or grant recipient, and take any necessary action to secure repayment of the loan or grant;

(10) reserve the right to modify, as necessary and by mutual consent, the terms or conditions of a loan or grant, which modification shall, however, not be inconsistent with regulations of the Department of Environment Protection concerning the performance of remediation of contaminated property;

(11) establish a priority system for making loans or grants for remediations involving an imminent and significant threat to a public water source, human health, or to a sensitive or significant ecological area pursuant to paragraph (6) of subsection b. of section 23 of P.L. , c. (C.) (now before the Legislature as this bill);

(12) provide that payment of a grant to a municipal government entity shall be conditioned upon the subrogation to the authority of all rights of the municipal government entity to recover remediation costs from the discharger or other responsible party; and

(13) adopt such other requirements as shall be deemed necessary or appropriate in carrying out the legislative purposes for which the Hazardous Discharge Site Remediation Fund was created.

b. An applicant for a loan or grant shall be required to:

(1) provide proof, as determined sufficient by the authority, that the applicant, other than a municipal governmental entity, where applicable, could not establish a cleanup funding source, other than a loan from the remediation fund, as required by section 21 of P.L. , c. (C.) (now before the Legislature as this bill);

(2) submit documentation on the nature and scope of the

remediation to be performed, costs estimates thereon, and, as available, proofs of the actual cost of all work performed;

(3) submit copies of all court orders, administrative consent orders or directives issued by the Department of Environmental Protection and, if deemed necessary by the authority, any reports, plans, or results of any preliminary assessment, site investigation, remedial investigation, feasibility study, remedial action workplan, remedial action, or other documentation required to be prepared or submitted to the department; and

(4) demonstrate the ability to repay the amount of the loan and interest, and, if necessary, to provide adequate collateral to secure the loan amount.

c. Information submitted as part of a loan or grant application or agreement shall be deemed a public record subject to the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.). An applicant may, however, request the authority to maintain the confidentiality of any information relating to the personal or business finances of the applicant, and the authority shall establish procedures for safeguarding information determined to be of a confidential nature.

d. In establishing requirements for loan or grant applications and loan or grant agreements, the authority:

(1) shall minimize the complexity and costs to applicants or recipients of complying with such requirements;

(2) may not require loan or grant conditions that interfere with the everyday normal operations of a loan or grant recipient's business activities, except to the extent necessary to prevent intentional actions designed to avoid repayment of the loan, or that significantly affect the value of the loan collateral; and

(3) shall expeditiously process all loan or grant applications in accordance with a schedule established by the authority for the review and the taking of final action on the application, which schedule shall reflect the degree of complexity of a loan or grant application.

26. (New section) No loan or grant from the remediation fund shall be made to a person who is currently in violation of an administrative or judicial order, judgment, or consent agreement regarding violation or threatened violation of an environmental law regarding the subject property, unless the violation, fee, penalty or assessment is currently being contested by the person in a manner prescribed by law or unless the violation resulted from a lack of sufficient money to perform required remediation activities.

27. (New section) a. The lack of sufficient moneys in the remediation fund to satisfy all loan or grant applications shall not affect in any way an applicant's legal responsibility to comply with the requirements of P.L.1983, c.330 (C.13:1K-6 et seq.), P.L.1976, 141 (C.58:10-23.11 et seq.), or any other applicable provision of law.

b. Nothing in sections 20 through 32 of P.L. , c. (C.) (now before the Legislature as this bill) shall be construed to:

(1) impose any obligation on the State for any loan or grant commitments made by the authority, and the authority's obligations shall be limited to the amount of otherwise

unobligated moneys available in the fund therefor; or

(2) impose any obligation on the authority for the quality of any work performed pursuant to a remediation undertaken with a loan or grant made pursuant section 23 of that act.

28. (New section) a. There is imposed upon every person who is required to establish a cleanup funding source pursuant to section 21 of P.L. , c. (C.)(now before the Legislature as this bill) a cleanup funding source surcharge. The cleanup funding source surcharge shall be in an amount equal to 1% of the required amount of the cleanup funding source required by the department. The surcharge shall be paid on an annual basis as long as the remediation continues and until the Department of Environmental Protection issues a no further action letter for the property subject to the remediation. The cleanup funding source surcharge shall be due and payable within 14 days of the time of the department's approval of a remedial action workplan or signing an administrative consent order or as otherwise provided by law. The cleanup funding source surcharge shall not be imposed upon any person who voluntarily undertakes a remediation without being so ordered or directed by the department or by a court or pursuant to an administrative consent order.

The department shall collect the surcharge and shall remit all moneys collected to the Economic Development Authority for deposit into the Hazardous Discharge Site Remediation Fund.

b. By February 1 of each year, the department shall issue a report to the Senate Environment Committee and to the Assembly Energy and Hazardous Waste Committee listing, for the prior calendar year, each person who paid the cleanup funding source surcharge, the amount of the surcharge paid, and the total amount collected.

29. (New section) There is appropriated from the "Hazardous Discharge Fund of 1986," created pursuant to "Hazardous Discharge Bond Act of 1986," P.L.1986, c.113, the sum of $100,000,000 to the New Jersey Economic Development Authority for deposit in the Hazardous Discharge Site Remediation Fund, created pursuant to section 22 of P.L. , c. (C.) (now before the Legislature as this bill) for the purposes of issuing loans and grants for the investigation of property suspected of being contaminated by a hazardous substance or hazardous waste discharge or for the remediation of property contaminated by a hazardous substance or hazardous waste discharge in accordance with the provisions of section 23 of P.L. , c. (C.) (now before the Legislature as this bill).

30. (New section) a. The Department of Environmental Protection shall adopt minimum cleanup standards for soil, groundwater, and surface water quality necessary for the remediation of contamination of real property, including, for remediations conducted pursuant to P.L.1983, c.330, buildings and equipment. Where feasible the cleanup standards shall be established as numeric or narrative standards for particular contaminants. The standards shall apply to remediation activities required pursuant to the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), the "Water Pollution

Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), P.L.1986, c.102 (C.58:10A-21 et seq.), the "Environmental Cleanup Responsibility Act," P.L.1983, c.330 (C.13:1K-6 et seq.), the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.), the "Comprehensive Regulated Medical Waste Management Act," P.L.1989, c.34 (C.13:1E-48.1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.), the "Sanitary Landfill Facility Closure and Contingency Fund Act," P.L.1981, c.306 (C.13:1E-100 et seq.), the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," P.L.1987, c.333 (C.13:1E-177 et seq.), or any other law or regulation by which the State may compel a person to perform remediation activities on contaminated property.

The cleanup standards shall be developed to ensure that the potential for harm to public health and safety and to the continued viability of special ecological receptors is minimized to the maximum extent practicable, taking into consideration the location, surroundings, the intended use of the property, the potential exposure to the discharge, and the surrounding ambient conditions, whether naturally occurring or man made. Until the minimum standards described herein are adopted, the department shall establish cleanup standards for contaminants at a site on a case by case basis.

The department shall not propose or adopt cleanup standards protective of special ecological receptors pursuant to this subsection until two years following the effective date of this act or until recommendations are made by the Ecology Advisory Task Force pursuant to section 31 of P.L. , as (C.) (now before the Legislature as this bill).

b. The Department of Environmental Protection may provide for differential cleanup standards pursuant to subsection a. of this section based upon the intended use of a property or an area of a property. The department may not, however, as a condition of allowing a differential cleanup standard based on intended use, require the owner of that property to restrict the use of that property through the filing of a deed covenant, condition, or other similar restriction. Where the department provides for a differential cleanup standard based on the intended use of the property, it shall, as a condition of permitting a remediation to occur that would leave contamination at the property at levels or concentrations above the most protective standards established by the department:

(1) require the owner or operator, discharger, person in any way responsible, or other relevant person, to take any remedial action reasonably necessary to prevent exposure to the contaminants, to maintain, as necessary, those remedial measures, and to agree to restrict the use of the property in a manner that prevents exposure;

(2) require the recording with the office of the county recording officer in the county in which the property is located, a notice designed to inform prospective holders of an interest in the property that contamination exists on the property at a level that may restrict certain uses of all or part of that property, and a delineation of those restrictions and a description of all specific

engineering or other controls at the property that exist and that need to be maintained in order to prevent exposure to contaminants remaining on the property; and

(3) require a notice to the governing body of each municipality in which the property is located that contaminants exist at the property and specifying the restrictions on the use of the property.

c. Where restrictive use conditions of a property as provided in subsection b. of this section are no longer required, or where the restrictive use conditions have varied, because of the performance of subsequent remedial activities, a change in conditions at the site, or the adoption of revised cleanup standards, the department shall, upon written application by the owner or operator of that property, record with the office of the county recording officer a notice that the use of the property is no longer restricted or delineating the new restrictions. The department shall also notify, in writing, the municipality in which the property is located of the removal or change of the restrictive use conditions.

d. Upon receipt of the notification sent pursuant to subsection b. or c. of this section, a municipality shall send a copy of the notification to the construction official for the municipality. The construction official shall maintain the notification in a manner whereby it will be known and available to the construction official prior to issuing a construction permit for the construction or alteration of a building or structure at the subject property. The construction official shall not issue a construction permit for the construction or alteration of a building or structure at the subject property if the construction or alteration would be in conflict with any of the restrictions contained in the notification. The provisions of this subsection shall not apply if a notification received pursuant to subsection c. of this section authorizes all restrictions to be removed from the subject property.

e. Notwithstanding the provisions of any other law, or any rule, regulation, or order adopted pursuant thereto to the contrary, upon the adoption of the cleanup standards pursuant to subsection a. of this section, whenever contamination at a property is remediated in compliance with the cleanup standards that were in effect at the completion of the remediation, the owner or operator of the property, the discharger, or any other person in any way responsible for any containment shall not be liable for the cost of any additional remediation that may be required by a subsequent adoption by the department of a more stringent cleanup standard for a particular contaminant. However, if the department adopts a new cleanup standard for a contaminant based upon a finding that the new standard is necessary to prevent a substantial risk to human health or safety or to special ecological receptors, a person who is liable to clean up that contamination pursuant to section 8 of P.L. 1976, c.141 (C.58:10-23.11g) shall be liable for any additional remediation costs necessary to bring the property into compliance with the new cleanup standards.

31. (New section) a. There is established, in but not of the

Department of Environmental Protection, an Ecology Advisory Task Force. The Task Force shall consist of 15 members as follows: the Commissioner of Environmental Protection, or a designee, and two representatives each from industrial businesses, the environmental consulting profession, the real estate industry, the environmental science academic community, public interest environmental organizations, the legal community, and from municipal government. The members on the Task Force shall be selected by the Commissioner of Environmental Protection, to the extent possible, from a list of names provided by the represented interests or from names of persons who have testified before the department on previously proposed cleanup standards. The Ecology Advisory Task Force shall, within two years, make recommendations to the department on the development of standards protective of special ecological receptors.

b. The Ecology Advisory Task Force shall:

(1) review the scientific literature to identify existing sources of information and data necessary for the development of cleanup standards protective of special ecological receptors and to determine the current state-of-the-science in the identification of adverse impacts of contamination on these receptors and the establishment of containment concentration levels necessary to protect these receptors;

(2) review scientific literature on the methods, procedures, data input needs, limitations, interpretation, and uses of ecological risk assessments;

(3) collect information on public and private activities concerning the development and uses of ecological risk assessments and cleanup standards protective of special ecological receptors;

(4) evaluate the ecological components which should be protected through the application of cleanup standards protective of special ecological receptors;

(5) identify public policy issues involved in the development of cleanup standards protective of special ecological receptors;

(6) suggest an approach and methodology for the development of cleanup standards protective of special ecological receptors;

(7) evaluate the social, economic and environmental impacts of regulations which would incorporate state-of-the science ecological risk assessment methodologies;

(8) recommend necessary changes in statutes and regulations necessary to implement the advise of the Ecology Advisory Task Force; and

(9) review and make recommendations on any other aspect of the adoption of these cleanup standards the department determines is necessary for a complete evaluation of these issues.

c. Upon submittal of its recommendations to the department concerning the adoption of cleanup standards protective of special ecological receptors, the Ecology Advisory Task Force may, at the discretion of the commissioner, continue in existence in order to continue to research these issues and advise the department on the matters specified in this section.

32. (New section) Any person who, before July 1, 1992, has

discharged a hazardous substance in violation of P.L.1976, c.141, and prior to July 1, 1992:

(1) has not been issued a directive to remove or arrange for the removal of the discharge pursuant to section of P.L.1976, c.141 (C.58:10-23.11f), or

(2) has not been assessed a civil penalty, a civil administrative penalty, or is not the subject of an action pursuant to the provisions of section of P.L.1976, c.141 (C.58:10-23.11u),

(3) has not entered in an administrative consent order to clean up and remove the discharge, or

(4) has not been ordered by a court to clean up and remove the discharge,

shall not be subject to a monetary penalty for the failure to report the discharge or for any civil violation of P.L.1976, c.141 (C.58:10-23.11 et seq.) or P.L.1977, c.74 (C.58:10A-1 et seq.) that resulted in the discharge if the person notifies the department of the discharge and enters into an administrative consent order with the department to remediate the discharge in accordance with the provisions of P.L.1976, c.141 (C.58:10-23.11 et seq.), or any rules or regulations adopted pursuant thereto, within one year of the effective date of this act. Any person who notifies the department of the discharge pursuant to this section shall be liable for all cleanup and removal costs as provided in section 8 of P.L.1976, c.141 (C.58:10-23.11g).

33. (New section) The Attorney General, in consultation with the Department of Environmental Protection, shall prepare, and the department shall distribute, for the cost of reproduction and postage, to any interested person, informational materials that set forth criteria that may be used to evaluate the qualifications of environmental consultants, environmental consulting firms, engineers, geologists or any other consultant, other than attorneys, whose expertise or training may be required by a person to comply with the provisions of P.L.1986, c.102, P.L.1983, c.330, P.L.1976, c.141, and P.L. c. (now before the Legislature as this bill). The materials may describe the expertise or training necessary to address specific types of environmental cleanups, sites or contamination, the significance and availability of various types of liability insurance, the average cost of services and tests commonly performed by consultants, the significance of available accreditations or certifications and any other relevant factor that may be used to evaluate the qualifications and expertise of environmental consultants.

34. (New section) Notwithstanding the provisions of Executive Order 66 of 1978, the regulations adopted by the Department of Environmental Protection pursuant to P.L.1983, c.330 (C.13:1K-6 et seq.) and allocated in the New Jersey Administrative Code as Chapter 26B of Title 7, shall not expire as provided in that Executive Order but shall remain in effect until that time the department adopts new regulations revising the existing regulations to conform with the provisions of P.L. , c. (now before the Legislature as this bill).

35. This act shall take effect immediately.

STATEMENT

This bill would substantially amend the "Environmental Cleanup Responsibility Act" (ECRA) and the State's other hazardous discharge remediation programs in order to encourage cleanups, reduce costs of compliance, provide financial resources for cleanups, encourage the redevelopment of the State's industrialized areas, and protect the public health and environment. It is also the intent of this bill to begin a change in the perception of New Jersey from that of a State antagonistic toward business concerns to a State that seeks to work with businesses and property owners to solve environmental problems in a manner beneficial to all and to the economic future of the State.

The original intent of ECRA was that contaminated industrial property should be cleaned up as a precondition to its closure or transfer. The cleanup would thus occur when private money was available, thereby avoiding the abandonment of contaminated property that would require publicly funded remediation. Because ECRA compelled the owner or operator to perform the cleanup no matter who caused the contamination, cleanups would occur without lengthy litigation to determine responsibility. The owner or operator could seek reimbursement from the responsible parties after the cleanup.

The act also protected a buyer from acquiring contaminated property and the commensurate liability. A purchaser of property in New Jersey, as well as the lending institution, would thus feel reasonably assured that the acquired property would be free of contamination.

Despite the laudable goals of ECRA, neither the Legislature nor the Department of Environmental Protection anticipated the law's impact on commercial and industrial real estate transactions in the State. At the time of the enactment of ECRA the hazardous waste cleanup industry was in its infancy, and thus the act provided only broad directives concerning the cleanup of contaminated sites, which in effect required the Department of Environmental Protectionto adopt the technical rules and regulations necessary to implement the act. Because of the general nature of the act, confusion arose as to which industrial establishments were subject to the act, when the act was triggered, and what was expected of the owner or operator of the industrial establishment performing an ECRA cleanup. The answer to these questions was crucial, because ECRA not only imposed high monetary penalties for noncompliance, but allowed the department to void the transfer of property undertaken in violation of the act. Additionally, because transfers were conditioned on certain departmental approvals, property transfers and stock transactions were delayed while all parties wrangled with a vague and cumbersome law. The initial confusion, backlogs, and problems of the early years of ECRA's implementation have only recently been resolved.

In the eight years since ECRA was enacted, the department, environmental attorneys and consultants, and the business community have acquired extensive knowledge of the manner in

which remedial activities should occur. The ECRA and other site remediation programs have evolved, establishing new procedures and terminology not reflected in existing statutory law. Additionally, both the federal and State liability laws for hazardous substance discharges have made the public and the real estate community aware of the dangers and liabilities of contaminated properties. Also, since the enactment of ECRA, the State has enacted a number of other laws that overlap with ECRA.

In the light of the experience and events of the last eight years, this bill would amend ECRA, as well as certain other hazardous discharge site remediation laws, to reflect the current state of scientific and regulatory knowledge and public policy priorities.

This bill does not remove the requirement that contaminated industrial establishments be cleaned up when they are closed or transfered, nor does it privatize the remediation of these sites. Rather the bill attempts to carefully draw a balance between the public's interest in ensuring that hazardous contamination is cleaned up so that it poses no threat to public health or to the environment with the interest of businesses in performing expeditious and cost effective cleanups and with transfering property in a timely fashion.

The bill also provides loan and grant moneys for cleanups, promotes the redevelopment of industrial areas, and clarifies the intent and operation of the law.

This bill balances the various interests by taking certain properties out of the ECRA process and by allowing the privitization of the remediation process under certain circumstances. This bill defines the various stages of a remediation - preliminary assessment, site investigation, remedial investigation, feasibility study, and remedial action - and recognizes that the State's interest in overseeing a particular type of cleanup may vary depending on the stage of a cleanup.

This bill provides that the owner or operator of an industrial establishment previously subject to an ECRA or similar full site remediation can close or transfer the industrial establishment without going through the ECRA process by submitting a certification. The bill also allows properties that are of minimal environmental concern to be cleaned without departmental oversight and approval and for properties where underground storage tanks are the only environmental problem to be transfered without the necessity of a negative declaration or a remedial action workplan approval. The bill provides that up to one third of a property may be conveyed, even if contaminated, without triggering ECRA for the remaining parcel and that a condemnation of less than two thirds of an industrial establishment will not trigger ECRA review on the remaining parcel.

This bill provides that when a tenant closes or transfers operations, ECRA will be triggered for only the property in the tenant's exclusive control. The areas in common control will be subject to ECRA when ECRA is triggered by the landlord.

This bill provides that certain transfers between subsidiaries would not be subject to ECRA. Also, deferrals of cleanups, currently permissive by law, shall be approved by the department once a preliminary assessment, site investigation, remedial investigation, and feasibility study are performed. This bill removes from ECRA compliance, owners or operators who close or transfer an industrial establishment while that property is still in a prior ECRA review process.

This bill also would allow a person, pursuant to ECRA or otherwise, to perform an emergency cleanup to prevent the spread of contamination without the risk of having to redo the cleanup as long as the measures were taken in compliance with department requirements and standards. This provision should help speed up cleanups and reduce environmental risks to the public. In order to balance the needs of the public to be protected from risks caused by hazardous discharges, and the need of businesses to have finality of a cleanup action, the bill provides that if a discharge is remediated to the cleanup standards in effect, the person liable for the original discharge can not be compelled to further clean that site if the cleanup standards change absent a substantial threat to the public health or to the environment.

This bill codifies the ability of the department to adopt cleanup standards for all site remediation activities performed pursuant to the State's various environmental laws, and allows differential standards to be established based on exposure risk. This bill provides that the department cannot adopt ecologically based cleanup standards until after an Ecology Advisory Task Force offers input. This bill also codifies the natural resources that can be protected so as to avoid uncertainty in future rulemaking.

This bill deliniates these natural resources to include those natural resources which either federal or State law has identified as needing protection, management, or regulation in order to ensure that the State's discharge remediation program complements the State's natural resource protection and management programs.

This bill precludes the department from requiring a deed restriction on the property if the property is cleaned to a standard less then the most protective. Rather, notice to subsequent owners or operators will be provided by a deed notice. Enforcement of the restrictions will be by the local construction official in the building permit process.

This bill codifies a recent State Supreme Court decision, In Re Adoption of N.J.A.C.7:26B, by stating affirmatively that offsite contamination is required as part of an ECRA cleanup. This bill also codifies the issuing of administrative consent orders under ECRA and states what these orders may provide. This bill provides that a pamphlet on how to select an environmental consultant will be prepared by the Department of Law and Public Safety.

This bill seeks to lower the cost of remediation by eliminating the requirement for financial assurance that is currently required in addition to paying for the remediation activities. In its place is a requirement that a person undertaking a cleanup establish

and maintain a cleanup funding source by establishing a fully funded trust, a line of credit, or being able to fund the operations out of working capital. The bill allows the department, or the transferee in an ECRA process, to use the moneys in the cleanup funding source guarantee to complete the cleanup in the event of a stoppage in the remediation activities.

The person providing the cleanup funding source will be assessed a 1% surcharge on the amount of the cleanup costs. The moneys collected by the surcharge will be placed into a Hazardous Discharge Site Remediation Fund. The fund would be used to give low interest loans to persons performing ECRA or other cleanups. Moneys would be targeted for urban areas, municipally owned properties, voluntary cleanups, ECRA cleanups, and for emergency cleanups. Additionally, muncipalities would be able to obtain grants for the identification of municipally owned contaminated property. Only those persons, other than municipalities, who could not otherwise provide a cleanup funding source would qualify for a loan.

The fund would be administered by the New Jersey Economic Development Authority and would be funded by a $100 million appropriation from the "Hazardous Discharge Bond Act of 1986," by the surcharges, interest, loan repayments, legislative appropriations, and by any moneys placed into the fund by the authority.

Finally, the bill seeks to encourage the cleanups of sites by providing a one year amnesty from all ECRA or other discharge penalties for any person who agrees to comply with the relevant law within that one year period.

Makes various changes to ECRA and to other hazardous discharge site remediation programs; imposes a surcharge on remediations; establishes a loan and grant fund for remediation activities; appropriates bond moneys.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

APPENDIX:

bgs: 1-125

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SENATOR HENRY P. McNAMARA (Chairman): Good morning. Will those serving on the panel please take their places?

ASSEMBLYMAN JOHN E. ROONEY (Chairman): Please come to the table, Mr. Albohn. (laughter)

SENATOR McNAMARA: Good morning. I would like to welcome you to this joint meeting of the Senate Environment Committee and the Assembly Energy and Hazardous Waste Committee.

We will be discussing the provisions of S-1070, the ECRA reform bill. This bill is designed to achieve twin goals of promoting cleanup activity, and encouraging increased economic development. It attempts this by streamlining the regulatory process, establishing administrative predictability and decision making, and by easing the financial burden for cleanup.

I would like to state at the outset that this bill is the result of comments collected from interested groups over the last seven months, but it is in no way a totally finished product. We anticipate that this meeting will provide us with further guidance.

I want to thank all of those, in both the environmental and business communities, who have provided assistance in this effort. I would also like to thank the staff of the DEPE, who have provided valuable insight into the regulatory process, and the staff of OLS, who have tirelessly translated meetings and suggestions into the draft we are reviewing today. A caution, however, to all of you: I don't believe our work is yet done.

Now, a word about format: For this meeting, we have asked that a number of people comprise a panel to discuss the bill and to offer constructive suggestions. We anticipate that questions among the panel members would be directed through the Committee. This morning, the comments will be focused on those sections of the bill which attempt to establish administrative predictability. This afternoon we will concern ourselves with

the provisions of the bill designed to streamline the process, and we will take up the issue of financing the cleanups at another meeting at a later date.

As we indicated on the meeting notice, we encourage anyone who is not on the panel and who wishes to submit testimony, please do so in writing. We have received numerous suggestions in this forum, and it has proved invaluable. We will keep the record open for a short period, so that anyone who does not have testimony in written form today may submit it within a couple of days.

I'd like now to turn the meeting over to Chairman John Rooney, for any comments he may have. Chairman Rooney.

ASSEMBLYMAN ROONEY: Thank you, Chairman McNamara. It's always a pleasure to sit beside my neighbor in Bergen County, as a Senator from District 40, and me from 39. It's always nice to see Bergen County legislators. Assemblyman Russo will be joining us shortly. He also shares that District.

I think the Senator covered basically everything that has to be covered on the topic. I just would like to add that in the almost 10 years that I've been in the Legislature, one of the things that I hear most often is the problems that we have with ECRA. I think it's about time that this meeting occur. I congratulate the Senator and applaud him for doing the groundwork -- for doing all that work over the last seven months -- in bringing us to this point today. And, as the Senator said, "It's not done, yet." We're working on it. I also acknowledge Mr. Albohn on my Committee who has been in the forefront in the Assembly for the ECRA reform.

I could give the horror stories that I'm sure we're going to hear today. I happen to be a salesman that calls on industry in New Jersey, and I see plants closing, and people disappearing from New Jersey that were there the day before, and are gone today because of the environmental cleanup responsibility. They've just abandoned the property. There

are so many properties today that are vacant and abandoned that we have to do something about it. This bill may not address it totally, but it's a darned good start.

So with that, I think we should probably introduce the members of our Committee at this time. I'll start with our side in the Assembly. We have our Vice-Chairman of the Committee, Ernie Oros. We also have Assemblyman Art Albohn, who is the cosponsor of this bill, -- prime cosponsor of the bill -- Assemblywoman Barbara Wright, and Assemblyman Anthony Impreveduto. The other two members, who are not here as yet, are Assemblyman Bob Smith and Assemblyman Dave Russo. And, I'll turn it back to the Senator.

SENATOR McNAMARA: On my far left, we have Senator Rice, prime cosponsor of the bill in the other House, Senator Jack Sinagra and Senator Randy Corman.

Okay, for this morning's panel, the topic is the measures necessary to establish administrative predictability. I think it might be a simpler format if we started out and handled a section at a time. So, Section I, which is ECRA definitions and determining what facilities and events are subject to ECRA, I would like to throw out and start listening to any of the comments--

Yeah, you're right. Assemblyman Rooney pointed out to me that it might be wiser before we did that, that we introduce the panel. (laughter) So, if we start at the left, Mr. Hogan, if you would introduce yourself and then continue from left to right.

E D W A R D A. H O G A N, ESQ.: My name is Edward Hogan. I'm an attorney with the law firm of Porzio, Bromberg and Newman, in Morristown. I'm here today representing the New Jersey Business and Industry Association which, with its 13,600 business members, is the largest business trade association in the United States.

I R V I N G C O H E N: My name is Irving Cohen. I'm the President of Enviro Science, Inc. I am representing the environmental consulting community at large.

R I C H A R D J. C O N W A Y, JR., ESQ.: My name is Richard Conway. I'm an attorney with the firm of Hannoch Weisman in Roseland, New Jersey, and I'm here as a volunteer on the NAIOP Committee -- the National Association of Industrial and Office Parks Committee on ECRA.

A S S I S T A N T C O M M. L A N C E M I L L E R: My name is Lance Miller. I'm the Assistant Commissioner for the Site Remediation Program, New Jersey Department of Environmental Protection and Energy.

E D W A R D L L O Y D, ESQ.: My name is Edward Lloyd. I'm the Director of the Rutgers Environmental Law Clinic, and I'm here to represent environmental interests today.

A N G E L O M O R R E S I, ESQ.: My name is Angelo Morresi. I'm an environmental attorney and environmental engineer working in industry throughout New Jersey. I represent the Chemical Industry Council, and I'm going to be acting as Chairperson because we have a number of people that are going to be participating from the Chemical Industry Council in their own expertise. So, we'll be switching and playing musical chairs a little bit today.

SENATOR McNAMARA: You'll also have to be switching and playing musical chairs with the microphone because, otherwise, we're not going to be able to hear you, or certainly not those in the back of the room.

MR. MORRESI: Before you get started, I'd like to just make a brief statement. Basically, we're here today because we're encouraged by the activities of the--

SENATOR McNAMARA: Angelo, excuse me one second.

Can you hear him in the back of the room? (negative response)

ASSEMBLYMAN ROONEY: The other thing is: Just for the record, identify yourself before you start speaking, or, you know, if we identify you it would be easier, just so we could pick up who's speaking on the transcript.

MR. MORRESI: Angelo Morresi. We want to just make the statement that we're very pleased with the work that the Legislature is making in this area, and we're very encouraged by the positiveness of the whole process. We're looking at this as a benefit to New Jersey's business and industry. The most important thing we have to make a statement about is that the process that we're talking about today is one that needs to be looked at. The DEPE, who has worked on this in the ECRA process, has to be commended, because they have made a difficult process work. These guys are probably the best in the DEPE, and they could make any process work. We've come to that conclusion. So, that's where you start out with.

The idea here is to come up with a premise that to minimize environmental and public health risks, there may be some things that have to remain in the ground, of sorts, but, we're talking about minimizing public health and environmental risk. We also hope that we can change the perception of ECRA from one that is negative, to one that is very positive. We want to be encouraged by ECRA. We want to hopefully clarify some applicability, streamline the process, and encourage the distinction between the industrial and residential cleanups. We want to see that ECRA and New Jersey benefit from this whole process.

Thank you.

SENATOR McNAMARA: Is there anyone else that would like to make an opening comment? Mr. Hogan?

MR. HOGAN: On behalf of New Jersey Business and Industry Association, we'd like to thank the Committee for the opportunity to come back. We very much appreciate the process, the scoping hearings, the initial hearing, and the various

meetings with the Office of Legislative Services. We're very glad to have done that.

Obviously, we're here to speak about S-1070. We appreciate that opportunity. We do note, however, that while we're glad to have the opportunity to submit comments and suggestions for the wording of the statute, the Association feels very strongly that ECRA is based on a series of assumptions of the early 1980s, which are no longer valid today. Those assumptions in large part have been disproven over time, and as a result, we believe caused the ECRA as we presently know it, not really to be necessary.

Those developments, obviously due diligence which did not exist in the early 1980s-- ECRA caused the regulated community and the legal community to finally read the Spill Act and circle and understand what that was. Regulations of the Underground Storage Tank Program under ECRA and other programs have matured. We think, in many respects, the cumbersome process of identifying certain facilities and certain times to go through a regulated process, is one that lacks a certain degree of rationale. We think that that's been proven by the fact that no other state has rushed to enact a statute which has the same format as does the New Jersey statute. We've seen one state follow shortly: Connecticut, which adopted a statute which does not have the same level of state involvement, which in a number of other states go forward with a full disclosure type statute similar, for instance, to the statute in Illinois, and to a lesser degree, the statute in California.

We think that while we're glad to comment here, we think in many respects the concept that no one will report spills has been outdone by the Department finally clarifying what spill reporting means, in many respects, with the new authorization under the revised Spill Act. The State does know about, should know about, environmental contamination. It has other mechanisms to discover that, and purchasers have the due

diligence process that did not otherwise exist. We think both protecting the environment through the auspices of the State, protecting purchasers through their own enlightened self-interest, dictate in many respects that this particular statute, which deals with only certain facilities in the State at certain times, lacks a certain rational basis, but we still appreciate the opportunity to work with you today.

SENATOR McNAMARA: Thank you, Mr. Hogan. I don't think that anybody has ever made claim that the ECRA law was fair. An alternative to make it more fair might be to make every transaction that goes through subject to the same-- I don't think there would be too much support anywhere for that, so let's--

MR. HOGAN: We're surely not advocating that. Thank you, Senator. (laughter)

SENATOR McNAMARA: That's what I kind of thought. This Committee, I do not believe, intends at all of thinking of throwing the baby out with the bath water.

Mr. Miller.

ASSISTANT COMMISSIONER MILLER: Senator, I'd be remiss if I didn't make a very brief opening remark that commended you for your efforts, and the staff of Office of Legislative Services for taking on this monumental task. It's a very complex issue. As you indicated, it does have a profound impact on the economy of the State. The process that you utilized has been tremendously open and tremendously fair to the Department. For that, I thank you very, very much. I hope that we can come to a conclusion on the major aspects of this bill, and maybe foremost is to call it something other than ECRA. If we all put our heads together, we'll come up with a name for this bill that doesn't have ECRA in it, because this bill goes much further than ECRA. It addresses the entire Site Remediation Program for the State of New Jersey, and I think we should be looking at property transfers as just a portion of

that, and not the complete problem that everybody has associated it with.

Chairman Rooney, as you indicated, a lot of the problems that people classify as ECRA, oftentimes are not even subject to ECRA. But they get that label. If we can come up with a different name for this bill and start focusing on what sites are contaminated-- We have to address that contamination. I think it will go a long way to getting rid of the negativism that's developed over the current implementation of ECRA since it was passed back in '83.

Thank you.

SENATOR McNAMARA: Is there anyone else that wishes to make an opening remark? Any remarks from any members of the Legislature, Senate side?

SENATOR RICE: Mr. Chairman, just briefly I'd like to go on record to say that environmentalists and others who continuously criticize the kinds of things we're trying to do in the environment, that urban cities have a very, very difficult problem. I'm abating all the concerns we have, and just kind of putting some things in perspective. I mean, it's easy to criticize and talk about all the negatives -- the auto thefts, crime, and those kinds of things, and why communities are filthy -- but the reality is that we know the workforce has traditionally based itself in large urban cities for a lot of reasons, and industry has traditionally been in those cities for those reasons. We're losing our manufacturing base in the entire corridor of Newark, for example, in the negative sense -- or positive -- a direct impact on Maplewood, South Orange, my suburban districts which are our borderline districts.

So, I want to commend you, also, on the work, and I think we are moving in the right direction. I just want to be on the record to say that some us who represent urban communities understand the need for the change in ECRA.

ASSEMBLYMAN ROONEY: Anyone from the Assembly? (negative response)

SENATOR McNAMARA: Okay, back to Section 1: ECRA definitions and determining what facilities and events are subject to ECRA. Who would wish to lead off? Mr. Hogan.

MR. HOGAN: Assemblyman, Senator, this is Edward Hogan. I expect that most of the comments will be related to the transactions subject to ECRA. I think, probably, a brief introduction as to the facilities subject to ECRA might be appropriate.

Facilities that are subject to ECRA are ones that have the requisite Standard Industrial Classification, and use, store, treat, refine, generate hazardous substances or hazardous waste. Section 19 of your bill suggests to DEPE they go back and study the applicability of Standard Industrial Classification numbers -- which ones should be subject. DEPE has done that in the past through a series of two rule makings which in the mid-1980s under the existing ECRA legislation exempted out about -- if I'm correct, Lance -- about 25 percent of the facilities -- from about 24,000 to about 18,000 facilities.

What, however, has happened does relate to definitions, and that is the facilities subject to ECRA have to have a requisite Standard Industrial Classification number and must use, store, treat, refine, generate hazardous substances, or hazardous waste. The definition of hazardous waste has been borrowed from the hazardous waste statute, and although it is somewhat outdated, it still refers to special waste manifests which haven't been used since the early 1980s under the predecessor to the ECRA regs. There is at least a recognition that some hazardous waste -- not all hazardous waste, or such hazardous waste or sufficient quantity or concentration -- is to cause the facility to be subject.

However, in the initial legislation, DEPE was told to take the list of hazardous substances that had been used under the Spill Act, and to use it as appropriate. DEPE, following that, has adopted that wholesale. However, what has happened is that there is no minimum threshold or cutoff. And the DEPE which has struggled with the issue of some minimum or de minimus standard, through a rule making identified a de minimus or alternative compliance procedure. You're still subject to ECRA, and you go through a minimized process if you have small quantities of hazardous substances at a facility. However, in doing that rule making, it confirmed that if you have those hazardous substances, you have sufficient quantity of hazardous substances that cause you to store hazardous substances.

Cutting through all of that, WD 40, Xerox toner, White-out, are all hazardous substances under the statute. Thus, if you haven't a Standard Industrial Classification number subject to the statute, you virtually and automatically have sufficient hazardous substances to cause you to be applicable to the statute. Instead of a two-part test as was originally envisioned, it's a one-part test, because everyone has hazardous substances, whether it's fire extinguishers, or Xerox toner, or White-out.

Now, it may not be as great a burden for those types of facilities that have small quantities to go through the process, but in the definition side -- I realize you're not dealing with process -- but from a definitional side, a definition of hazardous substances that had some de minimus or minimal cutoff would restore the two-part test, because facilities that have small quantities still have to fill out the application forms.

If they qualify for the de minimus standard, DEPE has drawn it very narrowly -- certain qualities of paints, inks, fuel for lawn mowers, and that sort of thing -- if you meet that and you meet other certain procedural requirements --

ownership, history, and the like, under a very narrow DEPE program -- you still have to fill out the forms, file the fees, and go through the process.

In a definitional change which would say, "certain quantity of hazardous substances," whether you borrow the definition from the Right to Know statute which would deal with common package materials, whether you do a volume metric cutoff, or some cutoff, you would solve that perception problem in New Jersey that we face. Those of us who are consultants or counsel face the issue of trying to tell a facility, "But, gee, we don't store hazardous substances," and tell them they have to comply with ECRA because they have a closet with cleaning materials. And while it's no terrible burden, it gives New Jersey a bad impression, and it still costs them several hundred or several thousand dollars, and delays the transaction potentially several weeks.

The problem, of course, anyone will recognize, is, a quart or a gallon or a drum of material could cause a groundwater contamination problem, but as you indicated in response to my initial comment, ECRA doesn't cover every facility. It's not going to catch every problem. If you're trying to get the best focus, we think that would be appropriate. DEPE has told us time and again they feel constrained by the statutory definition. We think there's a time in the definitional section to say certain hazardous substances are not hazardous substances, whether it be volume, whether it be the form of the container, but something along those lines. We think that that would be very helpful.

SENATOR McNAMARA: Lance.

ASSISTANT COMMISSIONER MILLER: Maybe I should preface my opening comments in this: I'm going to try to act somewhat as a technical staff to both Committees on this without taking formalized positions, where I might have to take some things back, and, obviously, discuss them with the Commissioner and the Governor's Office.

SENATOR McNAMARA: We would appreciate that.

ASSISTANT COMMISSIONER MILLER: I certainly want to react to what I hear in terms of what I might be able to synthesize the issue to.

What Mr. Hogan is describing is really a fundamental change in what, I think, was the initial intent of the Act. To me, the initial intent of the Act was to say industrial property is not going to be allowed to be transferred until it's checked. If there is contaminated property that exists, under ECRA, we're going to clean it up before we allow that property to change hands. So, what had been occurring in the past, of generation after generation of just passing on the contamination problem until it literally hits somebody's well, and somebody had to deal with it now because it's physically impacting a receptor -- people's drinking water has been impacted-- Now that problem would get addressed. That's how we were handling things in the Department in the late 1970s and the early 1980s.

What the ECRA bill said was, "If you're an industrial establishment, we're going to check your site." It didn't matter what you were doing on that site. You could be running the cleanest operation in the world, but if you were handling a hazardous substance and you were doing a transaction, it said you were going to check that property. That was your responsibility. Fairness is not something that I'm going to comment on; that's your prerogative as the Legislature, and the Governor's Office, to answer those very difficult policy issues as to what's fair. That's what the bill did.

What Mr. Hogan is proposing switches that. It makes it a situation where you're going to focus on those people that may have actually caused the problem to have to go through ECRA. We would be missing, then, those situations where somebody is operating a clean business today because they're handling so few chemicals, but their property could be

seriously contaminated. And we would miss those if the type of change that Mr. Hogan is articulating was put into this bill.

SENATOR McNAMARA: Richard Conway.

MR. CONWAY: My name is Richard Conway.

I appreciate the comment that Mr. Miller just made in response to Ed Hogan. I think it's correct that there would be a change in philosophy, but I think to a considerable extent, that's why a lot of people are here.

NAIOP's major concern with ECRA is that as it tries to keep tenants in the State of New Jersey, as it tries to attract new businesses to come to the State of New Jersey. People who have either experienced or heard of the problems of getting through ECRA, basically say, "I don't want the DEPE reviewing what I do now, or what I'm ever going to do, in the way I've heard.". The only way to rebut that would be to change how the DEPE handles ECRA matters; to make decisions about sites and transactions that we don't want to go through ECRA. Is there some risk that some sites and some transactions will escape attention for some period of time? Certainly. But the Legislature made that choice as to some sites. Gas stations, for example, have been exempt from ECRA from day one. There is no doubt that some gas stations are sources of considerable environmental problems. It's an appropriate decision for the Legislature to make; where to draw the line? We suggest that the line could be drawn much more narrowly than it has been in the past.

So, in reaction to Section 1, NAIOP has provided to the staff a recommended set of exemptions from ECRA that we believe should be included as, perhaps, a definition, and then in the applicability section there would be a statement, "except for the exempt transactions." We think that would be a very useful tool. With that as a defined concept, businesses outside of the State of New Jersey would be able to better evaluate whether or not New Jersey is going to have an impact on their transactions.

Like it or not, one of the things that have changed in the past two years is that many corporations have substantial in-house staffs. They rely on those staffs. They may not be as familiar with New Jersey law as a New Jersey practitioner, but they know what they've read. They know what they've heard. They know what they've experienced in 1986. If we could go to those people and say, "We've made a decision in New Jersey. We're not giving up on environmental issues, but we are prepared to invite you back to become a more reasoned process, to restrict the number of transactions and sites on which the DEPE will have review authority." They will, at least, think a little more seriously about coming back to New Jersey instead of saying, "No way."

As an enhancement of that, I note that in Section 1, in several of the definitions, the statute adopts DEPE's new lexicon of cleanup plans and sampling plans. That lexicon -- remedial investigation, site assessments -- all of that language comes directly out of Superfund. I'm sympathetic to the reason for that being there; an effort to become more consistent across a wide range of programs, but imagine the terror that that adoption will bring to those very companies we're trying to convince to stay, or come back.

ECRA is now Superfund. The terminology is the same. The number of documents that are required are the same. The number of filings, the number of expenses that are going to be incurred in going through the process have expanded.

I don't think that's the message that NAIOP was hoping the statute would accomplish. Yet, I think it's inevitable by adding that language into the definitional structure.

One last observation: In several sections of the definitions, a test is articulated that I know DEPE has been struggling with for years. That is that certain transactions would be exempted when, after the transaction, the assets available for the cleanup are essentially the same. I don't

think that definition works. I think it's a very difficult definition. It requires evaluations of law that are extremely complicated to make. When is a parent corporation liable for the environmental problems that a subsidiary may or may not have caused, may or may not have inherited? In order to apply that test, some of those issues will have to be evaluated. That is by no means a bright line test. If the goal, again, is to improve the certainty, make it easier for companies to figure out whether ECRA will or will not apply as they plan their transactions and their deals, I don't think this does it, and if it doesn't do it, then, in fact, we haven't simplified it. Those businesses will sit there and say, "This is just too complex. I'm a big business. I can stay out of New Jersey and solve my problem entirely."

ASSEMBLYMAN IMPREVEDUTO: Mr. Chairman, I just have a question, if I may?

SENATOR McNAMARA: Yes.

ASSEMBLYMAN IMPREVEDUTO: First of all, forgive my naivete or my ignorance. I've had very little experience with ECRA, so I'm going to ask you as you speak and talk about the problems, speak in layman's terms so some of us who are not directly involved in many of the ECRA things, can understand better.

But, let me propose a question, something that goes back to what Mr. Miller says, covered by you. Certainly, you could -- and this is to Mr. Hogan-- It makes a whole lot of sense, very de minimus standards--

Lance, if I own an office building, and that office building was built 50 years ago, and in that office building I've had doctors, a real estate company, a dentist -- just general office people -- but we had our own cleaning staff, and we had maybe a 50-gallon drum of floor cleaner, maybe another 50-gallon drum of some bathroom cleaner: Do I come under ECRA?

ASSISTANT COMMISSIONER MILLER: No. (laughter) I just wanted to make sure. I was pretty sure. I was 99 percent sure that I knew the answer to that one. Absolutely not. Those type of activities -- the SIC codes associated with them -- are not on the list.

ASSEMBLYMAN IMPREVEDUTO: Okay. Now, I want to sell my building. I've got a buyer who wishes to buy it. Naturally, throughout the years when that guy cleaned up, you know, he threw some of the stuff out, maybe out in the parking lot--

ASSISTANT COMMISSIONER MILLER Assemblyman, let me make it a real environmental disaster for you.

ASSEMBLYMAN IMPREVEDUTO: Okay.

ASSISTANT COMMISSIONER MILLER Okay? Your building is in a suburban or rural area of the State. There's a septic system. The building is not tied into a sewer system. Immediately surrounding your building are residential homes using private wells. Yes, the cleaning staff took all the spent solvents that they used and put them where they always put them -- you know, your building's been there for a long time -- down the septic system. All the septic system does to those type of chemicals is move them from the septic system into the leaching, which is designed to put the water into the ground and get it back into the groundwater. It just so happens that it's taking all the chemicals with it. Now it's spreading out, and it's impacting all your neighbors' properties.

ASSEMBLYMAN IMPREVEDUTO: Now that you've answered your question, can I ask mine?

ASSISTANT COMMISSIONER MILLER Yes, sir. I'm sorry. I was trying to give you a hypothetical situation.

ASSEMBLYMAN IMPREVEDUTO: Well, let's say that I'm not in that rural area, but, in fact, my office building is located on Route 3, a ten-lane highway. It's paved over. Yet, there

are some bushes around the edging to make it look nice, and a few trees and flower plantings, and some grass out in the front. And it's in sewerage, right to the sewerage plant -- it has a third level sewerage plant, you know, sewerage treatment-- So, yes, throughout the 30 years time, the maintenance man dumps his pail of window cleaner, dumps his floor cleaner, into the dirt because he thinks he's watering the plants. Now I want to sell my office building. What happens?

ASSISTANT COMMISSIONER MILLER I think I'll let some of the attorneys that would be representative of the buyers--

MR. COHEN: Irv Cohen of Enviro Sciences.

You wouldn't be subject, because what you had laid out before was rentals in the building that are not SIC applicable. The first test that you have to look for is your Standard Industrial Classification code, and none of the codes that you had mentioned fall into the statute. Therefore, you could sell your building. You could have-- Taking Lance's statement rather than your original one where you had a septic system and the material was dumped into the septic system inadvertently or advertently -- it's not subject. It does not fall under the Act.

ASSEMBLYMAN IMPREVEDUTO: I got to tell you, when I bought a piece of property to build a building, the property was vacant forever. It was never built upon, on a highway in Hudson County. I had to go through an ECRA test to buy the property; to say that this property was clean. I'm saying, "Why? There was never anything on it."

MR. COHEN: That's because people use the term-- Somebody said before -- I think it was Lance who had mentioned, let's try to get away from the word ECRA. Everybody has now pounced upon a word that is used as a generic term. People will call up attorneys, people will call up consultants and say, "I need to go through ECRA," when it's not even part of

the decision. As Senator McNamara just said, it's an issue of banks that turn around and ask you to do due diligence. Ed had mentioned before that the passage of the Act causes people to now look at their property in a different vein, so the banks and lending institutions are turning around and saying, "I want an environmental evaluation." They, in turn, have called it ECRA, and everybody around that calls it ECRA. It truly doesn't belong there. It's just an environmental due diligence that you have to do as a buyer of a property, to see if you're buying a pig in a poke.

SENATOR RICE: Mr. Chairman, based on that, the same property could be an elevation problem. I just had one recently. The guy made the same stuff for years. It was one of those nonenvironment type of things -- I think it was garden hoses -- and all of a sudden he dies, and the widow is there and bankrupt, in South Orange. It's the cost factor. Now whether the bank required it or someone else, the problem is that everything was test, test, test. She spent over $30,000. She has no more money. And you know what? Everything she was required to do was done. Then they said, "Well, we want to see if it has gone into the water." It was not going into the water. "Well, we're going to test it anyway." And you had to put these things in, get four. Four of those cost about 15 apiece. It was about $45,000 more to test the water.

The point is, she can't sell. It's sitting there. But then you find out, she's near a railroad, not that far away, and there's an elevation piece where water is constantly coming down. But a caution is, let's assume all her stuff is correct, and the problem is being created by some natural forces to cause the elevation situation. So what do you do then? I mean, you know, you say, "Well, trace the water back." I mean, that's more in line of what you're trying to do.

ASSEMBLYMAN IMPREVEDUTO: To the average guy in the street -- and I consider myself to be that; I don't know a

whole lot about that stuff -- the problem is, you want to buy a building. You want to fix the building. You want to rent the building, and you've got to get in and do it quick, because time is money. You're paying that interest every month, and you're held up by somebody for 10 months, or three months, or six months. I'm talking about the little guy; I'm not talking about EXXON. The little guy in the street is affected whether intended or not. Everything we're talking about is, "I was affected by it directly."

ASSEMBLYMAN ROONEY: Tony, one of the reasons we're here today is when the ECRA law was drafted, it gave the authority to the DEPE -- the DEP at the time -- to draft the regulations that went along with it. Nothing is in law. We're trying to codify it now. We're trying to say what's going to be.

ASSEMBLYMAN IMPREVEDUTO: I understand that, John. But the point that I wanted to come to, in all honesty, there's got to be some type-- You can look at it and say, okay, there are certainly certain areas that are much worse than others; limited resources, limited funds. Who do we concentrate on first, the farmer who spilled the oil from his tractor for 50 years and now can't subdivide his property?

ASSEMBLYMAN ROONEY: But that's not in there -- SIC codes; the Standard Industrial Codes--

ASSEMBLYMAN IMPREVEDUTO: John, let me finish.

ASSEMBLYMAN ROONEY: Okay.

ASSEMBLYMAN IMPREVEDUTO: Or do we look at the heavy duty guys that are really out there, you know, with serious problems?

K E N N E T H H. M A C K, ESQ.: Can I perhaps jump in? Because I think what the Assemblyman--

My name is Ken Mack. I represent the CIC.

I think what the Assemblyman is saying is something that goes to the very heart of ECRA. That is, no one from its

inception to now can look at it and figure out with precision what it applies to in terms of what transactions trigger it.

I spent five years litigating with the DEP -- and they spent five years litigating with me -- in a case that resulted in the Appellate Division decision in which 13 out of 15 of their applicability regulations were conditionally approved, but remanded for the DEP to determine when they were inapplicable.

A lot of those efforts have, with mixed results, found their way into the present draft of the bill, and each one of you, I think, has a package from CIC which includes draft language that I largely wrote. That represents an effort which I either promised or threatened both the DEP and a number of other people to do the last five years; that is to try to correlate the statute with existing corporate law. For example, the original statute and the draft that's now proposed contains the phrase, "as a trigger, the sale or transfer of the controlling share of the assets of an industrial establishment." That phrase as far as I know appears nowhere else in no other statutes on this planet.

The problem with that is, when lawyers who are not imbued with the occult mysteries of ECRA applicability -- and believe me, it is almost that; I am a practitioner, so I should know. If you don't know what those occult mysteries are as to what is applicable, you cannot look at another statute and figure out what the phrase, "controlling share of the assets" means. Now, this is especially unfortunate, because the people that determine at the outset what the applicability of ECRA is are not environmental lawyers like me, or Angelo, or Eddie, or Richie, or Ed Lloyd. It's not us. It's a corporate attorney. They look at the corporate statutes. And as you'll see from the draft that we've prepared, all that we propose is simply correlating the ECRA statute with the corporate law of the State of New Jersey, the partnership law, and the other law, so

that you don't have to be an expert and know what the staff is thinking from one day to the next as to whether or not ECRA is applicable.

I do not really want to put myself out of a specialty, but I also don't really enjoy listening to out-of-state lawyers and nonenvironmental lawyers look at the statute, and when I tell them what the DEPE thinks it means, they begin laughing. They say, "Hey, I'm not going to recommend that my client do business in New Jersey. I'm not going to let them buy property in New Jersey." Or, I get somebody with an office building, such as yours, Assemblyman, and I tell them it's not applicable. They say, "Well, where does it say that?" It doesn't say that, so here you have this vast chilling effect on business which serves no good environmental purpose, and which is easily soluable.

SENATOR McNAMARA: Did you submit your--

MR. MACK: Yes, I did.

SENATOR McNAMARA: --and they were submitted to the DEPE and also to the AG's Office on Friday?

MR. MACK: I understand that the DEPE and the AG-- That's exactly right.

SENATOR McNAMARA: Well, I daresay there's no comment as of yet from either one of them because I'm sure neither one of them have read it.

MR. MACK: Well, actually, as to the DEPE, they've all seen something like this in my comments of the regulations which go back for months.

It's not in any way a far out concept to say that this law should correlate with other laws.

SENATOR McNAMARA: I think that's a rather basic common sense recommendation, but you have to understand, this Committee, at this point, is not going to be able to make a comment on it because it's just being handed out at the moment. So, it is very definitely something that-- And that's

the purpose of this hearing: to get all of those comments and take a hard look at them.

ASSEMBLYMAN ROONEY: As the Senator said, we're going to have this hearing, another hearing, and a third hearing. I think the importance of this issue is shown by the fact that we're having joint sessions, and we want to do it quickly. We're going to do it at the same time. We're going to have both bills moving through concurrently, because we all agree that this is a major issue. It always has been, and its time has come.

The DEPE is here, and I've had nothing but good reports back from the DEPE that they're willing to work with us on this issue, so I have no problem that we're going to resolve this. It may not be to everyone's satisfaction, and that's probably the test of good legislation -- that the compromise comes out where nobody is satisfied with it, but at least we all have something we can all work with.

I agree with Assemblyman Impreveduto. I've seen the results. I haven't seen it in office buildings, but I've seen it in industrial areas.

ASSEMBLYMAN IMPREVEDUTO: Buy a piece of property.

ASSEMBLYMAN ROONEY: Yeah. But, again, you get into the historical issues and-- I could tell horror stories here all day, but I don't want to do that. We're here to try and pull this bill together.

SENATOR McNAMARA: Wait a minute. Ed Lloyd?

MR. LLOYD: Thank you, Mr. Chairman. I'd like to add my compliments to both the Legislature and the DEPE for holding these hearings, and for proceeding in, I think, a very reasonable fashion to address an issue that's extremely important to the environment and to the economy of the State.

I want to say a word about the applicability issue that we've been talking about. Then I want to move to a definition that's not in the definitions that I think needs to be.

I was involved in litigation that Mr. Mack referred to as well, and the result of that litigation was, in essence, that DEPE's regulations were upheld. The regulations were remanded to the Department, where all of us sat down and worked to come up with some bright line tests -- I think that the regulations that exist now include those bright line tests. That's what we're talking about here today -- administrative predictability. I think you can look at those regs today and have a very good idea of what's applicable. And, if you can't, the way to certify it is then to go to the DEPE and say, "I want a determination on applicability," and DEPE has gotten itself in a position to give you those determinations in a fairly rapid and formal way, so that you are protected. And you can, if you're an out-of-state attorney or nonenvironmental attorney, get the answers you need. I think that that's an important point to make.

I'd like to move to a definition that's not in the Act that I think needs to be. That regards what's called "special ecological receptors." That is the key phrase when we go to begin to discuss the ecologically-based standards that are called for in the Act, but it is not defined and I think that it has to be defined.

SENATOR McNAMARA: Ed, I think that that's defined in Section 30. Now, I might--

MR. LLOYD: Mr. Chairman, the subject--

SENATOR McNAMARA: It's in the definition section that precedes Section 30. If you would take a look at that?

MR. LLOYD: I will take a look at that, and it's possible that the draft I have does not include that definition.

Let me comment on what I think ought to be in the definition, and I'll be happy to give additional comments to the definition that's there.

I believe that it ought to be defined as the most sensitive species that's to be affected by the contamination.

Now we have human health standards that are established that are based upon humans being the most sensitive species. Those standards will cover a great number of the harms we will see from contamination. But there are contaminants and levels of contamination that affect other species at far lower levels than they affect humans. It seems to be that it is in those instances where the most sensitive species is the one that needs to be defined as the special ecological receptor.

At one point, the language in Section 30 talks about, in establishing ecologically based standards, whether it affects the viability of a special ecological receptor. I think we need a definition on "viability" as well, because if we're talking about bright line tests and administrative predictability, we want to define our terms as carefully as possible so that there's not confusion or disagreement as to what those terms mean.

With respect to viability, I would suggest that we talk about any effect on that special ecological receptor, including sub-lethal effects. When we're talking about a human health-based standard, we're not just talking about something that will kill a human. We're talking about something that would affect human health, would affect the reproductive capacity of humans. I think we need to do the same with ecological receptors. That is, if a sensitive species' reproduction system is affected, that needs to be the basis upon which we're going to define an ecologically-based standard.

Mr. Chairman, I'll be happy to look at the definitions that are there, but those are some thoughts that we have on how to define receptor, and the viability and the impact on those receptors.

SENATOR McNAMARA: Ed Hogan.

MR. HOGAN: Yes, just to get back very briefly to the facility subject to ECRA -- the industrial establishment issue. I think Lance made clear the DEPE views it as a

single-pronged test. If, indeed, that is the case, we would suggest if it's going to be a single-pronged test -- if that's what the Legislature intends instead of a two-pronged test -- to remove from the definition of industrial establishment any reference to hazardous substances, you have the regulated SIC code; you are an industrial establishment. Leaving it in causes confusion and exactly the kind of streamlining you want to achieve-- By leaving it in, it leads people to think that they don't have hazardous substances and creates the kind of ridicule that the statute has engendered, because everything you have is a hazardous substance. It leaves people with the impression it's a two-pronged test. If the Legislature intends it to be a single-pronged test, then it is just a Standard Industrial Classification number. If it means it to be a two-pronged test, it has to be a meaningful two-pronged test, and not an automatic one. Again, I think it's an issue where clarification would be useful.

ASSISTANT COMMISSIONER MILLER: We're starting to bridge into the areas of streamlining the process, and we can either go into that now, Mr. Chairman, or hold that, because we have some ideas that we're working on to address those issues.

SENATOR McNAMARA: This afternoon.

Irving.

MR. COHEN: The issue with regard to the levels of de minimus classification of hazardous substances as Ed Hogan had mentioned before: Like all the other consultants that are working in this field, I don't think I've come across one case that we have been involved with, where a Standard Industrial Classification code applicable client ever even considered White-out, or toner, or anything associated with normal office operations, that has caused him, or her, or them, a problem. If, from a definition point of view, it is meaningful to exclude them in some form from our perspective -- from the environmental consultant's perspective -- since it's really not

something that has been considered in the past, I don't see where this is going to cause a problem in doing so with regard to defining it. If it makes it easier, that's fine.

We've worked on many, many cases, and to this date this issue has never been an issue. If we had a SIC applicable code and there was no hazardous substances on the site as defined by the Act other than what Ed Hogan was talking about, normally this procedure is very short. It's a filing; it's a quick and simple application to the Department. If you want to consider these aspects as containing hazardous materials, you can file a negative declaration. The concept that Lance was saying before is absolutely true. What we're dealing with is a situation where the SIC code applicable party either has done something to the environment, or hasn't. If that company has not done anything to the environment, then these little added issues really become a nonissue.

SENATOR McNAMARA: I would have to say that the worker Right to Know-- When I had my business, I had to have my secretary instructed because she was handling hazardous material in using White-out. That is the only area where I ever heard it mentioned. I've never even heard it mentioned until today, when it came to the subject of ECRA, but ECRA has such an incredible umbrella effect that I'm not surprised to hear anything.

Richard? Excuse me, one second. Richard Conway?

MR. CONWAY: A couple of quick points following up several that have just been made. First of all, I'll reserve my comment on the ecological receptor for a later point. I, personally, have serious reservations about getting into that whole set of problems, but I'll hold those comments.

I'm very glad that the DEPE issues letters of nonapplicability. It's a helpful tool that they do so, but I don't take comfort in having the ability to go to them and ask whether or not a particular transaction is or is not subject to

ECRA. And, in fact, I can tell you the transactions that could have happened in this State have not happened, precisely because that was the only way to determine whether or not ECRA would apply. The businesses involved said simply, "Thank you, but no thanks. I'd rather not do the deal." A statute that has as its premise an impact on whether a transaction can or cannot occur, that relies on the discretion of the Department to answer that question, does not help convince businesses to continue to do those transactions. It is not a helpful analysis.

Following that thought, Mr. Cohen pointed out that he has not had transaction sites that have had environmental problems from minimal hazardous substances used on that site. That only supports the proposition that they should be removed as a test. Why? Because although some sites have come to the environmental lawyers and those lawyers have analyzed are you an industrial establishment, hopefully they've either obtained a negative declaration or a letter of nonapplicability; many sites have not. And as written, the regulations and the statute permit the possibility that there are transactions and sites that have been subject to ECRA over the years, and have violated the law, at least hypertechnically, even if they have no environmental problems, because applicability is not an environmental problem-based test. It is a SIC code and a hazardous substance, and that's quite a concern because this law enables people to void transactions. Section 8, which has been preserved in this draft allows transactions to be voided for violations of ECRA.

That's a terrible result if you're trying to plan transactions. It is a problem for the future, as the lawyers who seek to avoid a transaction perhaps for other reasons are searching for an excuse and find that there is a site with a covered SIC code that did use hazardous substances and did not go through ECRA. I would recommend that the right to void be

seriously curtailed, perhaps even eliminated. It's never been used. I don't think it provides the kind of advantages that were originally thought to be provided, and it is a serious impediment. You talk to out-of-state counsel. You tell them there is a right to void. Again, who needs it?

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: In response to several points. I know Rich didn't mean exactly what he said when he said ECRA prohibits transactions, because ECRA does no such thing. It just conditions any transactions that's subject to the law to go through the process. And, I'm going to pick on Rich.

SENATOR RICE: Lance, I believe what he said is the perception of it in itself.

ASSISTANT COMMISSIONER MILLER: Yes, Senator. Absolutely. It's these perceptions of ECRA that we have to get over. Sometimes I think we're our own worst enemy in this State, bashing ECRA so much that everybody in the country-- I'm on a national association of state officials; everybody knows of ECRA. In that setting, they're all very envious of us in New Jersey because we have the mechanism to deal with these situations in a laid out framework. They all have to get involved in these problems. They don't have a resource base to do it. Oftentimes, their answer when people come to them, they say, "I can't do it. They're going to have to decide on their own."

All that does is postpone to some later date the issues that we're facing today in New Jersey. So, if somebody transfers property knowingly because they're doing due diligence today, and they say, "Oh, I'm not really sure whether this is a big problem or not. I'll buy it. Maybe I'll take a few hundred thousand dollars off the selling price," or whatever, what's going to happen down the road when that state now says, "No, I think that site's contaminated. You have to

clean it up"? Where's the litigation going to be then, or when EPA comes in and says, "Oh, it's time for us to investigate this site," because it happens to be on the surplus list of sites that they have to deal with?

EPA defers to us in New Jersey. Not one ECRA site has been placed on the national priorities list in the State of New Jersey. Because they recognize our program. They recognize that we're dealing with these problems and they're basically deferring to us. You make wholesale changes to this program: we're going to lose some of those types of benefits. So, we have to look at this as a whole. We're being very, I think, forward thinking in ECRA and in these amendments, to keep those aspects of the bill that are good. We're trying to add predictability. We're certainly a lot more predictable in this bill than we were in 1983.

I've just spent the weekend reading our response to the comment document on the regulations that we talked about. There are some additional nonsubstantive changes to that rule that we feel we can make to add even more clarity, based upon the comments that we received. So, we're always striving to make this law as clear as possible.

The number of applicability determinations has come down drastically over the years. When I first got involved in this program, testifying before Assemblyman Albohn back in 1986, we were clocking in 6000 of them a year. The past year we got in about 3000. I hope that's not all due to the economic downturn. I hope a lot of that is due to more clarity, to attorneys being able to point right to specific sections of the regulations and say, "No, that deal is not subject."

MR. MACK: Can I just make one very quick comment in response to both Lance and Ed Lloyd?

First of all, I do not agree with the statement, as one who is a practitioner in this area everyday -- including

today -- that there is greater certainty in the law as wrought by the proposed regulations. No one I've spoken to really agrees with that statement or really professes to understand what those regulations are supposed to say. And I ask each of you, if you have five minutes to be fairly bored reading them, to read them and try to see whether you understand them, because they ought to be understood by a layperson.

But the real point is that ECRA and the Internal Revenue statute are unique in having regulations that purport to say when a statute is applicable. There are no other two statutes that I know of that have regulations to apply here. Normally, you look at the statute and it tells you when it's applicable. If you need regulations to tell you when a statute is applicable, then either there's something wrong with the statute, or there's something wrong with the regulations, or both. In either event, it promotes the same sort of confusion that people have when they do their tax returns. If that is a good thing for New Jersey's environment or its economy, then so be it. If it's a bad thing, then it ought to be changed, and we've proposed how it ought to be changed.

SENATOR McNAMARA: Some conclusions that you could draw is -- and I know it can't be the point that you're thrusting at -- is make it applicable to everything. I can't believe that I'm hearing that you want to simplify it. You'll put us all out of business.

MR. MACK: All I'm say is that you shouldn't need regulations to tell you when a statute is applicable. Every other statute in the world says on its face, "when it's applicable," and you can understand it.

SENATOR McNAMARA: Please understand the purpose of the hearing. We want to hear your comments, and, if we run at the rate of beating something to death for an hour per section, that today's meeting will never get past the subject matter of this morning's session. You have to understand that the

members of the Committee, I think, have comprehended the message. If not, it's all being recorded. We have staff, also, and I'm sure that we'll get additional comments from each and every one of you in written form. So, I don't want to make anyone feel I'm cutting them off, but, thank God we didn't just make it a plain old open hearing, because we would be here for three days. So, could we move on, Mr. Hogan, or do you want to make one last comment?

MR. HOGAN: One last comment, which is two parts. (laughter)

SENATOR RICE: Mr. Chairman, before you do that, can I acknowledge the presence of my colleague so he'll know at least I'll need some legal help over here? (laughter)

MR. HOGAN: Very simply, I wasn't meaning to suggest the presence or the lack of presence of a hazardous substance caused a major substantive problem. It causes a definitional, impressionistic problem that I don't think is justified and anywhere related to the problems-- But, we'll address that in written comments.

As to the transactions which we believe are really much more important, and which I think Mr. Mack has addressed in his comments, the BIA-- We've had a chance to look at some of Mr. Mack's comments. He's litigated those issues. We think they're clarified. I would point out that most of the focus on transactions has been on transfers.

ECRA is also applicable on closures, or cessations of operations. We think that the draft legislation has some problems in not being specific. It would suggest that any filing of a bankruptcy triggers ECRA. A Chapter 11 reorganization should not-- DEPE generally is not taking that position, but the statutory change would leave the impression that not only would a liquidation under seven trigger ECRA, but a reorganization under 11 would trigger ECRA. We think that would be a very bad idea. We think that needs to be

clarified. As to temporary cessations, we think it's important. We very much agree with Mr. Mack's comments and suggestions on temporary cessations. We think that's important.

Finally, as to closures for health and safety reasons, which are separate closures: As written, OSHA shutting you down for failing to have guards on your machines could be considered a closure of the facility. Even if they shut you down for a day, it would be a health or safety closure. We don't think that should trigger ECRA. We think that the issue as to closures ought to be pure -- a cessation of operations when the business shuts down; not when the lease expires because you could remain in operations as a holdover tenant. You can cease operations prior to the end of your leasehold. It ought to be when the operations cease, not necessarily with a health or safety issue as broadly defined, or for that matter, a reorganization under 11.

SENATOR McNAMARA: Randy, did you want to make a comment?

SENATOR CORMAN: Yes, I just have a question for Mr. Conway.

Earlier in your testimony you noted that there were a lot of tenants that your members have lost because of ECRA. A little while ago you indicated that there are a lot of transactions that have not occurred because of ECRA, and in prior hearings we've heard industry representatives who have said that we lost a lot of businesses. Businesses moved out and, consequently, we have lost jobs as a result of ECRA. Do you have any statistics or estimates as to how many transactions or how many tenants have been lost?

MR. CONWAY: For those of us in this business that question has posed the most difficulty in trying to assemble answers. Part of the problem is the confidentiality -- the relationships that we have with those people. Part of the problem is some of those people are presently in front of the

agency, perhaps on other matters. They may have left. They may be going through ECRA on one matter. They don't necessarily want to come forward and have their name put on the table, feeling as strongly as they do. I know of no way to readily assemble that. Yet, I can certainly say from personal experience that I am aware of many situations where ECRA -- truly ECRA -- has been the deciding factor in whether to stay, go somewhere else, or to come into the State.

SENATOR CORMAN: Do you know of any instances where people have come forward and didn't mind being public about the effects of ECRA? Maybe Mr. Hogan has--

MR. HOGAN: As a matter of fact, there's been a number of people that have come forward. There's a book that's been written by a member of a different association -- Commerce and Industry Association -- a fellow named Bruce Siminoff. It's a book that's supposed to be out in the next couple of weeks, which has compiled a number of -- you want to call them horror stories; the people who have been less hesitant to come forward and identify themselves. I believe that's supposed to be released for publication within the next two weeks.

SENATOR CORMAN: Do you have any of that information that you could provide to us, or do we have to wait to buy the book?

MR. HOGAN: There have been a number of newspaper articles and I'm sure that while I may not, I'm sure Mr. Siminoff would be pleased to send those. I know there's been a number of newspaper clippings and a number of folks who have identified themselves would be glad to submit-- We would be glad to suggest to them they submit.

SENATOR CORMAN: Does BIA have any estimates on how many jobs may have been lost because of ECRA? Maybe through confidential surveys of your members?

MR. HOGAN: The only one I know that's taken the time to do that has been a fellow with Stevens Institute, a Dr.

Merino who performed a statistical study. What I recall is, it was a study. It's very thick and large, and I don't recall the conclusion, quite candidly. But there was one effort at a scholarly study that I am aware of. I know some DEPE employees are pursuing advanced degrees, and I think they've used the ECRA program as a testing ground for their theories. Lance may have a thought on that.

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: I think we also would want to look at the corollary to your question, Senator, and that's how many transactions has ECRA brought into the State? Because, sometimes people like the idea that they are getting finality in that the Department is saying, "This site is clean." Now, I'm going to come here. I can operate and know that as long as I don't contaminate that site, I'm okay.

We did that down in Camden County with Campbell Soup and GE -- massive transfers going on down there. I know of another situation when Merrill Lynch was moving from New York City to New Jersey, they looked at two properties along the waterfront. One of them was subject to ECRA; one of them was not. Which property did they pick? The site subject to ECRA. Some of the feedback that I got on that was they liked the finality. They liked knowing that the Department had reviewed that and said, "Yes, that site's been cleaned up." We can go there without future liability problems."

SENATOR McNAMARA: I'm sure they'd like it better with the bill, because it's going to make it that they're not going to have go back again when they go to sell it.

ASSISTANT COMMISSIONER MILLER: Yes, absolutely. We're clarifying that point in this bill.

MR. LLOYD: On that point-- There are very good points being made here. It depends on what the previous use was, not on what the future use is.

MR. MORRESI: I think you have to look-- Remember what Ed Hogan said in the beginning of this, and that's that there are a number of programs in place now that were not in place then, and there are a number of people doing the purchasing-- The bar is very knowledgeable in these issues now. In the situation where you have your office building, you would do your due diligence whether you're subject to ECRA or not. So your buyer would be protected in that situation.

In the situation where you're going to make a purchase or not, whether it's ECRA or not ECRA, you're still going to go through the process of due diligence and review to identify whether or not there are any problems. Once you identify the problems, you're going clean them up to DEPE standards. So there's not really a big difference in the overall procedures. It's just the process becomes more cumbersome going through the ECRA process, quite frankly.

SENATOR CORMAN: If I could ask a follow-up question to Lance Miller?

Actually, you had a very good point. Has the Department done any compilation, or have there been any estimate who may have come to New Jersey because they like ECRA? You gave me two instances. Are there more?

ASSISTANT COMMISSIONER MILLER: Director Karl Delaney did his research thesis for his master's degree on why people do their business transactions -- tried to look at ECRA, and was that having an impact? There's a host of reasons why people move around. Environmental issues, in general, are on that list. Foremost -- Karl, if I botch this it's because I read your study a while ago; feel free to jump up and correct me -- the labor market was one of the keymost factors. Making sure that they had the labor pool and at the price that would make their product economical, was often at the top of that list.

Environmental things kind of fit into a secondary category, and then, certainly, you know, that's environmental regulation overall, ECRA just being a piece of that. So, his research indicated that ECRA would not have a major impact. Some of the studies that the Department of Commerce has done has shown a tremendous influx of new firms coming into the State over the years, to the tune of several hundred new firms coming in. Whether they're locating because of ECRA was not asked. Again, it's probably because they're locating here because it's a good place for them to be logistically, and they have the right labor market for their given activities.

SENATOR McNAMARA: I guess the problem that I have with that, Lance, is that I see a lot of influx in the administration type offices, etc., not manufacturers. And manufacturing, rightly or wrongly, has a perception New Jersey's not a friendly place to do business; that the Department in the past had a punitive type of attitude. I say in the past, because I really do believe that's past. So, I honestly--

This bill is not going to be judged on the book that is going to be published two weeks from now. I think a lot of the problems were when the bill was passed, no one, including the Legislature, the business community, or anyone involved, had any idea of what the impact the bill in the form that it was passed, would have. It's taken a long time to shake the system down, and I believe by working cooperatively that we can come up with something, as Assemblyman Rooney stated before, that is not going to make everybody happy. Everybody will most probably be a little bit unhappy, then that means we may have worked out -- may have -- worked out an artful compromise.

I would like to move on to the second section since time is beginning to run.

John, do you want to read that one?

ASSEMBLYMAN ROONEY: This is on the Section: ECRA process, use of preliminary assessments, site investigation, remedial investigation, feasibility studies and remedial action work plan terminology, notice provisions, and administrative consent orders.

It's all yours, gentlemen.

J O R G E B E R K O W I T Z, Ph.D.: My name is Jorge Berkowitz. I'm with Sadat Associates, a consulting company in Princeton. I'm representing CIC, and it might be of interest to you that in one of my previous incarnations, between 1983 and 1986, I ran New Jersey's Superfund Program of which ECRA was a small part.

As Mr. Conway has so adequately pointed out, Section 2 does not streamline ECRA. It makes it more cumbersome. Not only does it mimic the Superfund process as a paradigm, which I don't think anybody in their right mind wants to do if they're really looking for streamlining and efficiency, it adds another step and that's the feasibility study step. The feasibility study step does not exist in the ECRA process presently, nor does it have to.

Now, I think when we started taking a look at what made sense as an alternative to the process outlined in Section 2, we came up with an outline, I don't know if this outline has been disseminated to you all, or not.

And I thought-- I was feeling pretty smug because this thing made sense. What we basically did was, we said, "Well, what DEPE is going to do is establish some standards." What we need is a minimum amount of DEPE approval, enough private initiative to keep the process moving with a pay-all at the end where the Department has an approval process at the end, where they can come in and say, "Yes, you did it right," or, "You didn't do it right."

Now, after feeling smug about this, I realized that we invented this back in 1984. It was called the "at peril

process." We did it for New Jersey DEPE because the regular ECRA process was being bogged down and mired in inactivity, so we allowed people to proceed "at peril" and basically following this paradigm.

So, the point here is, this is not terribly revolutionary. This is what the Department is already doing in many cases. Now, again, I'm feeling pretty good because at least I'm consistent. Then I read Section 17 in your document. Section 17 in your document deals with immediate removal actions. Basically, your paradigm and immediate removal actions should be the paradigm for the entire program. What that means is, "private party, move ahead." It's essentially this paradigm: Private party, move ahead. We'll give you the standards. You give us notice. You give reports, but you do not require our approval. At the end of the process, you're going to certify that you've hit all the marks, all those marks that appear in the technical standards, the cleanup standards, and all the documents that DEPE needs to make this work. But at the end, DEPE will come in and audit the process to make sure that you've hit all those marks. Anytime during the process you want DEPE intervention, you can request it. Does that mean DEPE is in the dark during the whole process? Absolutely not. There are mandatory reporting requirements throughout.

We would offer that as an alternative to the model. That's the paradigm that is a proven paradigm that doesn't work -- and that is the Superfund paradigm. While other people here can say by the use of a term: preliminary assessment, site inspection, remedial investigation, we can put a new spin on it. The point is, when the Department has got to develop guidelines for it, there are canned guidelines they can pull off the shelf. And Superfund-- You can find prescriptive ways to do a RIFS, PA. You can find all prescriptive measures to do that. And if Lance is going to say, "Well, that's not what we

mean," the problem is that a lot of people in the consulting community don't have the insight of what Lance is saying, and they will propose a remedial investigation feasibility study a la the Superfund process, and it will drive the cost sky high.

SENATOR McNAMARA: Lance. Did you bring any relief? (laughter)

ASSISTANT COMMISSIONER MILLER: It's here. It's moral support. I feel it. (laughter)

ASSEMBLYMAN ROONEY: I also have to add--

ASSISTANT COMMISSIONER MILLER: We had this debate last week.

ASSEMBLYMAN ROONEY: Well, actually, I just have to add that Mr. Berkowitz comes from Mr. Sadat's firm, who was previously in the DEPE--

ASSISTANT COMMISSIONER MILLER: They both were.

ASSEMBLYMAN ROONEY: I know.

DR. BERKOWITZ: That's why we can give incredible insights into the process.

ASSEMBLYMAN ROONEY: So, if they can't understand the process, it must really be bad. (laughter)

ASSISTANT COMMISSIONER MILLER: Well, the other line that Dr. Berkowitz has also presented looks awful familiar to me in the form of the voluntary cleanup program that we announced in the beginning of this year. Mr. Berkowitz said that we're codifying the Superfund approach. I don't care what you call it. I mean, you can call it a banana. The way you investigate a site is that process.

Mr. Cohen can go and describe his details. People do preliminary investigations. If they find something, they delineate the extent or degree of contamination. That's called the remedial investigation. Once that's done, we then look at what your alternative is -- that you have to remediate the site. That's called a feasibility study. These are terms of art.

Jorge is worried about us pulling Superfund guidance off the shelf. I'd be the last person to do that. He reacted to that saying, "Well, I said I wasn't going to do that," but I've gone farther. We've proposed our State regulations, our technical requirements, defined each of these. They define what is required in each of these steps. One of the key things of why we feel we need to look at feasibility studies is when a nonpermanent remedy is being implemented. All too often in ECRA and other cleanups, we have contaminated soil being taken up and sent out of the State of New Jersey.

Legislators, you know what your colleagues are saying about that in other states. They want it stopped. They have their Congressmen and Senators down in Washington pushing legislation that would prohibit that. We want it stopped, too, for environmental reasons. We feel that we should be dealing with these contaminants more on-site wherever possible, and where somebody isn't going to deal with the problem on-site, then we feel we should have an opportunity to review that before they implement a remedy that would take the waste out-of-state.

So, we're trying to define when we're going to be involved. Anybody, be it in ECRA, somebody that would be subject to ECRA at some future point in time, or any company that's out there right now, can look at their property under this outline that Jorge presented -- that's also presented in our technical regulations and our oversight regulations that codify the voluntary cleanup program -- go through that process, get the site clean, come to the Department and say, "We cleaned up the site. We'd like your approval of that," get that approval, and then if any time they trigger ECRA, all they have to certify is that they haven't had any new discharges and they're through the system. They're done.

That type of approach is out there. This bill recognizes that. I think trying to come up with alternative

terms that have now become commonplace in the field through the last dozen years will be a mistake.

SENATOR McNAMARA: Mr. Cohen.

MR. COHEN: Many comments have been made before, concerning language that's used -- terms that confuse people, issues that go back to Superfund-related terms that are used, and how it affects the businesses as a whole.

You're trying to focus on legislation that is good in its theory. The problem that has affected the businesses that are basically involved in the ECRA program or the environmental permitting programs, deals with fairness, equality, speed, and language. The reason why companies do not necessarily come into New Jersey as a manufacturing facility, is not only related to the environmental permits that they require to operate, which is onerous to them in their eyes, but the terms that are used here basically focus them on Superfund-related issues. I agree with Jorge and the concept of the at peril type cleanup.

What is consequential about this procedure is the timing that it takes to get through the process. Most companies that object to going through the ECRA process are not necessarily objecting to the fact of what they get at the end, although there's a question as to the language of the piece of paper that is issued to them at the end which has to be addressed, but, it's the time that it takes them to get through from point A to point B, and point B being the end -- not the simple company who has a minor spill or de minimus amount of material on his property. It is the one who has a major manufacturing facility that has substantial contamination, and the amount of time it takes to get through each individual review process at the agency level.

The solution to it is very, very difficult. You can work with saying, "Okay, we will provide you with reports and we will do it at peril, and have the DEPE review it at the end

and put their stamp of approval at the end," but there's no registration process that exists to say environmental consultants have to be registered with the State and have to have certain qualifications to fulfill that function, although now there are some certifications that have been required of consultants working in certain areas.

But the end result for the owner of the property is that he now has to pay a consulting firm to do the work. That report goes into the State and goes through a review process. In most instances, in heavily contaminated properties, it takes an inordinate amount of time. It's not saying that the required time to review the documents should be thus, or a certain amount of time, but, what happens is it goes in many instances almost in a cycle of going from one department, to another department, to another department. That makes it very difficult to get through the process in its end result, trying to get the piece of paper that says that you have not cleaned up the property. That has to be addressed in this section.

If we go and use the terminology of doing RIF -- remedial investigation feasibility studies -- you will have in your hands similar to what we have with the Superfund sites right now. How many Superfund sites have been cleaned up in the United States? Very few. Most of them just go in reiteration, and reiteration of consultant to consultant to consultant, reviewing various options, and nothing gets done. The concept of doing it at peril, doing it properly, meeting the schedule, meeting the requirement that is put forth in a document that everybody knows what they're dealing with, will give you your end result. A quick, easy solution: a statute that is meaningful, and the end result a piece of paper that says, "Yes, this has gone through it. It is finished. We are done. We're not going to come back and hit you with another hammer for some other reason."

SENATOR McNAMARA: Richard?

MR. CONWAY: I've said earlier my concern with using the CERCLA language. I won't repeat that, but I'll add that CERCLA is an adversarial-based process. It starts with something is wrong at a site. It's been discovered by an agency. It is rarely a true voluntary process. ECRA is very different than that. ECRA is a process that is not intended, at least as I read it, to be adversarial. That's what we have the Spill Act for. ECRA happens on transactions or cessations of operations. I think just that difference makes it difficult to use the same terminology regardless of how you solve what the investigatory process should be. Also, I think that in a nonadversarial process, the bias should be a little different. The DEPE often either indirectly or directly as a result of history, takes matters forward in an adversarial manner.

I question, for example, in Question 4, why the DEPE should necessarily be the ones setting all the schedules, which is what it says? Why shouldn't an industrial establishment be permitted to propose a schedule? If the schedule is reasonable, why shouldn't that be accepted?

The answer would be, "Well, it shouldn't be accepted if it's an adversarial process," if there are bad people who have to be beaten up and told how to do things the right way. But I don't think ECRA should establish that kind of tone. I think ECRA should reject that kind of tone. It should become more encouraging. If business is going through this in the kind of premise we have, a transaction, a cessation -- as long as they're acting reasonably, I think the bias of the statute should change to an approval of that approach.

I'll point out one answer to some of the delays might be to give greater power to the agency in ECRA to issue as many permits in one-stop shopping as possible. That may be difficult to accomplish because of certain Federal requirements under some statutes. But, if this statute said, "Dear DEPE, When you issue an approval under ECRA, please issue at the same

time, all of the permits that you can approve or waive the necessity for those permits. Let's expedite this process," I think that would be a very powerful device to help, because there is certainly nothing more frustrating to many of the companies that go through ECRA to find themselves whipsawed between the different groups in the DEPE, one of which has as its very, very important agenda, getting the whole site cleaned up, another of which has as important an agenda, making sure their transition areas of wetlands don't get invaded, just to pick an example. Sometimes that whipsaw imposes as many delays as the actual substantive environmental problem itself.

NAIOP had submitted to the staff some suggested language along those lines.

Thank you.

SENATOR McNAMARA: Irving?

MR. COHEN: Just one added comment on what Rich just mentioned. There are actual regulations that oppose some of the things that are attempted within ECRA. I don't know if you're aware of that or not. For example: on-site cleanup, as an issue; rather than take all the contamination that exists on a major piece of property and take it to another state, dig it up, and move it out. There have been issues of trying to clean up on a person's property, especially if you're dealing with a larger type operation. You cannot do that. You can do that. You can wait for the permit that might take you two years to achieve and, in the meantime, you're holding up the ultimate cleanup of that site because it is the antithesis of what is regulated under the ECRA Act, and truthfully, that is not speaking to that issue. There has to be a mechanism to bridge those gaps. There has to be a mechanism within the State to allow you, if you put in a program to clean up the site, on-site, that ECRA has the authority to turn around and say, "I agree with that approach. That approach is technically sound. It's going to do what it's supposed to do and here is your permit to do it. Let's get going with the cleanup."

SENATOR McNAMARA: Lance, do you have any comments in the interim?

MR. MILLER: Listening to all of this, I only have one reaction, and that is that we need to make sure that all these people are on our mailing list and that we make sure we do a better job of articulating the changes we've been making in the Department to address all of these things that are being done. We recognize that permits are needed sometimes in relation to when a site is getting cleaned up.

Well, I'll just call it the Doria bill because I can't remember what EMAP stands for right now -- that legislation that passed said that permits for cleanups are a priority for the Department. If someone feels they are hung up in the permitting process, all they have to do is give a phone call to the case manager, and we'll look into it and try to get that permit issue resolved. We have the ability within the Site Remediation Program to issue discharge to groundwater permits, so if we're pumping up contaminated groundwater and we're going to put it back in the ground, we can do that ourselves, and we do so very quickly in those situations.

We're not perfect as an agency by any means, but what we're doing is trying to resolve these issues. Everything that I've heard is not new. These are all existing problems that we're aware of. We are addressing them. We're making progress. We will solve the problem of the permits. The solution is not to have my case managers approve a wetlands situation where the remedy is going to be impacting on wetlands. My staff doesn't have the expertise in that area. We could make a wrong decision. If my staff had to develop the expertise and look into it, it would take an enormously longer time than going to the technical staff that has that expertise, getting them to review it quickly, and get the answer out. It's a matter of priorities. It's a matter of the Department focusing its resources on what needs to get done. Those are

things that are happening. I think that's the extent of how I can respond to it.

DR. BERKOWITZ: Jorge Berkowitz. I'll be brief.

ECRA reform must accomplish two things. It must move the cases through in a more timely fashion. It must be more predictable. In a rare moment, I'll concur with Assistant Commissioner Miller. The voluntary cleanup program is working. The MOA process is working. Why you need a different process that has the same objective, I have no idea. Why you can't build upon that process in this ECRA reform, I have no idea. I think it should be mainstreamed, and not something you should trip over incidentally.

SENATOR McNAMARA: Any other comments?

ASSISTANT COMMISSIONER MILLER: One other issue on Section 2. It's on page eight of the July draft, line seven through 12. This is the issue of when someone enters into an administrative consent order, that they would not waive-- I'll just read the sentence: "An administrative consent order may not grant authority to the Department beyond that provided to the Department by law, and may not require an owner or operator to waive any right to appeal a Departmental decision involving the substantive requirements of a remediation or an issue of fact."

What that says to me, as one of the two nonlawyers on this panel, is that we sign an administrative consent order -- and you have to remember what an administrative consent order does -- it allows the transaction to proceed. So we had Company A there now, they enter into an administrative consent order, Company B comes onto that property, they are now operating at that site. Company A has to go through ECRA; that's what the administrative consent order is. They get to the point where a cleanup plan, a feasibility study, now is submitted to the Department. We review that and say we either agree, or for whatever reasons we feel that-- Let's use the

example where we disagree -- instead of doing alternative 1, you have to do alternative 3. The company says, "No, I'm not going to do that. I didn't waive my rights. I'm not going to implement that." Well, let's look at it from Company B's standpoint. They signed this consent order thinking that site was going to be cleaned up. Now we're in litigation. That litigation can go on for who knows how long. Company B now wants to sell it. Now what do we do? I don't have the answer to that question. Company B, they're not going to want to implement the remedy that the Department wanted. That's Company A's responsibility. Company C is not going to want to buy the property because they don't know if anybody's going to clean it up, or what it's going to be cleaned up to.

I think this provision causes some problems, not only for the Department, but for the regulated community-at-large.

SENATOR McNAMARA: Mr. Hogan?

MR. HOGAN: We've had an opportunity to review this, and a concern we have with administrative consent orders is, first of all, to look back as to why consent orders exist? The original statute was based on the fallacious assumption you could either get a negative declaration or an approved cleanup plan in the context of a normal business transaction. Facts have proven out that you can't do that. It takes iterations of sampling plans or remedial investigation feasibility studies, whichever term you want to use, before you get that, and ECRA's a precondition to be able to consummate a transaction. The consent orders were invented, in essence, to allow rapid consummation of the transactions with ECRA compliance to follow.

What Lance has identified, though, is an important issue which is missing from the reform of the statute, which is when you end up with a technical disagreement with the Department, you're left to have to pursue and get the loggerheads. And I'd be the first to admit that Lance and many of his people work very hard trying to minimize those. But

there will be a time when you get into an issue where you get into loggerheads with the Department on a technical issue, and the Department is cast forever being a public agency that has more junior people than may otherwise be available to the private sector. But there will come a time when professional jealousies or technical disagreements are going to exist and you can't resolve those.

What Lance is suggesting is, you ought to waive your right to do that if you enter a consent order. You ought to sign the ultimate blank check, and that creates a real problem the consent order was meant to avoid, which is to allow transactions to go forward. When you have a technical disagreement, your choice, often, is simply to go up to the Appellate Division, ask it to be certified as final agency action and, in essence, have the issue litigated through.

One issue we haven't seen here in the bill and which the Business and Industry Association of New Jersey would ask -- NJBIA rather -- is that there be some form of alternative dispute resolution, some form of technical ability to litigate these issues, resolve these issues, short of formal litigation, short of the administrative hearing process. What Lance is suggesting is, in the administrative consent order, you ought to hand over all your rights to challenge those issues, and my sense is, anything you do to chill administrative consent orders is going to undo the good the administrative orders have.

The reason ECRA works, and I hate to use the term that would be too dramatic, but it extorts compliance. Companies jump through hoops because they need to get a deal done, and Lance loses that leverage when he enters a consent order, because it allows the transaction to go through. But recognize that the role of Legislature is to balance not only environmental concerns, but economic concerns and business concerns. Consent orders allow transactions to go forward. But if you're telling a company not simply are you waiving the

right, but you're going to enter the process, you're going to post financial assurance in the amount Lance and his people come up with, you're going to agree to stipulated penalties rather than other penalties -- a liquidated damages clause which we're all familiar with in the business context of what the violation will be -- you are agreeing to the jurisdictions of the State courts in New Jersey, if you don't follow the procedures.

But, if you're going to give up your ability to disagree, Lance is retaining his right to tell you to dig up every foot of soil on the property and, mind you, he may not, but any piece of property could be a $50 million cleanup if you dig it down to as far as you go. To suggest that someone's going to waive that, is going to eliminate the ability of business on the other side of this country, or the other side of the Atlantic or Pacific oceans, to do deals in New Jersey, because the consent order process is going to be very chilled if, in essence, they have to sign a true blank check.

SENATOR McNAMARA: Richard.

MR. CONWAY: I would echo those comments, and I think NAIOP, in the drafts that it had provided to staff, included some language which created both a formal appeals process, which is sort of conspicuous by its absence from this statute -- there is no road map for when an appeal does or does not make sense -- and also suggested that an alternative dispute resolution is something to be encouraged. We did not put in a specific mechanism because, at the time, we couldn't think of a precise easy way to do it. But we suggested that the Department should pursue that, and I think in many ways they do. I think they have a lot of meetings. I think they are willing, and I know they are exploring the availability of formal alternative dispute resolution techniques.

ASSISTANT COMMISSIONER MILLER: Thank you, Rich.

MR. CONWAY: You're welcome.

ASSISTANT COMMISSIONER MILLER: Since you are the co-chair of that work group that we've established-- (laughter)

SENATOR RICE: I have a question. You mentioned the digging and the digging, and the testing and the testing, but those things merely apply to inner city housing developments. Is that correct?

MR. COHEN: Yes.

SENATOR RICE: You mentioned before, the problem with constant testing. That's the problem I have. We plan to take a simple residential community and rebuild, although we know what's going to be there. So I just want to go on record, because I don't want the news and everybody to think we're talking only businesses. We're talking about how to develop a community in general. That's what I've been carrying around for the last three years, even when the Commissioner Daggett-- They couldn't come up with answers, but if this doesn't relate to it, I'm going to make sure I come up with one form, because it's obvious the developers and others know what the answer should be in testing.

SENATOR McNAMARA: Ed Lloyd.

MR. LLOYD: Mr. Chairman, with respect to the plans that Lance read about waiving the right to a substantive requirement: Mr. Hogan talked about technical disagreements. I think, if nothing else, the Legislature ought to clarify what they mean by substantive requirements. I mean, I share Lance's concern that we could be setting up a situation where we're going to litigate on the site forever and not get a cleanup. I think that's a major concern.

But with respect to what Mr. Hogan said: If we're talking about narrowing the issues that are going to be left for dispute, we ought to do that, and we ought to do it in the legislation so that it's clear. At least we're limiting the area of disagreement that we're going to have post-ACO. I'm not sure we should allow any disagreement post-ACO, but if we

do it, we should narrow this definition so we know exactly what kinds of disagreements might have to be litigated in the future.

SENATOR McNAMARA: Good comment.

Angelo.

MR. MORRESI: Mr. Chairman, we're pragmatic people, and we also don't like to get stuck in paradigms of a way of looking at things because that's the way they were getting done.

Two things you have to think about, I think, is that over the past 10 years there are good general consulting engineering principles on how to go about investigating and cleaning up a site. Those principles are out there. There are cleanup standards that are proposed that people utilize in achieving those goals. There's also the premise as to why--

The Department was most ingenious in creating the need for the ACO, because there was no other way of making a deal work. You know, you just sit back and think, why do you need an ACO? If you legislate to allow the transaction to take place, make the person who's going to make the transaction take place post the bond or whatever has to normally take place, but remove that obstacle. There's no need for an ACO anymore, because you've already put into the statute penalties -- the need for the bond and under what circumstances the transaction could move forward. The procedures are in place already in order to effect the cleanup. What more burdens or penalties are necessary to make this deal operate or make the cleanup occur? It's just not necessary anymore. For me, another ACO may be $3500 to $5000 in preparation, but that's not the issue here. The issue is how do you make this thing move forward and be done with it so we can look to more important things.

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: Senator, Angelo raised that point in a previous meeting. I think it has a lot of merit. The issue that I raised, though, still needs to be addressed because if you allow the transaction to proceed under

the legislation rather than posting bond or putting money into the fund that this bill creates, we still need to address the issue of when do they have the right of appeal. It's not, do they have a right? They do. It's when they have that right.

All of our other environmental statutes, quoted at the State and Federal level that deal with cleanup have that at the end, after the site's been remediated. I don't think in my experience, the nightmarish cases that we have in terms of getting sites cleaned up are all when we went to court and said, "Your honor, we can't agree on a remedy. Here, you decide." Now we're going to a judge that's trained in law, and weighing factors and trying to develop a compromise position, and that's what you get.

Well, a lot of times on remedies, a compromise remedy doesn't work. Somebody has to make the decision. To me that's what the Department and the executive branch is charged with. If we implement a remedy, and we get excessive, we've been wrong. When we seek cost recovery, we lose. That's the risk and the burden that we have to try to make our proper decisions. To me, that works. That gets the site cleaned up. If we went too far, if we did some things that were excessive, the person that's responsible doesn't have to pay for that. But, the site's still cleaned up. We have to recognize-- That burden's very strong for us so that we try to be very careful that we don't go too far.

There's going to be technical disagreements. That's going to happen. I feel that that decision -- that final decision should rest with the Department, and if we have to get into a situation where we're going to debate whether the Department was right or not, that should be done more in a cost recovery action than in delaying the cleanups and moving forward.

SENATOR McNAMARA: Mr. Hogan?

MR. HOGAN: I would simply note that Mr. Miller has identified the fact that in the Superfund Program it's a cost recovery action -- a decision made at the end. He suggested ECRA, if I understand it. That under a consent order you have a limitation of right to appeal technical issues, and the decision ought to be made at the end. The problem is, in the ECRA program, if the Department has made the private party go too far they don't get to recover their costs from DEPE. All the costs are borne by the private party, so there isn't a cost recovery action. Whereas-- And he identifies-- The agency is very careful when it's spending public money, but when it's private money, maybe we don't have to be so careful.

And the threat, although it has been a threat rarely used, that there be litigation -- and there's nothing wrong, necessarily, with disputes; we suggest alternative dispute resolution as an alternative. But people have rights, and in essence if you're saying you have to waive all your rights, and appeal at the end, it's going to be a hollow victory if the Department's caused you to go too far, to move too much soil because you're not going to be able to have a cost recovery action. And you don't want to eliminate the Department's motivation to be responsible, because their mission is to look at protection of the environment and not necessarily have the ability or the motivation, necessarily, to weigh factors, particularly when it's not their money as compared to when it is their money.

ASSISTANT COMMISSIONER MILLER: Ed, I was addressing the situation where the responsible party wouldn't do the work. You're addressing it where the responsible parties are doing the work. Well, if they're doing the work, that means they agreed reluctantly or whatnot with the Department to do that work. That issue is, I think, irrelevant.

SENATOR RICE: Yeah, but the costs--

MR. MORRESI: I have to make a statement that we have to get away from this thinking that everything should be litigated to come to some conclusion. I think there should be another way of dealing with the issue.

SENATOR McNAMARA: Yeah, actually I think ECRA stands for the permanent and it really should be definite -- definite in different letters -- because it looks like an act of a permanent employment of consultants and attorneys.

MR. MORRESI: Could I make one other statement on the issue of cleanups and remedies?

There is, although I think Lance and I probably disagree on this one-- If there are prescribed standards to be met, as there are, it seems to me that if we reach those levels, the Department shouldn't be too concerned how we do that. And that's really where the private rights and the private parties-- You may debate whether or not they're going to ship the soil to Michigan, or you're going to incinerate it on-site, but that becomes a private party issue in a lot of areas, and it seems to me that if we can get to that level and we've cleaned up the site, what more do you want in that area?

SENATOR McNAMARA: Irving?

MR. COHEN: The ACO is a mechanism that consultants try to avoid when recommending an action of a client in the ECRA process. They try to avoid it, because it really is a nonrecourse position for the consulting end side of the negotiations. When you sign an ACO presently, you can walk in and have a very good discussion technically with a case manager or even a supervisor of the case manager. If they are set that this is the way they want to proceed, and you have tried to convince them otherwise, you lose, because they will hold up to you the fact that you signed the ACO, and you will do it that way.

I think it's important to focus on what was just said before, which is the end result being the standard to which

you're going to shoot for is what is important. You cleaned up the site to that standard. If somebody comes in with a novel mechanism to do that that costs two cents versus $10 million and actually works and works with all the environmental safeguards that are required, that should be absolutely something that should be considered. Even if it's not proven today, if it's the risk of the private party to take that risk to try it, and he can save that money to do it and can achieve the goal, he should be allowed that opportunity. The ACO does not allow you that opportunity.

SENATOR McNAMARA: Richard?

MR. CONWAY: An important thing, to take a step back on ACOs, focus on the impact of the very approach we just heard articulated. You can appreciate that the Department has a dilemma. It has the responsibility for making sure sites get cleaned up. It doesn't want to engage in a legal battlefield on whether or not something is clean enough. ACOs give it an advantage in that battlefield that they don't want to surrender, for understandable reasons. But more is at stake than merely that site, because it is the companies that have been through that battle once and have lost that will not come back, because they don't need to waive their rights in other states to do business. In New Jersey they do. They don't have to surrender the ability to challenge the DEPE's decisions in other states. Here they do.

That's a cost that weighs very heavily on them, trying to explain to a businessman why it is he really doesn't have much of an option in the discussions with the DEPE. Yes, you can ask for meetings. Yes, if you work very, very hard, and very, very long, eventually you will get the attention of some overburdened senior staff of the DEPE to come to a meeting where they are presented with the very difficult task of how to assess what's the right decision. Do they rely on the judgment of their technical people who are hired by the State, have a

mission, are "unbiased," but may not be experienced as the other side -- the business community's hired guns who may or may not have the credentials, who may or may not be right?

That's a very daunting task, and I don't envy them that. I engage in that battlefield all the time. When the dust is settled and it's over, the business people sit there convinced that they did not get justice. They did not get a hearing on the merits of what was at stake. They got a, "You have no choice. You signed the ACO. Do what you're told." It's important that we countermand that vision in this statute.

SENATOR McNAMARA: It makes me wonder where all of -- maybe not you individually, but all the groups that you're representing. Where the hell were you in 1984?

MR. MORRESI: Mr. Chairman, just a brief comment.

If you've signed an ACO, you've committed to do a cleanup. You then come up with a process that's going to save you $10 million. There's nothing to prevent you from going back to the Department with that process and saying, "We have an alternative here. We can save some money." There's nothing to prevent you from renegotiating that ACO. I don't think the issue is that there's a different technique. The point is, the Department's making the decision that that's not a technique that's going to do the cleanup. I think the decision on doing the cleanup has to remain with the Department.

SENATOR McNAMARA: Mr. Impreveduto?

ASSEMBLYMAN IMPREVEDUTO: That I can't understand. What's wrong with the permanent risk philosophy? What's wrong with saying, "Look, we're concerned. There's a problem here. We want it fixed, and this is the state to which it must be fixed. Fix it." Now, what's wrong with that?

MR. LLOYD: There's nothing wrong with that, and what the ACO does is--

ASSEMBLYMAN IMPREVEDUTO: No, no, putting that aside--

MR. LLOYD: Well, I don't think you can put that aside. I mean, the point is you've got a problem. You've got a set of standards that you have to fix it to, and you want a transaction to go forward. We need some guarantees that that cleanup's going to be done. We need some financial assurances to make sure the cleanup is able to be done, and the ACO is the mechanism to ensure that. I don't think there's anything wrong with that process. The Department's got to make the decision, because they have the expertise to do it as to whether that is going to be done to the standards that they've established.

ASSEMBLYMAN IMPREVEDUTO: With all due respect, the people in the Department aren't the-- There are many knowledgeable people in the Department. But they might not be the only experts in the field. Maybe there are other experts in the field who may be more knowledgeable, okay? Maybe there are people out there that, as someone said -- and I forget who it was -- that there may be another way to make the widget. So, if they find the way to make the widget, and you might not necessarily -- or your experts in the Department may not necessarily agree with that, I don't see why you'd stop them from doing it. Why is that?

MR. LLOYD: I think that discussion has to occur at the ACO stage, because if it doesn't, then the transaction isn't going to go forward. Those are the kinds of things that should be presented to the Department at the ACO stage when you're making the judgments about what the financial assurance is and what the remedy is going to be. The Department can then evaluate whether that cleanup can be done.

ASSEMBLYMAN IMPREVEDUTO: Because you hold the hammer at that point-- If you don't like what they're doing, the hammer comes down.

MR. MORRESI: If the penalties are in the statute, why do you need an ACO? Why do you need another layer of government to impose additional penalties?

ASSEMBLYMAN ROONEY: I just want to interrupt for a minute. I just want to go over the time schedule that we have.

We're going to be breaking at 12:30 promptly. We'll be coming back at 1:30 for this hearing. I, unfortunately, have a meeting with the Speaker at 1:30, and many of the Assemblypeople have Committee meetings at 2:00. Those of the Assembly Committee that can come back at 1:30 to continue the hearing, if you can come in and out before your Committee meetings-- I have a Committee meeting, myself, at 2:00, but there's a public hearing, so I should be able to come back and forth throughout that procedure.

We will continue the hearing exactly at 1:30, and whatever point we're at, Chairman McNamara will decide what the agenda will be, and how it will continue, just so that it's on the record. And all the members of the Committee and everyone else -- the public -- will be getting copies of the transcript as soon as we can get them out, so we can refresh ourselves. I just wanted to let everybody know what our schedule is. I appreciate brevity from this point on to get on to the next topic.

SENATOR McNAMARA: Irving?

MR. COHEN: The ACO is normally signed before anybody knows what's on the site, and one of the problems that you have is that you've signed it without knowing what kind of contamination you're dealing with. You cannot propose a remedy at that point or even discuss a remedy at that point.

What I was trying to focus on before is the fact that if I have a black box, and this black box I have proven to work in the laboratory and it's something that I, just as an inventor, came up with. I don't want to share it with anybody. All I want to do is tell you that if you put this dirty stuff in from this end, out comes clean stuff at that end. I guarantee it. My client, who is the private sector person hiring me to do it, will allow me that option to try it on his property.

If I went in to DEPE tomorrow, and said, "Here's my black box. I want to use it on this property to clean up this site for the ACO." I can guarantee you I will be turned down. It is not something that deals with whether or not we have to put in the funds as a bond. The bond is in place. Assuming that an ACO was signed, the bond is in place. My client has elected to try that. If I tried to do that in the time clocks that are set within the ACO process, I probably would be turned down.

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: I would suggest that you try. You might find the answer is very different than your perception.

SENATOR McNAMARA: I'd like to invent the black box. (laughter)

ASSISTANT COMMISSIONER MILLER: So would I, Senator.

Those black boxes are coming on the market, and we spend a lot of time keeping up on those black boxes so that we can approve innovative cleanups. Those innovative cleanups are what we want to see, because that's dealing with the problem on the site, not sending it out-of-state.

Our staff is dedicated. It's knowledgeable. These people are coming out of school with the appropriate degrees. Yes, they get baptism under fire with the large number of cases they handle, but that also is an advantage because it allows them to see a lot of different problems. Their learning curve is very steep, and over a short period of time. If it wasn't, all the people that are here at the table -- some of them -- and behind me, wouldn't be hiring them all, and hiring them very quickly with one, two, or three years of experience. Now they go out and all of a sudden they have a greater aura of expertise because they're a private consultant.

No, that expertise was developed while they were in the Department. We also are able to maintain some of those

people in the Department. We have a large number of people with 10 or more years of experience in this field. Ten years of experience in site remediation is a lot, because it hasn't been around that long.

SENATOR RICE: Mr. Chairman, that's a frivolous argument. Let me just say, I'd like-- (remainder of sentence inaudible)

I'm a former Newark police officer. We had 15 years. Everybody went to Newark because we are busy, and we're even more busy now since they cut it in half. And you're right. If you go to the Essex County Prosecutor's Office to serve the department, your township, and everybody else, you're going to find they hire Newark policeman like that because they know what they're doing. You know, we have homicides regularly. But the problem is, because of that built-up experience and cutbacks, the crime problem we have today, in my estimation -- I'm speaking as one who lives there, and that's my background -- has compounded itself into a worse problem. It doesn't mean we wouldn't have the problems we have today, but I really feel in my heart it would have been less of a problem, although more than years ago.

So, my point is that you may build that experience up and everybody's getting this overload. I had 100 investigations a month as a detective. I did, myself, but now we have to take those things and say, "Well, no suspect. Put that in the file."

So, I just wanted to say that the argument-- I didn't want the Committee to buy into the argument

SENATOR McNAMARA: I think, Senator, Lance was trying to make the point that after they have two or three years of experience with the Department, that once they go into private enterprise, they're deemed to have a higher level of credibility than those who have been with the Department for eight or 10 years.

SENATOR RICE: What I got from them, Mr. Chairman, is it was clear to me that what he was saying was that this great work load gives them that experience quickly. I'm saying that great work load is starting to create a backlog in the system and delays what we have to do in terms of approval. That's the aspect I'm dealing with.

SENATOR McNAMARA: Ed Hogan?

MR. HOGAN: I would just be very brief. Just a note that I think that much of the perception of ECRA is because the industry has not been litigious. I've been involved in more than 300 ECRA matters, and I know of only one that has been fully litigated against the Department -- between private parties, yes, but not against the Department. I think that many industries have spent $30,000, $50,000, $150,000, $350,000, $500,000, often in response to technical demands. There are enough pressures to do the deal, or if you've done a consent order, the pressures of financial assurance sitting there, or private pressures to comply with the Department's request.

It is not one in which industry has been very litigious, and, in fact, I think that much of the resentment of the program is that there has not been an effective mechanism to litigate either against the Department, or to disagree with the Department. People cater to the demands and suggest that we need to cut back on the ability of the private sector to exercise their rights. I think this sends the wrong message, and I really do think that industry has not been litigious or anywhere close to litigious as they have been in other programs.

SENATOR McNAMARA: I would hope that whatever the Committee comes up with to resolve the problems does not encourage more litigation. I really and truthfully would rather have the environment cleaned up with less litigation.

MR. HOGAN: I think we all would.

SENATOR McNAMARA: There's too much money spent in that direction.

The next issue is the landlord/tenant issues.

Richard?

MR. CONWAY: We have a concern with the choice made by the Legislature in this draft on allocating the responsibility between landlord and tenants for common areas.

That is a difficult choice to face. I think DEPE has debated in many forums what is the appropriate choice, and I think the answer they have routinely come up with is, essentially, landlords and tenants are both liable. It seems to me, your choices could be to say that areas that are under common use are not part of the industrial establishment. Therefore, neither the landlord nor the tenant have to cope with them at all, ever.

Another approach would be the DEPE's approach, an area used by any tenant that is an industrial establishment stays part of the industrial, and is triggered whenever a trigger occurs -- whether it's the landlord's trigger, the tenant's trigger, and we'll let the dust settle where it is, whatever the lease says, whatever the parties work out, whoever ends up signing the consent order.

I think one of the reasons that change has been proposed is because that leaves sometimes an unsatisfactory taste in the mouth, particularly when one tenant ends up dealing with a problem that may have been caused by other tenants who use the same common area, but just didn't have the good fortune to trigger ECRA, or preexists, and may have been there by a prior owner of the site who sold it to this particular owner. So, I can appreciate why some change was considered.

To take the third approach that has been proposed here is that it's not a trigger when the tenant starts an ECRA proceeding. We'll hold it until a later point in time. When

the landlord triggers ECRA it is to create some real possibilities of future problems of uncertain dimensions. The tenant will be gone -- may be gone, and the landlord now has to deal with that problem in a situation where maybe the site has gone through ECRA on other occasions by other tenants, but the common area is left for him to cope with.

I don't think that's the appropriate choice. I would suggest one of the other two choices. I think that probably in the mix of issues that are on the table, leaving the present approach of-- Essentially, however the parties have allocated the risks between them in the lease, ends up being the party coping with the site--

SENATOR McNAMARA: Anybody else have any comments?

MR. MACK: Yes, very briefly, because I know we're going toward 12:30.

We would simply suggest taking out the last sentence in Section 16. We think that leaving until later for the landlord any common area cleanup is simply a snare for the unwary landlord and is simply one of those things which is going to scare people. We would suggest that you're not losing anything because, as always, ECRA is not the only environmental statute -- far from it -- in the State of New Jersey. It's limited on its face. It shouldn't be used to scare people. It shouldn't be used as a snare. We think that taking out the last sentence of Section 16 would render it into something that was predictable, clear, and fair to both landlords and tenants.

SENATOR McNAMARA: Ed?

MR. LLOYD: Mr. Chairman, our concern with the paragraph is the area under the exclusive current control of the tenant. I think that the judgment here should be made based upon the conduct of the tenant, not that portion of the property that the tenant occupied. I think they could litigate forever what was under the exclusive current control of the tenant. I think it's the tenant's conduct that we ought to

worry about. If the tenant's conduct led to contamination that migrated into a common area, it seems to me that tenant ought to clean up that common area. If the tenant's conduct led to contamination of a portion of the property of another tenant, it seems to me that tenant should clean up that area. So, I think that the focus of this should be on the conduct of the tenant, not upon what area of the property the tenant exclusively controls.

SENATOR McNAMARA: Ed?

MR. HOGAN: We're very happy to hear that environmental groups are supporting liability only related to conduct, because ECRA gets -- you're ECRA, you're it -- and whether you have a problem that has not been conduct related, it's a status statute. This is the one issue we have found most problematic. You're ECRA, you're it. You inherit the problems on that piece, wherever you are -- whether you're the owner or the operator. Whenever you trigger ECRA, you have triggered ECRA for all the historical problems on that property.

Indeed, we welcome the environmental groups in supporting the position of industry, but ECRA should only be related to the conduct of the current operator, and not be one which attempts to take the burden off DEPE's back as the court articulated in Superior Products v. National Lead -- you're ECRA, you're it -- and allow you to have to try to chase everyone else. I hope that's the tone of Mr. Lloyd's comments.

MR. LLOYD: Mr. Chairman, if I may, I think I'd better clarify. There's always a concern in having another lawyer interpret one lawyer's statement.

My statement was with respect to tenancies, not to -- as Mr. Hogan has translated it -- the entire scope of ECRA. There's a difficult problem with tenancies -- there's no question about it -- dividing the liability between the tenants, the landlords, and among tenants. I think that's why

we think in that instance, rather than try to talk about who's had exclusive control of a certain part of a property, that you look to tenant's conduct. I don't extend that--

SENATOR McNAMARA: I think your comment, initially, was narrow enough, but I appreciate Mr. Hogan's skill.

ASSISTANT COMMISSIONER MILLER: Mr. Chairman, the Department supports this Section, where any modification to it results in clarity to the tenants and landlords, so that the Department wouldn't be blamed for having to make these decisions. This is an area that needs clarification in the statute. We could support Section 16 as it's written. We could support modifications as long as there's clarity. Right now, this is an area where the Department, I think, unfairly, is often criticized. We have to get in the middle of these things. We don't like to be in the middle of them. We'd rather it be clear as to what their responsibilities are.

SENATOR McNAMARA: I get the message.

Interim response actions under ECRA, Section 17.

ASSEMBLYMAN ROONEY: Second team coming in again?

SENATOR McNAMARA: Yeah, I noticed Chemical Industry is the only one that keeps on rotating the batters. (laugher) By the end of this afternoon, the other five panel members are going to look like they've been through a war.

ASSEMBLYMAN ROONEY: Especially Lance Miller. (laughter)

DR. BERKOWITZ: I'm Jorge Berkowitz of CIC. Again, I'd just like to reiterate my previous comments that I think this section makes particularly good sense. I think a lesson could be learned that's more generic and broadened, not to include this section, but the overall process. I think it's to be commended, and we support it.

SENATOR McNAMARA: Is there anybody else on the panel that wants to say something supportive of the bill that we drafted? (laugher)

ASSEMBLYMAN ROONEY: Quit, while we're ahead.

ASSISTANT COMMISSIONER MILLER: Absolutely, Senator. Absolutely.

SENATOR McNAMARA: Uh oh. I didn't want to hear it from you. (laughter)

Any other comments on Section 17?

Ed?

MR. LLOYD: One comment, Mr. Chairman.

Generally I don't have a problem with it. I believe that the phrases at the end-- The last sentence: "The Department shall not require that additional remediation be undertaken at an area of concern subject to interim response action," and I would end it there. Put a period there. The last two phrases say, "except when further remediation is necessary." It seems to me that those are superfluous, and may create questions that we don't want to create or uncertainties we don't want to create.

The Department should only require additional remediation if the standards haven't been met. That's all I think that needs to be said. If the temporary remediation did the job, then nothing more is needed, and I think the last two phrases there add confusion rather than clarity.

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: There's going to be times when you're going to want to take an interim response action that is not going to achieve compliance with the standards. This language was designed to reflect that. You can have a situation where you may have very high levels of contamination in a lagoon, where you're going to go in and remove that lagoon right away. That would be an interim response action. You would evaluate the underlying soils as to whether or not you actually need further remediation to bring that into compliance with the standards. Saying that an interim response action needs to be in compliance with the standards, I think, is excessive.

MR. LLOYD: I wasn't saying that, Mr. Chairman. If I wasn't clear--

ASSISTANT COMMISSIONER MILLER: I'm sorry.

MR. LLOYD: All I was saying is that we agree you should be able to take an interim response action. If that response action gets you in compliance with the standards, the Department needs not do anything further. We agree with that. I think that the Department reserves the right to do something further if the standards are not complied with, and I'm suggesting that the two phrases at the end lend confusion, not clarity.

SENATOR McNAMARA: Irving?

MR. COHEN: I think the section as written is clear. It does what you want it to do, and it achieves the goal.

SENATOR McNAMARA: Jorge?

DR. BERKOWITZ: Just one comment.

I think that it's very important to keep the term, "area of concern" in the legislation. That means the Department does not have the right because you had a particular incident that required specific remediation-- The Department does not have the right to open up the whole property for investigation at that point.

SENATOR McNAMARA: Section 30, cleanup standards for all hazardous site remediations, deed notices--

You know what? It's 12:25. There is no way we're going to get into that discussion until this afternoon, because as things are going, we're only running about an hour behind schedule. So it's not too bad. We'll reconvene at 1:30. I would hope that the panel and members of the Legislature will be back here. Be here as promptly as possible, because I'd like to get it moving again.

Thank you, very, very much.

(RECESS)

AFTER RECESS:

SENATOR McNAMARA: I apologize for my own delinquency in getting back late. A couple of other matters that came up had to be addressed, so my apologies for all those that answered the call in a prompt manner.

I'd like to get back to the bill, and if we can keep the comments more on the bill rather than why, or as to what is perceived by some of the panelists the DEPE's action, I would prefer that. You know, the purpose of this is to constructively make criticisms or voice support, which did happen occasionally this morning -- very occasionally -- so that at least there is a benefit to myself, the other Committee members and staff, so that when we go back to revisit this, we will produce something that, hopefully, will address a number of those concerns.

We left off this morning with Section 30, cleanup standards for all hazardous site remediations, deed notices and construction permit restrictions, differential standards, and ecological receptors.

Now, I know that we're not going to hold to any 10 or 15 minute portion on this section, so let's open it up, but, please, keep in the back of your mind that I don't intend to spend overnight in Trenton today. I will spend as long as I possibly can to conclude this portion of the hearing. Let's go at it as briefly as possible this afternoon.

Thank you.

You know the topic. Who wants to start off? Jorge?

DR. BERKOWITZ: I'll give it a shot, Senator.

Jorge Berkowitz, CIC. Senator, I think this is an area that the Department needs significant help, and I think they'll express that concern as well, because what we have here is the need to establish policy that the Department can fall

into place and execute. That policy has to be what is an acceptable level of risk. Generally speaking, by default, we have said that one in a million risk is an acceptable level of risk. We haven't said that one in a hundred thousand is acceptable, or one in ten thousand is acceptable. We've just defined that, certainly, one in a million is acceptable. Are there levels of risk more than one in a million that are acceptable? That's the policy question that's got to be answered.

Generally speaking, if you take a look at articles that are being written about risk assessment, the body of information will show you consistently that risk assessment, as applied in calculating risk, is ultraconservative. The articles will tell you that, really, there is no distinguishable difference between one in ten thousand and one in a million risk, in that the models are ultraconservative -- the things that you add into the models, the assumptions that you make, how much dirt a child will eat, whether or not that's all biologically available. If you inject one gram of dirt that has a contaminant, is it all available or is it not available? All these conservative features that are built into the risk assessment process are ultraconservative.

The Department is caught in the horns of dilemma. De facto, one in a million risk is generally considered to be the acceptable of risk. But there are other precedents, even within the Department. The Air Toxics Program does not fix a specific number. The Air Toxics Program recognizes that there's a lot of variability in risk assessment, and establishes an acceptable range of risk. Anything greater than one in ten thousand, they deem unacceptable. Anything greater than one in a million, it's de minimus. Who cares? But in between, on a case-by-case basis, the Air Toxics Program is willing to make a decision. This is the type of approach, I think, we need to have in setting cleanup standards, because

these cleanup standards are far-reaching and not just germane to their ECRA program. It goes far beyond that, and I think it's very important to realize the frailties that are associated with risk assessment.

I think that the Legislature has got to articulate a policy that will give the Department the ability to move off this one in a million risk. Nobody is saying that one in a million risk is an acceptable goal. One in a million real risk is appropriate. But, one in a million calculated risk is often one in a hundred million.

And let's step back. We're throwing these terms out, one in a million. What does it all mean? Let's take a look at one in a million 70-year lifetime risk. If I had a one acre piece of property in downtown Trenton that had one in a million risk associated with the soil, that means I would have to put a million people on that acre of property. I'd have to make them live there 365 days, 24 hours a day for 70 years, and I might get one person who demonstrates an adverse impact. If I only put 100,000 people on that piece of property, I'd never see the risk. I'll never see the manifestation of that.

So, the point is that these are all abstracts. They're not real. They're concepts, and given the conservative feature of these concepts, the Department needs an out to reexamine the one in a million risk, and that's where they're based.

SENATOR McNAMARA: Lance. You're a glutton for punishment.

ASSISTANT COMMISSIONER MILLER: Yeah. I'm going to agree. The Department would like additional specificity placed in Section 30 (a), the paragraph that begins on line 12. If this statute was to provide a specific level of risk, that would make the Department's job that much easier in the establishment of its cleanup standards. It's been an area that we went forward with, with limited guidance from the

Legislature in our existing statutes as we proposed our cleanup standards. We received a tremendous amount of comment on those standards; more than any regulation that the Department has ever proposed. A large portion of those comments focuses on the issue of risk, and I think this is an area that the Legislature would do well to debate, and provide as much guidance as possible to the Department in this very critical area.

Jorge went into the technical aspects of the different risk levels from a public policy standpoint. The major difference is how much money are we going to spend on remediations? Cleaning sites up to a one in a million risk can be much different than cleaning them up to a one in a hundred thousand risk. I can't quantify that for you. Sometimes the remedy will be protective at one zillion risk, depending upon the remedy that you choose, but if you're actually getting into the removal of contaminated soils, you have a much different amount that would be generated, based upon those risk levels.

SENATOR McNAMARA: I'd like a comment from both those consultants from NAIOP and from Ed Lloyd as to what language change that they would be agreeable to or what would they suggest. Ed, do you want to start it off?

MR. LLOYD: Sure. I think that it would be a mistake to go in the direction that I think Jorge was going in. What we're here to try to get, as I understand it, is administrative predictability. If we want that, it seems to me the last thing we want to do is to say the Department can analyze a range of risks from one in ten thousand to one in a million. I think it does make sense for the Legislature to set a policy of what risk is appropriate. I think the one in a million is the appropriate risk.

With respect to specific language, I want to focus on the same paragraph we last focused on. It raises two issues for us: one is the ecologically based standards, and let me

start with that. The last sentence of that paragraph says that, "Until the minimum standards described herein are adopted, the Department shall establish cleanup standards for contaminants at a site on a case-by-case basis." We are perfectly comfortable with that language. I think it needs to be clarified. As we understand it and as staff has explained it, that means with respect to human health-based standards as well as with respect to ecologically-based standards that until the Department adopts standards we will do case-by-case analysis. That case-by-case analysis will address both human health standards and ecologically-based standards. If that's the case, we're very satisfied with that language. If it's not the case, the other interpretation that's possible in that language is that we're not going to do case-by-case analysis on ecologically based standards until we have the task force report, and the Department adoption. If that is the case, we have severe problems with that language. We do not believe that we should suspend environmental protection, that is, standards based on protection of the environment, for three years, until the task force does its work.

Let me spend just a moment about the task force. I believe I was the first one to recommend the task force in hearings before the Department, so we support the task force. We think it makes sense to get the kinds of people that are at this table together to work with the Department to come up with standards. I also think that we've got to have in place incentives to make that task force work so that we get those standards quickly. The best way to do that is to have, in the interim, a case-by-case analysis because that will give all of us an incentive to get the standards in place. So, we would urge that in the interim case-by-case analysis continues.

The second issue that is raised, with respect to this paragraph, is what's been called the differential standard. Let me spend a minute on that. A differential standard, in

essence, allows the Department to establish standards that are different from the health based and ecologically based standards that they've otherwise established. We have severe reservations with regard to that, but let me suggest that if such a standard is to be authorized in the legislation, we need to clarify that standard and enact criteria that will limit the applicability of the standard, and we have some to suggest.

First of all, any differential standard, we believe, should be required to give the same health based protection and protection of the environment that any other standard does. The premise for differential standards is that there will be different exposure to both humans and ecological receptors at some sites. If you accept that, then I think you need to say in the statute that if we're going to allow differential standards, we're going to do the same level of protection for human health, the same level of protection for the environment.

Secondly, we believe that the applicability of the differential standards should be severely limited. We think it should be limited to industrial properties -- truly industrial properties. We've testified before the Department on this. This is our testimony. We've given it to staff, as well. We would suggest limiting it to industrial properties that are included within the SIC codes in ECRA. It's already been defined. It's there for us. Those industries that we found to apply ECRA to, those are the same industries that we'll allow a differential standard for.

Thirdly, with respect to the differential standard, we think that there should be a buffer zone--

SENATOR McNAMARA: Why would you limit it just to the ones that fall within the SIC code? If you're talking about that you want to restrict it to industrial properties-- Industrial property doesn't change because it's an industrial property that doesn't happen to have the SIC code. I mean, in any transaction today, in reality, nobody is going to get money

from a bank unless there's an assessment that's been done. You know, we'd end up with three different standards.

MR. LLOYD: Well, I think what's envisioned here, and envisioned in the Department's proposed regs, is that we are going to have a whole host of different standards. I would agree with you. Our initial position is we should have one standard, and that standard--

SENATOR McNAMARA: That's not necessarily my position that we should have one standard, to be very honest with you. I think we need to move off that one standard because of the risks involved.

Hopefully, we've learned something over the number of years, and I'm hoping that what we have learned can constructively move things forward, but I'm having a problem when you're talking about the industrial standard to be restricted to only those industrial sites that have SIC codes.

MR. LLOYD: Senator, I'm suggesting that because that's a mechanism that's in place. I think we could work on another definition of the SIC codes, because I think that might be a good way to define it. This should be included and allowed to have differential standards. I think we have to put some criteria on it: What are the facilities that it will apply to, and if that definition is broader than the SIC codes in ECRA-- We're not saying that's the only line that can be drawn, but I think the line that needs to be drawn is at an industrial facility.

In the regs, those facilities that were allowed differential standards included restaurants, included food stores, and commercial developments. I think that's far too broad. I think we probably can find a place where we're limiting it to industrial establishments, and I think that that would be appropriate. Maybe we can work with staff on what language that should be. We're not wedded to the ECRA definition, but I suggest that we should limit it to industrial properties.

The third thing is: I think there should be a buffer zone around those sites. That is, any site that is going to be cleaned up to a lower standard should also have a buffer zone around it. There should be a buffer zone between those sites and residences, for instance. We shouldn't be putting those kinds of sites in the middle of residential neighborhoods. Unfortunately, in this State, there are areas that have residences abutting industrial property. I think we need to protect those residences.

We think, also, that there should be financial assurances required that when a site is cleaned up to something less than the full standard, financial assurances be put in place so that when we do want to further clean it up to what's called a residential standard, there is money in place to see that that can be done.

Two other points: One is--

SENATOR McNAMARA: In the practical role, I think that's impossible. I think that that happens when the person buys the property. The person that buys the property-- And if there is a separate standard for a property that can only be used for a certain use, and it cannot be used for residential, it's going to sell at far less than a piece of property that you could use for residential development. So, you know, it's never going to be used for residential unless it meets that criteria.

MR. LLOYD: That's correct. But, what I'm suggesting is that we put in place a mechanism so that when in some future time-- I don't think it necessarily is going to be perpetually used as an industrial site. When a buyer wants to use it for a residential site, there is a financial ability to do the additional cleanup.

Let's just take an example: Assume it costs $1 million to clean it up to a nonresidential standard, and an additional $3 million to clean it up to the residential

standard. We're not saying put that additional $3 million in escrow tomorrow, because if you're putting off that cleanup for 30 years, the amount of money you have to put in that fund is far less than the full amount of cleanup. So, if we're going to allow a deferral, put some money in place so that at a future time when the conversion does take place, there's a financial ability to do it.

The next issue is--

SENATOR McNAMARA: Again, I think we have a difference of opinion, because in the practical real world you're going to create a lot of liars.

Lance?

ASSISTANT COMMISSIONER MILLER: Senator, doesn't your bill really address the problem that Ed's--

SENATOR McNAMARA: I thought it did.

ASSISTANT COMMISSIONER MILLER: By allowing grants and loans to municipalities-- Say a municipality has a piece of industrial property in its jurisdiction. It gets cleaned up by the responsible parties to the differential that would be protective, the same as if it was a residential property, and eventually the property becomes vacant for whatever reason. Now the municipality wants to turn that into residential property. They would have the ability to come to this fund that gets created from this bill, and get the money to clean up the rest of that site. Then, it's now there. It's now ready to be turned into residential property at such a time. To try to put a value on what that cost might be, you know, for 10, 20, 50 years in the future, to an administrator that might have to have some responsibility in making sure that money is there, I have problems with that type of a long-term, far-reaching administrative scenario.

MR. LLOYD: I think that the funds are in place in this legislation to address the problem. I think that the point that Lance makes about what's the amount is not an easy

one, but I think one that can be solved. I mean, the funds that are created in the legislation can be used to address the problem that I'm talking about. All I'm suggesting is, that the person who is going to clean up to the nonresidential standard should put an additional amount of money in that fund, to make that money available to the municipality, if it's the municipality in the future.

SENATOR McNAMARA: I've got a problem -- a real problem with that.

MR. LLOYD: All right. Two more issues: One is with respect to notice. The notice that's required for the differential standard here, we believe, is inadequate. Legal notice can be accomplished by filing it in the courthouse, but that notice does not give notice to the people who are going to be using that site, or who are going to adjacent to that site. I think you've got to have notice to the workers on the site, or people who are using that site, that this site has not been cleaned up to the full human health standard. I think that that notice has got to be posted on the site. I don't think you can just have it down at the county courthouse. I think you also should send it the municipal officials.

SENATOR McNAMARA: I would not envision the county courthouse at all. I would be more at the municipal level, because that's where a piece of property is going to go through for any kind of a zone change or any kind of a change of use.

MR. LLOYD: I agree with you. I think it has to be at the municipal level as well, but I don't think even that's enough.

The final issue is a question of access. If a property is going to be cleaned up to a differential standard, I think there has to be some limit on access. What you don't want is to have open access to that site, and there ought to be some limitation on it. We don't want people who are unaware that it has not been fully cleaned up, to be wandering on that

site, and I think there needs to be some specific requirements for limitation to access to those sites. If they're industrial sites it shouldn't be an overwhelming problem.

SENATOR McNAMARA: Is there--

MR. HOGAN: Yes. Thank you, Senator.

The New Jersey Business and Industry Association very much supports the concept of defining standards. We very much support the balancing of land use, intended use of the property, potential routes of exposure as identified in your bill.

As to the cleanup standards in subsection A in particular, our primary concern is that in the development of New Jersey-based standard -- New Jersey standards -- we don't end up with standards that are more strict than are elsewhere in the rest of the country. We think it will exacerbate the problem we have had in the past, where New Jersey is perceived as being antibusiness to the extent that there's any wording change we suggest would go-- Other than the comments propounded by Chemical Industry Council, we think that if there is a specific direction to the Department where there is a national standard -- of which there have not been many in the past, so far, but there have been some -- to the extent that the national standards can be utilized, that they be utilized, because in a few circumstances, DEPE has purposely gone farther, and we think simply to go farther simply because we're New Jersey--

SENATOR McNAMARA: On the bill, Mr. Hogan.

MR. HOGAN: Excuse me?

As to institutional controls, we find ourselves agreeing with Mr. Lloyd in suggesting that deed notices and deed restrictions are a problem. We don't think that they do what they are supposed to do, which is, I understand, to protect purchasers, protect potential users, and to ensure the long-term maintenance of the property. They have had also, in

addition to failing to meet their goals, we think, had some unintended bad side effects. We think that at the municipal level is the appropriate level to have notice. We don't think it should be reported in land records. It doesn't achieve those goals. We think notice for workers is more likely to occur in the municipal, or others who might be on the property, whether they be utility workers or those who might disturb the property, at the local municipal level.

As to purchasers, we think the section of the statute which originally required the immediate purchaser to be informed through a copy of the cleanup plan, ought to be retained or expanded to make sure that the immediate purchaser has that as a requirement. We think it's a statutory requirement that subsequent purchasers can, and should, be informed by specific statutorial language that the notification given to the first purchaser be cast onto others. We think that putting it in the deed records of the county causes a very, very, severe problem. We found it has had an inordinate effect on interstate transactions, where others who have looked at this from across the country think that there's some kind of bizarre problem -- and you're familiar with those issues. We think that it has to be at the municipal level. We think recording those records doesn't make any sense, even if it's merely a deed notice. The unintended side effect is that creates potential for extortion between landlords and tenants. We know that oftentimes, industrial landlords find themselves in circumstances where a tenant triggers ECRA. The tenant wants to clean to an industrial standard. You clean up to an industrial standard if you can have a deed notice or deed restriction as the Department requires.

We know that in the City of Newark, there are 32 million -- 32 million -- tons of fill that replaced the Newark marshes, historically. I know staff and DEPE has seen the presentation of the study that indicated this. You have an

industrial tenant who triggers ECRA in that circumstance. He has to clean to residential unless he can get the landlord on board to have a deed notice or deed restriction. That did nothing to put the cinder fill that was there-- None of that cinder fill of 32 million tons is anywhere related to the current operator. That operator, if he can't get the landlord to clean to residential -- and we've seen a number of circumstances where landlords have essentially said, "Fine, but you're going to pay me so much, or you're going to buy my property back," -- we think that eliminating it out of the deed notice and deed restriction process is going to be a real plus.

As far as maintenance of any cap or long-term issue, we think that that can be dealt with in a regulatory process. Although it may sound strange we may be advocating a regulatory process. We think that there are many other situations in which subsequent owners of property, and tenants of property, have to maintain a condition. Underground tanks are one where we have many, many, tanks in the State in which--

SENATOR McNAMARA: Underground are out--

MR. HOGAN: Right. What I'm suggesting is that current-- Subsequent owners and operators have obligations to maintain a unit, and we think that a deed restrictive property, if, indeed, it's an impervious cap that has to be maintained, we think that that can be dealt with outside the deed notice/deed restriction issue.

We note that the language you have takes out deed restrictions, but does leave deed notices. If it's left in the hands of only those who can file these notices, we think we're setting up an extortion situation between landlord and tenant. If there are parties that disagree over the issue, they surely have the private sector or the litigation context to resolve it between themselves. But putting the DEPE in the middle, is putting DEPE in tremendous pressure. We see a number of times where parties have been using DEPE essentially as a foil to

battle over these issues. We don't think that's the proper role of the Department.

SENATOR McNAMARA: Irving? I'm going to move down and across, Jorge, if you don't mind?

MR. COHEN: Mr. Chairman, you started by asking us for a wordage change, I believe, associated with this one paragraph. I think it's a very difficult concept to even attack the words that are in it.

Basically the standards that we're talking about are probability-based, and discussions went back and forth as to one in a hundred thousand, versus one in a million. If you were the one that contracts this environmental problem because of what was on the site, you're the unlucky person. It doesn't really matter if it was one in ten, one in a hundred, or one in a hundred billion. The concept of it being an imprecise science is what you have to focus on, and because it is an imprecise science, it's difficult to change the language. You have language that, albeit, is not the best -- and you said before, we're not going to make everybody happy. I don't know if there's an alternate that you could turn to that you could look at and say, "This is more meaningful."

There are standards that exist, nationwide, on certain substances. I don't see that reflected in past history, or even proposed regulations with regard to standards. That needs to be looked at. There's a wealth of knowledge that's out there. There's a wealth of knowledge in this State. I think the task force is the one to deal with the issue of what you want, how you want it, and how it should be presented. In that forum, I think you'll be able to come out with the best available practical solution to a problem that you're trying to address legislatively, that you can't put words around.

SENATOR McNAMARA: Richard?

MR. CONWAY: We will have to get to you our suggested revision in language, because we've been troubled by the same

issue, I think, that the Committee has been troubled with: How to come up with appropriate articulation of risk? I think that is the focus, whether you start with ten to the minus four, ten to the minus six, where you talk about other kinds of risk. As a policy matter, this State faces the issue of risk every single day. How much money do we dedicate to our health care, to our hospitals, to road design? Certainly we could reduce risk much more on the number of our highways by designing intersections more capably than we have today.

SENATOR McNAMARA: I'll accept that, Richard, but please try to stay with the bill.

MR. CONWAY: Okay, but I think with that as a focus, one of the things that comes through loud and clear is we don't see the consideration of costs mentioned in the language here, and if that is a relevant consideration -- and I, personally, think it should be -- then that should be mentioned here.

Terminology such as: "the potential of harm minimized to the maximum extent practical," I can't quibble with the words. I'd have to think further about them, but that sounds like an extremely powerful standard, and I could imagine a tremendous amount of time and energy being spent on evaluating whether a particular cleanup at a particular site meets that standard. If I then add the next layer, that I have to engage in the same analysis as to special ecological receptors, I have to admit to you that I'm very, very, much frightened by where that will take me.

I'm not sure how I even have the science -- I'm not a scientist -- but I don't know that it's out there, to begin to make that assessment. I don't know what it will cost to make that assessment. I do know that this State will once again be in the lead if this is the approach that we take, and I'm very concerned with that.

SENATOR McNAMARA: Lance, do you want to--

ASSISTANT COMMISSIONER MILLER: Yeah, I'll jump in now. I'm somewhat disappointed in my colleagues on the panel. Here we've opened the door for them to address this major public policy issue of what an appropriate risk level is, and everyone of them dropped back 15 and punted. They seem like the Giants. (laughter) On the record, I'm a Giant fan. I grew up rooting for the Giants. I still root for them.

SENATOR RICE: Sometimes that's the way the Giants win. (laughter)

ASSISTANT COMMISSIONER MILLER: That's true, but their defense isn't doing it this year. In the past we could rely on their defense. That's even gone someplace else this year.

There are a few options: The national contingency plan, which sets the framework for the Superfund Program, establishes a risk range of 10 to the minus four, 10 to the minus six. The language that's in here, "maximum and practicable," are what's in the current statute and that's what enabled us to generate the regulation that we have today.

I go back to my earlier comment: The Department feels it's appropriate for legislation to address this very important policy issue. We can assist in the science, but, as Commissioner Weiner said several times, in major decisions like this he likes to have the assistance of 120 people in the Legislature, not making the decision as one person.

I also had the same concern that Ed Lloyd did on the ecological standards. I would hope that we would not be prevented from developing those on a case-by-case basis for the two years that the task force is working. We need to have the ability, if we see something is obviously impacting the environment from a particular site, that we would be able to develop cleanup standards for that site.

Turning to the differential standards: We need to cover two things, and the Department is not wedded to any particular approach -- but what we need to do is make sure that 1) notice is provided to people that are going to be subsequent

purchasers to that property, or to the people working at that property, or to contractors that are going to come on to that property, that they know what is there so that they can take appropriate risks into account.

I'm going to call foul on Ed Hogan, if I may. I think his example of landlord/tenant was totally inappropriate for saying the deed notices or deed restrictions were not applicable. If a landlord is trying to extort a tenant, the tenant's attorney should sit there and understand the loss sufficiently to say, "Wait a minute. I'm not cleaning this up, and if I don't clean it up it's your responsibility under ECRA. So there, you're not going to extort me." Hopefully, we'll address the landlord/tenant situation as we talked about earlier, and then that issue disappears, and then we don't have the extortion issue. But we need that notice, and then we also need the restriction aspect, that if we approve a remedy, that is a cap where we are leaving contamination in place in some type of institutional control, where a physical barrier is placed on that contamination in lieu of remediating it, that that remains effective over time, in perpetuity -- if I pronounced it right--

ASSEMBLYMAN IMPREVEDUTO: Perpetuity.

ASSISTANT COMMISSIONER MILLER: Oh, perpetuity. Thank you, Senator. Over time, that it remains and it stays as it was developed, as it was approved.

What I heard in terms of suggestions, and even this language -- although it says specifically in paragraph B that it can't be a deed restriction-- The actual language, though, sounds like a deed restriction. So again, it's coming back to what you're calling it does make a difference sometimes, but in reality, is it the same thing?

The comments that we got on our cleanup standards, which are interesting-- The majority of comments that we've gotten that address the deed restriction issue, didn't argue

that deed restrictions weren't appropriate. They more focused on the language, and that we can work on. We can work on the language of the documents, and we can improve them. So there seems to be some generalized support for that. And if deed restrictions are utilized -- and we have utilized them, and property has been able to be resold after them -- maybe it becomes much more commonplace. EPA is using them on Superfund sites. So, again, maybe we're out ahead of the rest of the country. This is something that's going to have to be. It's going to have to be present. I don't know. If somebody can come up with an alternative way of dealing with it, fine; we'll be happy to work that it in. I think as long as-- Our focus is it needs to cover those two aspects.

We haven't addressed one other aspect of this Section 30 that kind of ties into deed restriction -- excuse me, it ties into the establishment of the cleanup standard -- and that's section E where we define who will pay if the cleanup standards change over time. We all recognize that they're going to change. The science in this area is evolving rapidly. We say that we're not going to remediate the discharge unless there is a substantial risk to human health and safety, or the special ecological receptors.

We need to define what "substantial risk" means. Maybe, again, here, you know, for an example that we have a standard just for the sake of discussion -- 10 to the minus six. That's the standard that we established. Maybe substantial risk is a one order of magnitude reduction in the cleanup standards. So, in other words, unless the new standard would result in a more than a 10 minus fifth risk, we would not make that standard change in the remedy that was implemented, but at that time would suffice. But, we need, again, that type of specificity so that we don't sit there as a Department -- and hopefully we never would -- take a standard that is currently 20 parts per billion today, the science changes, and

makes it 18 parts per billion two years from now. Well, there's no difference analytically between those two numbers. Yes, there's a difference of two parts per billion, but if we took the same sample and analyzed it several times we could come out with 18; we could come out with several numbers within that limited range. That's the limits we have on science. People look at these numbers and say, "Oh, it's 20." Like we can count it, you know? These are somewhat of an estimate within a narrow range. If the standard became two, yes, now we have a significant difference -- two and 20. You're not going to get that. You're going to see that difference in a sample. Now we have a difference in a level of risk, and maybe that's a way to approach this issue.

SENATOR McNAMARA: I think I hear what you're saying, and what the intent is, because somebody comes in and spends "X" number of dollars to clean up the property, the last line of a letter from the DEPE is devastating to one's morale because it sounds like, well, you close the door but at any given moment we can walk back in. There has to be a standard established that would make a substantive difference to human health or an ecological reserve, but it's got to be spelled out.

ASSISTANT COMMISSIONER MILLER: I agree.

SENATOR McNAMARA: Mr. Lloyd?

MR. LLOYD: To come back to the point about whether the science exists to develop ecologically based standards, we submit that it does, and what we submitted to the Department and was submitted to staff on ecologically based standards, supports that. Without getting into any great detail, I mean, the EPA has done studies on doing ecological assessments. They're submitted here. There's a data base available for over 2500 chemical substances. We do have the science to do it, and we think we should go forward with that, and the information is here.

With respect to the comment that we should not be more stringent than other states: The problem is that we are the first State to address this question. No other state has tried to come up with cleanup standards, to define the question of how clean is clean. I submit to you that we must be taking the lead. We are taking the lead. We're taking the lead because we have to. Even EPA hasn't come up with full cleanup standards, so we're going to have to develop them in the first instance, and I don't think we should walk away from that responsibility.

With respect to the ecological receptors: I, during the break, took a look at the definition that's included in Section 20, and I would submit that that definition is tied to a whole list of other environmental statutes, both Federal and State. I haven't looked at every one of them, but I'm not aware that special ecological receptor is defined in any of those statutes, and I submit to you that it isn't. I'm afraid that the definition that's in the bill now will lead to nothing more than additional litigation about what is a receptor, and what should be the standard based upon impact on that receptor.

I won't repeat the comments I made this morning, but I would suggest that the definition should track the most sensitive species, and the comments I made along those lines, that we have a definition in this Act that we can work from.

Finally, with respect to the municipal notification: I want to again make it clear that I wasn't saying we shouldn't have notification in the county courthouse; I think we should, but that that's not significant. Municipal notification to the Environmental Commission, to the construction officials, the municipal government is fine.

Let me make one point, though, about enforcement. In the legislation it says that we will depend upon a municipal code official to make sure that the restrictions that have been

made part of a cleanup continue to be in force. I would suggest to you that municipal code officials are not in a position to do that. They are there to enforce building codes. I think the Department's got to be involved in that enforcement. When a change of use or a change in the site is proposed, I think there's got to be some comment or feedback from the Department, perhaps through municipal government, but I don't think the municipal government has the expertise that's needed to review sites that have already been cleaned up under this Act.

SENATOR McNAMARA: Jorge?

DR. BERKOWITZ: Thank you, Senator.

Jorge Berkowitz. I'll try to be brief. And Lance, I'm not going to quick kick on the third down. I'd be glad to help you write some language -- help the Committee write some language -- relative to appropriate levels of risk.

Senator, I think we have a real important issue here, and that is the ecological standards. If, in fact, we're talking about ECRA reform, I think that the adoption and the rush to ecological standards can undo all the good that you're proposing to do with this legislation.

I've been involved in doing an ecological risk assessment. I have no standards. I have no parameters. It's freethink time. I think to rush into this without studiously looking at the consequences and the impact, is a mistake. I beg you to wait two years, have that advisory committee convene, and not report to the Department, but report to you. This is too important of an issue.

Lance talks about, well, what about those sites that there's something happening out there? You've got the Clean Water Act. You have a whole plethora in New Jersey of all kinds of enforcement tools to take care of those problems without developing an ecological risk assessment process -- risk assessment standard. The concept of focusing on the key

receptor-- Think of this; think of this for a second. You cannot take tap water out of this building and run it into the Delaware River, and pass that standard. You'll violate on copper alone. Think about that. That's frightening.

So, I beg you. I implore you. Go slowly on the ecological risk assessment. Do it studiously. Do it with your eyes open, and you please make the decision with advice from the Department.

Second point: differential standards. It's very important, if we're talking in the name of ECRA reform, that we not be ashamed of having differential standards; that we embrace it. We stand up to it. We step up to the issue, and we articulate that that is a goal of this piece of legislation. And, what we do is, on page 31, line 28, we don't say the Department of Environmental Protection "may" provide for differential cleanup; we say "shall" provide for differential cleanup, because it is important if you're going to recycle these brown sites.

Third issue: The Department's come up with site specific-- The Department's come up with generic risk assessment standards and cleanup standards. In Chapter 6, it describes the risk assessment process. In doing that, the Department was absolutely forced to use mean tendencies, to use mean exposures, to have basic assumptions which apply to all. But clearly there are industries to which those assumptions do not apply; the number of hours that the people were exposed, the type of exposure, the roots of exposure. In those particular cases -- and I understand what the Department's saying was -- to get away from site specific risk assessment-- I applaud it, quite frankly, but in those cases where it is not germane -- their models are not germane -- the private party has the right to do a site specific risk assessment and to promote those findings to the Department.

Next item: Interior building and equipment. I don't know that you really want to have interior building standards, particularly if they're one in a million-based. Realize that in the SICs that we're talking about, OSHA applies regulating employer/employee relationship. OSHA's standard isn't even close to one in a million; in many cases, one in a thousand. Therefore, the risks that are acceptably imposed by compounds that are regulated by OSHA, swamp the risk that would remain on the walls, because the paint that's impregnated in the cement. So, I think that interior building standards in that regard are not appropriate.

Finally, deed restrictions. As has been discussed, deed restrictions or owners, whether intended to be or not, it is my opinion that given all the regulatory authority within the Department, the Department can determine a less onerous way of making sure that caps are maintained, that impervious surfaces are maintained, that individual parties who are potentially purchasing a site, know about it without having a deed restriction.

Thank you, Senator.

SENATOR McNAMARA: Boy, I hate to go all the way back to you, Hogan.

MR. HOGAN: Very quickly, since Mr. Miller called a foul on me, I'll just respond. I apologize. My understanding was, where I had a party who was subject to an ECRA administrative consent order, the landlord was not-- DEPE gives me a choice of cleaning up to an industrial standard or not. Now I can tell the landlord that I don't have to -- that I need to only clean to industrial standards. I was mistaken, Lance, and if, indeed, that is the case -- that I don't have to clean to industrial standards-- There's a misimpression in the regulated community--

SENATOR McNAMARA: I don't think that's what he said.

ASSISTANT COMMISSIONER MILLER: Both are responsible. Signing the consent order doesn't change that responsibility.

MR. HOGAN: It should not, but where the Department has-- If you don't provide what the Department requires--

SENATOR McNAMARA: I'll tell you what. I think that the Committee has gleaned from both of you-- The interplay is totally unproductive, especially since the clock is still running.

MR. HOGAN: I apologize.

SENATOR McNAMARA: If I could stop the clock it would be terrific, but that time keeps running along.

Any other comments on Section 30? (affirmative response)

Oh, I'm sorry. I apologize. Senator Corman had a question. I apologize.

SENATOR CORMAN: With respect to differential site standards, I have a question about that. How is this going to relate with municipal land use laws? Will the site standards be based on what is-- In the text of the bill, it says "intended use." Now, is that going to be based on what the property is zoned for, what the applicant says he wants to use it for, without regard to what the zoning is?

ASSISTANT COMMISSIONER MILLER: Senator, Lance Miller. We recognized those issues when we developed the standards -- our proposed cleanup standards. As part of our process, certainly the owner of the property has rights. The municipality can change the zoning of that property for the future, but they can't tell somebody that's currently in industry, "No, you may no longer be in industry. We're rezoning your property." That, they have to condemn the property to do, and go through that process. So, one, we felt it was certainly within the confines of the applicant, in this sense, to say, "I want the deed restriction."

When we do our cleanups, we let the municipality know what's going on. We will take their concerns into consideration, but, I think, when push comes to shove on this matter, the person that owns the property has a lot of legal backing. It's their property. As long as they're not doing something that's endangering public health and welfare, that use to remain, and they're going to be able to maintain that property, and if they want a deed-- Excuse me, if they want to have a differential standard to keep it there, they'll be able to do so.

SENATOR CORMAN: I don't know if my question is specific. How would "intended use" be defined by the Department under this bill? Would it be whatever the applicant says, "Well, I'd like to have a factory here," even if it's just zoned commercial/residential, or would it be what the permitted use is under zoning laws?

ASSISTANT COMMISSIONER MILLER: I think it depends. If the property is remaining, somebody's doing a cleanup of an activity facility and they are going to remain there, the intended use is that activity. If they are going to cease that activity and change, all right, they're going to sell it to somebody else, and now the municipal land use comes into play. Now I think that becomes the intended use.

Did I answer your question that time?

SENATOR CORMAN: All right, let's just take it one step further. Let's come up with a specific example. If that property is zoned residential, and the applicant would like to put a shopping center there, he comes to you and says, "Well, I would like to only clean this up to commercial standards." Now, in order to actually build this, he would have to get, I presume, a use variance. How does this all fit together? How does DEPE sort this out?

ASSISTANT COMMISSIONER MILLER: That's a tough example for me to deal with, because by it being residential initially--

SENATOR CORMAN: Think of property, nothing there; zoned residential.

ASSISTANT COMMISSIONER MILLER: Okay, zoned residential. Okay, so we're dealing with a past contamination problem. If the municipality came in and rezoned that property by use variance or whatever, we would then be in a position to say we could then grant the differential standards because of that intended use.

SENATOR CORMAN: But you would not grant the differential standard until such time they got whatever local approvals they had to.

ASSISTANT COMMISSIONER MILLER: I would think we would need that, otherwise, we have to say that's going to be residential property, and remediate it to whoever would-- But the scenario that you're giving, you have a developer coming in-- All right, so now we're working with somebody. Somebody's responsible for that contamination. If we happen to find out who that was, and we were working with that person, that person would have been required to remediate that site to the residential level. So, it depends who's doing the cleanup which also may have an impact on whether we use the differential standards or not, because that person might be trying to get it into a different land use.

SENATOR CORMAN: Okay. So, I'm just gathering this from testimony, that in many cases decisions made by the local governing body -- the zoning ordinance or by the board of adjustment -- that they granted a use variance, decisions such as that might ultimately have an impact on what standard will be used for any site that's going to be cleaned up.

ASSISTANT COMMISSIONER MILLER: I think that's appropriate. You know, we want to work with the municipalities. They have control of the land use within their municpality. They're making the decisions that are best for that municipality. We want to assist them so that development

can occur within that municipality, and if protecting human health and the environment can be accomplished by the use of differential standards, and that area we're describing in this example gets redeveloped as a shopping center -- and that's what that municipality determined that it was needed -- who am I to sit there and say, "No, that site needs to be cleaned up to residential numbers"? What additional environmental protection am I providing by that? Who am I protecting?

SENATOR CORMAN: I'm not asking you these questions to be critical, one way or another, I'm just--

ASSISTANT COMMISSIONER MILLER: That was a rhetorical question.

SENATOR CORMAN: Although, one observation that I would make is that probably this would-- I think that having been a municipal official, I can forsee this becoming more and more reason for people to object and enact local applications, one more argument against any new master plan by changing this from residential to commercial, it's going to allow more contamination. That's just an observation.

SENATOR McNAMARA: Ron, do you have a question or comment?

SENATOR RICE: No, that's okay.

SENATOR McNAMARA: Jack?

SENATOR SINAGRA: Only because I was out for a little while--

Does the standard apply to a site that the plant's actually closing? Let's say a corporation owns a plant somewhere, and they're going to close it. Would they only have to remediate it to a certain industrial-- Let's say it's an industrial plant with an underlying-- Regardless of what the underlying zoning is, let's say I'm going to close the plant for economic reasons. Could I dab the industrial standard versus a residential?

ASSISTANT COMMISSIONER MILLER: If that owner is going to maintain ownership of the property, even though they're closing it down, yes.

SENATOR SINAGRA: But, wouldn't it then, conceivably, be cheaper for that owner to say because he's bound by ECRA and the law to clean up it up when he closes it, and he says even though he knows it will never be used as industrial, he's never going to sell it, nobody's going to buy it, nothing's ever going to be made there-- Say I'm going to clean it up to industrial standards. Would it be significantly less an investment of him in that property?

ASSISTANT COMMISSIONER MILLER: That situation could occur. As a matter of fact, I can think of an example where that may actually be happening: where the industry wants it to be deed restricted for the property to remain as industrial and the municipality wants that area converted to a residential development. It happens to be one of the last remaining areas to develop in that municipality.

What's the Department's role in that, versus the municipality and that individual property owner, to try to work those things out?

SENATOR SINAGRA: Isn't there some reason that the property would, by nature of the cleanup become, again, a useful piece of property? See, my concern would be: Is the property only going to be cleaned to a certain level because that's the cheapest you could possibly do, but it may never, in fact, become a useful piece of property?

ASSISTANT COMMISSIONER MILLER: I haven't come across a piece of property, yet, in the State of New Jersey, that we haven't been able to remediate to some degree that some development can occur there. It might not be able to be used as a residential development. I've had an interesting conversation with a major home builder in this State, where I said: If I had contamination at depth at a site and their

surface oils were clean -- either brought in or whatever -- and I restricted the development of those residential homes to avoid basements -- I build them on slabs so that we don't get into the contaminated area -- and we just notice everyone that there is contamination at depth, so that if a contractor comes in, or the use changes at some point in the future, that they would know about that, would they be able to market those homes? The unfortunate answer was, no. That was from the developer; that they would not be able to market homes in that type of scenario. That's scary.

SENATOR RICE: He was building in Short Hills. Different story.

ASSISTANT COMMISSIONER MILLER: No, we were talking about Newark.

SENATOR RICE: No, he didn't know what he was doing. He was trying to inflate the price problem. (laughter)

SENATOR McNAMARA: Ed?

MR. LLOYD: Just briefly.

I think that the two Senators' questions go to the issue of how-- When someone comes in and says, "I have an intended use," that that intended use has to be a use that is capable of being carried out, and is actually carried out within some period of time. Maybe we should work on some language of that sort. I don't think it would be appropriate for someone to come in, and say, "I have an intended use that isn't allowed by the local zoning," or to come in, and say, "I have an intended use with no real prospect of that use ever occurring," and I think the intended use maybe needs to be linked to a use that actually does occur within a given period of time after the Department certifies to a cleanup.

SENATOR McNAMARA: The only thing is, if it's industrial property, you clean it up to the industrial standard. It depends on the general economic climate of the State. Maybe there's nobody to move into it or use it. Does

that mean the property owner has to go back and clean it to residential, if it's in an industrial zone? That would be idiotic.

MR. LLOYD: But the point is, though, if we don't have any use of that property, we really haven't gained anything by cleaning it up. If we haven't gained a use--

SENATOR McNAMARA: Well, if we clean it to where it's at a level to where it's dangerous, even for industrial use, and we improve it to that level-- You mean a little clean is not better than totally filthy? Or, somewhere between perfection and zero? If it's 40 percent, is that not better?

MR. LLOYD: I'm not saying it's not better, but one of the purposes here is to foster economic development. One of the reasons we want a differential standard is to allow for that development to occur. I'm suggesting that if doing the cleanup doesn't promote that development, then, perhaps, the better position is to have it cleaned up to the residential standard, because maybe then you'll get a use on that property. I mean, if you don't get an industrial use on the property, we haven't-- Let's put it this way: We haven't gained the full benefit of what we're after in this law. We've gained some cleanup, Senator. I agree with you.

SENATOR McNAMARA: That's the risk that the investor that owns that property takes. If he's willing to gamble that he can get an industrial use and clean it to that standard, he still owns the problem. If, later on, he finds out that he can't and the only return he can get on his investment is if he goes for residential, then he has to meet the higher standard.

MR. LLOYD: That's true for a purchaser, but, as the Senator pointed out, someone who owns the property is closing operations. It's a different calculus, and we might want to look at--

SENATOR McNAMARA: All right, but if he closes the property and walks away from it, it goes up in tax sale. The

municipality gets it. And what have they got? Now they have a filthy piece of property.

SENATOR SINAGRA: But if it's a corporation they can't walk away.

SENATOR McNAMARA: Oh, let me tell you.

SENATOR SINAGRA: A major corporation.

ASSEMBLYMAN ROONEY: If you go bankrupt, you can.

SENATOR McNAMARA: There's a lot of property that's laying fallow in this State for the simple reason that the existing law that they have to go through residential standard-- And they're not going to do it. I think that's part of our problem.

I hear your concerns and I want to try and meet those concerns, but I really believe it's necessary to have that flexibility within the Department to be able to set those guidelines, and it's not going to-- You know, let's face it. If it's over an aquifer where it's totally contaminated and no matter what's done doesn't make it change, as opposed to an area where there's an aquifer that it's going to impact, obviously, they're going to have to clean to the standard where they don't impact the aquifer. I mean we've got to have enough faith in the Department to make that judgment call.

Okay, let's see. Irving, and then I'll go over to you, Angelo.

MR. COHEN: Differential standards are important for cleaning up sites in New Jersey. I think that the issue that Lance raised before -- the two Senators raised before -- also is justifiable as well, because when you clean up a piece of property to an industrial standard, the likelihood of being able to either borrow on that property or mortgage the property is very small because of the term, "deed restriction," or "deed notice." It's just the financial community's response to that type of activity to know that there is something on the property that makes it questionable as to its worth.

But that's not a decision that really needs to be addressed here, because what you are providing by giving the differential standards is for the company that is cleaning up the site either selling it, or transferring it to somebody else to operate the same type of activity -- the opportunity to do so in a meaningful manner. It's not necessarily the opportunity for him to turn around and clean it up to a lesser standard, flip it to somebody else who's going to then develop it as residential property. It's just not going to happen. I think we have to segregate the two issues and address the issue as it is, and this is providing the means by which cleanup is doable for those who want to maintain an industrial property.

SENATOR McNAMARA: That's the objective.

Angelo?

MR. MORRESI: Mr. Chairman, I think we agree with your philosophy that in some instances, half a loaf is better than none. I think the other thing, if you really want to look at this issue and take it one step further, there are some areas of the State which -- and I'll show you my little book-- It's a history of one of our greatest cities. (displays book) I have a love affair with Newark. I've been there for many, many years -- too many. I don't want to tell you about it. The idea here is that we have to encourage the developments in these cities. What we find is that we have to provide the Department with means to make decisions in this area. Now, these may be even more extreme than industrial areas, whether it be Camden, Trenton, or Newark.

We have to encourage different methodologies so that we can go forward with these sites. It might be encapsulation, which the Department allows right now, but it should be in the statutes that these types of methodologies are appropriate, where the Department could balance social, economic, and, also, environmental impacts as well as health. I mean, as you're saying, if an industrial site is fallow and there are

environmental and health impacts, it makes no sense to just leave it there if you can clean it up to a half of 40 percent. So, we see the need to encourage those types of control technologies which may not be excavating, or incineration, which may be able to leave it in place. It's very cost-effective, but it allows that the property could be developed over again.

SENATOR McNAMARA: Ed, I see you writing like a beaver. Do you want to--

MR. LLOYD: No, I'm doodling. (laugher)

SENATOR McNAMARA: Okay. Looks great.

Section 31.

MR. LLOYD: I'll give you the picture afterwards.

SENATOR McNAMARA: Ecology Advisory Task Force, Section 31.

ASSISTANT COMMISSIONER MILLER: I haven't taken the lead on one, yet, Senator.

SENATOR McNAMARA: Oh, terrific.

ASSISTANT COMMISSIONER MILLER: We fully support this provision. (laugher)

SENATOR McNAMARA: As you most probably just do today. (laughter)

Okay, we'll start left to right. Please, in light of the clock, we haven't started the afternoon portion of this meeting, so-- And it's only five to three.

Ed?

MR. HOGAN: We very much support the Section. We think it's very necessary. The Department has made a half of a start of ecological standards. We don't think necessarily the science is there. They proposed it in the proposed cleanup standards. We don't know whether it will come out or not. We think the science has to be refined. We encourage this type of study to go forward. We simply ask a report back to the Legislature, because I think without further guidance from the

Legislature, with the lack of much as we've seen the cleanup standards for one species, when we have tens of thousands of species to analyze, we think it's important the report come back to the Legislature rather than to the Department.

MR. COHEN: Knowing the problems that exist in the ecological assessment activity area, I support what has been said before -- that we welcome this task force. We think it should also report to the Committee and that you go slowly, because I don't think the necessary science is in place for us to be able to assess the meaningfulness of the data that comes out of those type of studies.

SENATOR McNAMARA: Richard?

MR. CONWAY: We would second what has been said by the other groups.

SENATOR McNAMARA: You have no further comment?

MR. CONWAY: No further comment.

SENATOR McNAMARA: Ed?

MR. LLOYD: Mr. Chairman, as I suggested. We suggested this Task Force. We support it. The only caveat is we think, as I said before, the science is there. We ought to proceed while the Task Force operates. I would also suggest the Task Force, I think, could get the job done in one year, come back to both -- I don't have any objections to it coming back to the Legislature and the Department -- but get the Department to propose some standards after one year, instead of two.

DR. BERKOWITZ: Again, I would counsel that you not proceed until the Task Force reports back to the Legislature, and proceed very cautiously and very slowly.

SENATOR McNAMARA: Why don't you introduce the afternoon session?

ASSEMBLYMAN ROONEY: It is now afternoon according to the agenda. According to the clock it's about three hours after. (laughter)

These are measures to streamline the administrative process for ECRA and other site remediation programs. Section 7, deferrals of ECRA cleanup.

One of the things I-- I know we've been asking Lance questions and specific instances. I have one where you wouldn't get a site and perhaps the owner of the company decides, "I don't want to do business here anymore." You know, it's the cost of doing business, whatever it is and the employees come around and say, "I'd like to buy the company," and basically do the exact same thing that we're doing on a particular site, and just have some sort of a leverage buyout over a period of time from the corporation. What is the current policy with DEPE as far as something like that? It triggers this changeover and it also happens when we throw in an actual situation: They had lubricating oil on the site and that's it -- clean lubricating oil, and they're going to continue in the same fashion.

This is actually what the company did. It's an actual example I'm using -- a case history. The company made lube oil systems for turbines on ships and other places, and when they tested it, they put clean lubricating oil in the system, pumped it around, tested it, and some of the oil leaked out on the test facility, and that was it. Now here's the employees of the company trying to buy out and keep their jobs. What's the present position of DEPE?

ASSISTANT COMMISSIONER MILLER: The contamination is within the confines of the building?

ASSEMBLYMAN ROONEY: Within the building.

ASSISTANT COMMISSIONER MILLER: I think that's a very good case for deferral.

ASSEMBLYMAN ROONEY: That place has been lying empty for the last four or five years, and the employees moved out and went elsewhere. The company is still basically liable. It's a national corporation; they haven't gone under. I don't

know if anything's been done. I'll talk to you off the record as far as the actual name. I don't want to do that on the record. I think the president of the new company will be coming to our next hearing to bring you that testimony before us. So, that's the situation. So, you're saying now it would have been deferral.

ASSISTANT COMMISSIONER MILLER: Did they apply for a deferral and were turned down?

ASSEMBLYMAN ROONEY: I think it was just a matter as soon as the sale took place, ECRA got triggered, the whole thing came down. They said they had to go through this remediation process, and they were looking at total costs between $1 million or $2 million which was what the estimates were.

ASSISTANT COMMISSIONER MILLER: They have a lot of oil inside.

ASSEMBLYMAN ROONEY: These are the kind of horror stories that all of us can share. So, I'm glad to hear that there's something that's better than it was five or six years ago.

ASSISTANT COMMISSIONER MILLER: The key factor in my answer is that it was inside the building, versus outside the building. What we'd try to do in that situation is work with the new company to eventually get the inside of the building cleaned up. I would hope that we would have worked with that new entity to phase that within their abilities.

ASSEMBLYMAN ROONEY: All right, I may have erred in that because they may have stored the equipment ready for shipment outside of the building. It may have been just like on pallets outside waiting for a truck to come along to load it, whatever, so there may have been an area right outside the building, and it might have been a dirt area or a gravel area that they may have stored it on. I'd have to check, but we'll find out the exact situation.

ASSISTANT COMMISSIONER MILLER: Okay.

ASSEMBLYMAN ROONEY: Okay. Anybody have any-- We want to start off with the deferrals. That's exactly the answer I was looking for; deferrals, which didn't happen in that case.

Yes, Angelo.

SENATOR RICE: Assemblyman, let me just warn you that DEPE, they would tell you test outside, and the way to go about testing, they'll tell you, "Well, you did fine for now. Test again this way, and test again." So, see, it becomes almost a witch-hunt situation. The question is how far do you go? The inside seems to be the problem, etc. So, when you said deferral and when Lance said there was a mechanism to address that it is, you can never get past testing forever -- if you're not broke by then.

ASSEMBLYMAN ROONEY: Well said, Senator. (laughter)

W I L L I A M C. S U L L I V A N, ESQ.: We just did our own very limited version of musical chairs. I'm Bill Sullivan. I'm staff attorney at the Environmental Law Clinic.

We have two issues with respect to the deferrals. The first is, of course, that under-- On page six, subsection 4, the last certification that's required to be submitted. I read underneath of that: the preparation, the approval, and implementation of a remedial action work plan may be deferred, essentially, in perpetuity.

What we would suggest is: I'd like to echo the comments that Ed just made with regard to the differential standard. If we're going to effectively have perpetual deferral, then we should have also some of the additional notice requirements that we suggested because-- Essentially, you're going to have a deferral of the remedial action at this site, and there should also be notification with respect to that issue since the site is going to sit there, and not be remediated. That's the first point.

The second point is that the general language of these sections on the limited, or site review, the expedited review, etc., all are set up in the way that they say which kind of certifications have to be provided, and then, the next paragraph says that, "upon the submission of those certifications, the Department shall approve whatever action is required." I would submit that either one or two things should happen: Either the sections on the certification should be more specific to say what kinds of criteria have to be met in the certifications, or it should say, in the lower section, that the Department may approve the deferral based upon a set of findings. But, at this point, it looks like somebody could submit a certification. There is no guidance as to what has to be in a certification, and the Department is required to approve the action. So, I think that language should be revised also.

MR. COHEN: The concept of deferral is appropriate. I think many of us have worked for companies that are continuing the same operations that they have in the past, and that provides another mechanism to proceed with the transaction.

The wordage in here gives me problems, because there seem to be contradictions within the certifications themselves as to what is being asked for. For example, if I can point to six, as Bill mentioned before -- six before where we're dealing with this certification -- right before that, it talks about a cost estimate for remedial action that is necessary at the industrial establishment approved by the Department. Then, it goes on to say that you can defer the preparation of a remedial action plan.

Well, you can't provide a cost estimate unless you do the remedial action plan in the first place. So, there's contradiction within itself that is of concern to me.

I have a concern in the implementation of this from the point of view of: Let's assume for the moment, in the case

that you were talking about that I was the purchaser of your property, and I wanted to go ahead and operate this same lube oil -- whatever it was that you had said before -- and I put everything in place to do what has to be done and operate the facility for two years. And, this recession that we're not supposed to be in right now, hits me just about the same time as I had done an expansion on the plant, and then decide, "I can't handle this anymore," and go belly up and file for bankruptcy. At that point in time, there is a deferral of a cleanup that is sitting there that's going to have to be done. My question is: I see nothing in the language here that would protect you as the seller to me, and I, maybe, at times, represent the seller on a piece of property. I see nothing that protects you from the Department coming back, and since I've gone belly up on the deferral, and I was the original cause of the contamination, coming through the back door -- coming back at you, and saying, "Now you have to clean it up. Forget that they've gone bankrupt." That would be a major concern to me.

As we go on to the next page, items one, two, and three, you talk about potential causes for denial. I think those potential causes for denial should be exclusively stated as what they are and what they can be. Thereby, we would then be able to define it and know what to expect, and know the parameters to which we will be operating under.

SENATOR McNAMARA: Isn't the originator called upon under the Spill Act?

ASSISTANT COMMISSIONER MILLER: The discharger--

SENATOR McNAMARA: I mean, in reality -- they don't like to think about it -- but in reality, isn't the discharger always responsible?

MR. COHEN: I'll answer that question as a nonlawyer.

SENATOR McNAMARA: Yes.

MR. COHEN: You would like to believe the answer is yes, but by the time that you achieve the end to that question, we are probably going to be old and gray, and gone. There are cases where these cases continue on. The program that one has to go into to make a circle of claim is even more onerous than what many of the people who don't come into New Jersey anymore claim about ECRA-type related activities. You have to follow the NCP which goes through a very detailed organizational approach to defining the problem and becomes as Senator Rice had mentioned before, very expensive, very long-term, and I'm not sure that the end result isn't a settlement that says, yes, I have some limitation to my action, but what that is would be a legal question.

SENATOR McNAMARA: Angelo?

MR. MORRESI: On this one here? What I'm hearing is something that, we think, is important.

SENATOR McNAMARA: Angelo, we can't hear you. Could you speak into the mike -- the black one?

MR. MORRESI: The black microphone.

One of the things that's important-- I'll take the opportunity at this point in time to just reemphasize that there's a need for preciseness in our language so that we achieve the goals we want to achieve, and also we don't achieve the goals we don't want to achieve. For example, there are a number of passages in the bill which basically define a program, and then the end of it says, "and the Department can ask for any other information it requires," or, "the Department will achieve what it has to achieve through whatever means is necessary," -- things like that which tend to take away from us being able to achieve what we really want to achieve.

The other thing to think about when you're talking about referrals is: What is the premise of the bill? Again, getting back to that, is the premise of the bill to prevent the transfer of contaminated property or is it to protect human

health and the environment? If we're going to protect human health and the environment, we can allow deferrals because, for the most part, there's a whole plethora of statutes that can deal with contaminated property that are on the books already. So, in our opinion, if you have ongoing operations, they should not be subject to the ECRA statute, because if you put in the ECRA statute that you're going to go through the investigation process and do the sampling and try to stop at that point in time, the Spill Act is going to attach at that point, and you're not going to effect deferral. It won't be in ECRA; it will be under the Spill Act. So in that situation, deferral cannot be real the way we see it written in the statute right now.

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: I have to react to that. I wish it would be so, but it's not. We do not have the capabilities to respond to every situation where there's a risk to human health and the environment, under the Spill Act. So, if we have a situation where contamination is found, we would hope that's cleaned up.

What Section C of this says, is that the deferral is there until the Department would bring its other statutes, but that might be some time, because when the Department's going to bring its other statutes to bear, it's ready to do the work itself with its public funds. That's when we would then tell the person, "You have to clean it up." We would have hoped they already would have, but if they didn't, that risk to human health and the environment would have occurred until that period in time as the Department was ready to act on that site as a priority. The deferral will allow increased risks. That's just a statement.

The Department does support this provision, as I said. We can live with it. We're hopeful that people that do-- I mean, when we're taking these cases through, we're

finding out what's there. We're analyzing the alternatives, but if somebody feels that because of their financial situation they can't do it right now-- The example that Chairman Rooney used is appropriate. If a business is going to go out of business rather than comply, then the Department wouldn't work on that site anyway. We'd rather work with that company -- work with them with this bill -- because now we'd have a mechanism to loan them money so that they can stay in business, and clean up that site over time. That's better than the site sitting there empty. In that situation everybody loses: The employees lose, the owner loses, the municipality loses, and the Department gets stuck with having to clean the site up anyway. We'd rather not have that situation.

So, that's why we can support deferral, but let's not kid ourselves that there won't be some additional risk occurring to people because of the deferral process.

SENATOR McNAMARA: Section 9: Expedited review of ECRA applications where the site has had previous remediation.

MR. SULLIVAN: Senator, the only comment I have on this is, and I won't repeat it for each section, but all of these sections-- With regard to the expedited reviews under this section, the limited site reviews and the new Section 10, again, are based on certifications, and there needs to be more specific criteria in the bill as to what has to be in the certification, or the alternative is to set up a specific criteria about which the Department will determine whether or not to provide the expedited or limited review based on the certifications. One way or the other, we need to set up some criteria. That's my only comment on this section.

MR. COHEN: There are some potential pitfalls in the expedited review process, albeit one that I'm sure most of us would like to see happen and effectively used. But the pitfalls -- representing industry as I do -- can occur if certifications that are given by the former owner are not truly

valid or accurate, and the owner or the person who gave the certification then dies. The problems that I would have with something like this would almost be a situation that the Department could then enact their provision that says, "Well, we'll void the sale."

The purchaser of the property that bought the property doesn't want that to happen, and he's left with a situation that is not what he expected. If there's no mechanism built into this to prevent it in some way, I think the ultimate buyer -- even though "buyer beware" can be heard very, very, handsomely by this situation occurring--

MR. MORRESI: Let me get back to what ECRA does. ECRA is a limited process; reviews limited sites. So if there are those types of potential problems, we should be able to live with them -- because ECRA doesn't deal with the gas stations. It doesn't deal with the repair shops. It doesn't deal with the hospital in the Meadowlands constructed on contaminated property. It doesn't deal with a whole plethora of properties that are on contaminated soils. So, if we begin with the premise that we're focusing on a narrow part of the ECRA cleanups, then we can live with certain problems that may result in the expedited review process.

Granted, there are going to be many more benefits from the expedited review process. So we support the expedited review. We would like to see that any information that's already been submitted to the DEPE be allowed to be just updated, rather than have to duplicate all the files that are down there. So, if it's already been through ECRA, you just update what's necessary to be updated between the date of the last ECRA, and then go right through the process to the certifications.

SENATOR SINAGRA: Lance, do you have any comments?

ASSISTANT COMMISSIONER MILLER: Senator, a very general comment on this section, and really the other four,

five -- five in total. The Department's been working to streamline its process since, certainly, June of '86. I can speak to that date specifically, since that's when I started in the ECRA program -- several years ago, now -- and we've done a lot to streamline the process. We've broken cases out by classification, low environmental concern, medium environmental concern, and high environmental concern. A lot of these issues, expedited review, limited site review, subsequent triggers, minimum environmental concern-- We support all of them.

What we're going to be working on with the Office of Legislative Services staff is trying to merge them into one section rather than setting up five separate administrative processes and classifications. We want to, maybe, group these things together as one limited type of review, and try to make it a little easier administratively.

So we'll be working on that, but we, certainly, completely support the concept. These things in here on expedited reviews and subsequent triggers are excellent.

SENATOR SINAGRA: OLS just reminded me they get paid by the section. (laughter)

Section 11.

MR. HOGAN: Edward Hogan, New Jersey Business and Industry Association. We applaud the draft in these sections. We think they're excellent. Indeed, much of it is institutionalization or statutory authorization for what the Department has done in order to expedite the program, and we think that is a good idea.

I do have one technical suggestion, however, in Section 10 c. which appears on page 14, beginning at line nine. Under 10 c., the owner/operator industrial establishment subject to the provisions of this section should not close operations, or transfer ownership or operations, until a remedial action work plan or a negative declaration has been

approved. We simply note that under 10 c. this implies that you cannot cease operations unless you have one of these issues, and while ECRA is a precondition to transfers, I don't think you can legislate people staying in business. We know we can't legislate people staying in business, but this would imply you're in violation of the statute if you cease operations without these provisions. Clearly, the regulatory obligation is triggered when you have a public announcement of the intent to close, but we think the 10 c. needs to be conformed to avoid any implication that you have to stay in business, or if you cease operation prior to this, that somehow you're at some risk of penalty. That's not the Department's position, as I understand it.

ASSISTANT COMMISSIONER MILLER: The current statute, and we haven't taken action against it, but also -- I'd have to pull them out -- has the basic concept that you have a certain amount of time to get your negative declaration before the transaction can close, in this case would be a cessation. And we run into problems of somebody ceasing and then never complying.

What I think some of this language tries to get to is that if you do that, if you cease and don't comply with the statute, you are in violation and subject to the penalty provisions of the statute. This language can be clarified, I think, to address your concerns and mine, so that people just can't cease, and then say, "All right. I've never violated the statute, but I'm still working on it," you know, five years later.

MR. HOGAN: I understand Mr. Miller's concern, and I think that we'll suggest some language that would deal with that issue. Clearly, when no one is taking a position, you can ignore the statute, but I think it points out the ambiguity that exists. It probably ought to be clarified in this language, and I don't think in the regulated community in

general, there's any vast disagreement. I can't not comply with the statute -- that is, you ought to comply with the statute. It's not the ceasing of business; it's the not complying with the appropriate time period. We'll address the language to address that. Otherwise, we're supportive of all of the expedited provisions.

MR. CONWAY: This is Rich Conway. We regret the Senator didn't have the opportunity to stand by and listen, and as we said, we fully support these provisions. These sections are exactly the direction that we think has to be taken to enable us to start getting the message of ECRA reform into the regulated community.

SENATOR SINAGRA: So, no one else on Section 10 and Section 11? (no response) Maybe I can get through before he gets back.

ASSISTANT COMMISSIONER MILLER: You may, Senator.

SENATOR SINAGRA: Nineteen I think we need to--

MR. SULLIVAN: Well, we have something on 13. This is Bill Sullivan from the Rutgers Environmental Law Clinic.

Section 13 establishes the right for an owner/operator to get ECRA clearance without ACOs, etc., where the discharges are "of minimal environmental concern." We have a number of issues on this one.

First of all, the applicant submits -- in order to attain this -- a number of different documents, including a certification supported by data that there are no more than two areas of concern on the site where the contamination exceeds the cleanup standards, and that remediation at these areas can be completed within six months.

Well, the first issue is "area of concern." Now, this a term of art that's been created by the Department during the regulations that they promulgated, and is included throughout this legislation. It may not necessarily be a bad term of art in many cases, but in this case, it has the potential of having

some bad consequences because area of concern is not defined in terms of its environmental impact or the size of the area. What happens is: Your consultant goes out and looks at the property, and he says, "All right, I have a two-acre lagoon -- an unlined lagoon -- with contaminated waste in it. That's one area of concern. I have a three-foot square area behind the building that may have some petroleum hydrocarbons in it. That's another area of concern. In other words, there's no relationship between the two. They're equally important for the purposes of this Section, but clearly they're not equally important in terms of their impact on the environment.

So, I would suggest that the language with respect to when this applies, and the certification that has to be submitted, has to do more, than simply add up the numbers of areas of concern. You have to have a more greater showing that the areas of concern that you have identified are of minimal environmental concern in order to satisfy this.

The other critical point we had on this was ecological protection. The language in here only discusses in terms of a threat to human health. So, again, with regard to our comments we submitted before on ecological protection, we think human health and the environment has to be included here as well.

There's some very vague language here about what's required in order-- What documentation you have to submit in terms of environmental risk-- Section A, subsection 6, states that the applicant must submit documentation establishing that the discharge does not pose a threat to human health, and here we add, environmental protection because of the proximity of an area of concern to a drinking water source or because of the location, complexity, or the nature of the discharge. Now, obviously we want to protect drinking water sources, but I submit that that's not the only environmental issue that we're concerned about. For example, you may have a site which otherwise may not pose a substantial risk to the environment,

but may be in one of the mixed use neighborhoods that we were discussing earlier with regard to the differential standard. So you may have an issue of child access.

I've been involved in cases where one of the main routes of exposure was the fact that they were unable to keep children from running around on the premises. The children were getting exposed. Kids love old factories. So, I think you need to be a little more specific here in terms of what kinds of environmental risks you're looking at in order to meet this minimal environmental concern criteria.

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: You received accolades from all the panel while you were out, Senator.

SENATOR McNAMARA: All I can say is I'm going to let Jack finish conducting the meeting. We've moved more sections while I was absent than we did all day. I'm sorry I didn't have Jack start this one. (laughter)

ASSISTANT COMMISSIONER MILLER: Just to respond to Bill's comment: Obviously, the Department has been involved with the Office of Legislative Services on this as we talked about earlier. I think what this recognition of here is that the Department is doing things that are also trying to expedite the process. Regulations that spell out what an area of concern is have been proposed. We're working through the comments on those. We'll be getting adoption out within the next several months on that.

So, I'm not sure we want-- I mean we always can whip that definition out of the regulations and put it in the statute, and that's one solution to the problem. But in some of these definitions, I think we might want to have more administrative flexibility: Put the regulations out there as we work through them. If people have problems with it, it's easier for us to change a regulation than a statute -- sometimes. Sometimes, I think it's easier for you to change a

statute than for us to change a regulation. But, it's that recognition that we are trying to do some things. We put some things out in regulation that are needed to help expedite the process. I'm not sure we need a definition in the statute.

The only other issue that we have on Section 13, and it's a minor point that we'd like to discuss, is the 30-day requirement. Thirty days goes by very, very quickly. The other requirement that respond to a negative declaration is 45 days. We're certainly capable of doing that. That's what we set up all of our negative declarations on. Again, administratively it would be simpler for us to respond in 45 days to all negative declarations rather than having them set out and separately categorized, a separate group of negative declarations to handle in 30 days.

SENATOR McNAMARA: Jorge?

DR. BERKOWITZ: Jorge Berkowitz, CIC. I'd like to agree with Bill that in some cases it doesn't really matter the number of areas of environmental concern, whether it's one or two or ten. Really the concept of de minimus isn't the number of areas of environmental concern. It's the real mass of contaminants that's a source of concern. And I think the Department has got to wrestle with the mass of contaminants rather than the numbers of areas of environmental concern, and that should be your threshold. Concentration is not relevant when you're talking about environmental impact. It's only an indication of total mass, and it's really the mass that's there that can potentially cause you the problem. So, we'd like to see the Department hone their definition of de minimus, and perhaps come up and address the area of total mass in a particular area.

SENATOR McNAMARA: Lance?

ASSISTANT COMMISSIONER MILLER: It establishes a two-part test. I'm not wedded to two areas of concern. I'm not even sure how the staff arrived at that number.

SENATOR McNAMARA: We did it the way sometime we figured you'd come up with your regs-- (laughter)

ASSISTANT COMMISSIONER MILLER: The best professional judgment, of course. (laughter)

Yes, I recognize that, and you have a very professional staff. And it's a good number.

Did I get out of that one okay? (laughter)

SENATOR McNAMARA: Fantastic. Fantastic.

ASSISTANT COMMISSIONER MILLER: You know, maybe the best number is three. Maybe it's four. Maybe there's other wordage, but the other aspect of it is the six months, and that's where you get into the mass, because if you have a large concentration -- a large mass of contamination -- you're not going to be able to address that in six months. So, you're looking at a few areas of limited contamination. You know, if it's three, I can see the Department saying, "No, no, no. Two is the right number." You know, we're willing to defer to other people's best judgment in that area. Six months is also a very important--

UNIDENTIFIED MEMBER OF PANEL: Twelve. (laughter)

ASSISTANT COMMISSIONER MILLER: No, I don't think you could do 12 areas in six months. You've got to show me an example of that first.

SENATOR McNAMARA: Do you concur-- Is it Ed? I'm sorry. Bill?

MR. SULLIVAN: Well, again, I think Jorge is correct in saying that the number of the areas of concern is not relevant, so I don't know if the Department goes to three or four. I don't think that's really solving the problem.

To some extent, saying that the amount of cleanup that can be resolved in six months might be okay, but it's sort of a back ended approach to figuring out how much environmental contamination there is. I mean, if the applicant comes in and invests tons of money and resources, and spends a lot of money

and gets the whole site cleaned up, well, that's a good thing and obviously they've met the six-month requirement. But it doesn't really address the question of minimal environmental concern. I mean, I think you need to make that determination based on the contamination conditions at the site, not necessarily how fast they can clean them up.

SENATOR McNAMARA: Section 19, provides for DEPE audit of SIC codes and exempts from ECRA applicability those businesses that pose little environmental risk once the site of their business has been reviewed once under ECRA or similar program.

Mr. Hogan.

MR. HOGAN: We like it. They've done it before. It's good for them to do it again.

MR. COHEN: As long as it doesn't take away from the review of the cases, I'm all in favor of it.

MR. CONWAY: Agreed.

ASSISTANT COMMISSIONER MILLER: Um. (laughter)

SENATOR McNAMARA: I knew it, Lance. The first three had to run into a problem with number four.

ASSISTANT COMMISSIONER MILLER: If it was what we've done before, I wouldn't have a problem, because that we've done. What this requires is something different, though. This is saying that for us to audit the ECRA SIC subject facilities to identify those industries which under normal operations are not expected to cause contamination. That's different, all right? That's getting into the actual operations of those facilities. We're going to have to do a whole different review, because now we're looking at what they actually do.

What we've done in the past is go through and identify SIC codes and then look to say, "Have any of those resulted in cleanups?" or, "What portion of those had to go to cleanups versus negative declarations?" This comes back, again, to the issue of past use. You can have a facility that under normal

operations is not causing a problem, but 15 years in the past there was somebody there that didn't operate within what are today the best business practices, and they dumped things in the septic system, or they dumped in the back, and the site is heavily contaminated -- not because of current operations but because of past operations.

SENATOR McNAMARA: Does this Section apply just to sites that already have been through ECRA once?

ASSISTANT COMMISSIONER MILLER: Okay, the once-through provision does. Absolutely. Yes. The reading of it is that-- I thought the audit was for all. If it's only for those that have been through once, then I withdraw my-- If that's the intent--

SENATOR McNAMARA: Maybe it's not clear, Lance, but that's the intent. Work on the language.

ASSISTANT COMMISSIONER MILLER: Okay, so it would only apply to facilities that are once through.

SENATOR McNAMARA: That once went through--

ASSISTANT COMMISSIONER MILLER: Then, yes. Absolutely. Also, once somebody's been through and they're no longer a problem, yes, then we can exempt those out.

Okay, I'm sorry. I apologize. We'll look at it again if that's not clear and try to propose clarifying language, but we fully support that concept.

SENATOR McNAMARA: Bill?

MR. SULLIVAN: As clarified.

SENATOR McNAMARA: Jorge?

DR. BERKOWITZ: No problem.

SENATOR McNAMARA: Are there any other comments? Yes.

ASSEMBLYMAN SMITH: Mr. Chairman, I have a couple of questions if they're appropriate, to finish the agenda.

SENATOR McNAMARA: Absolutely.

ASSEMBLYMAN SMITH: Section 29, appropriates $100 million which, in anybody's opinion is pretty serious money.

And I have this Discharge Bond Act of 1986. That money is appropriated to the New Jersey Economic Development Authority for deposit for the special remediation fund. What is it that the $100 million was originally intended to do? What would be the impact of reappropriating the money to some new--

SENATOR McNAMARA: Assemblyman Smith, it might be more appropriate to bring it up on the day that we're having a special hearing on that particular issue. That's on October 5. We have another meeting scheduled, and that particular issue is the focus of that meeting.

ASSEMBLYMAN SMITH: I didn't know that. On the agenda was other relevant topics, so I thought it was appropriate to bring that up.

Other question: This is not with regard to the appropriation, but to the people eligible to receive the money. Is that something you want me to hold, as well?

SENATOR McNAMARA: I would prefer it if you would hold it till that meeting, because I think that those that will be testifying at the meeting, and have an interest, will be in attendance. We have a large number of people that have expressed an interest in that particular area of the bill, and were told that today it would not be discussed.

ASSEMBLYMAN SMITH: Save the question, Mr. Chairman.

SENATOR McNAMARA: Thank you very much.

Yes?

MR. CONWAY: There is a problem that is not dealt with in the bill, at all. That's access. We have confirmed the decision of the Court, that under ECRA, industrial establishments can be compelled to deal with off site migration contamination. I think the experience is that's a lot easier said than it is done. One of the major stumbling blocks is arranging for access on neighboring pieces of property to accomplish that.

I think a lot of people are struggling with how to accomplish that, and it might be helpful if the legislation gave some assistance in doing so. I believe in the NAIOP suggestions we had given to the staff, there was some suggested language that would empower the Department to authorize access on adjacent neighboring pieces of property.

SENATOR McNAMARA: I would also welcome from any other members of the panel any suggested language, because that is something that we have been wrestling with getting. I might add that whether the Supreme Court had gone that way or not, it was my feeling that the initial rough draft of the bill that we did, included that if there was contamination by migration from a property that it was the responsibility of that property owner to clean it up. So, the Supreme Court only confirmed what I thought was a common sense answer to a rather serious question.

MR. SULLIVAN: Mr. Chairman, if I could just add on that point? I think there's one perspective on that that should be understood. Of course we're in support of requiring off site cleanup. There is a problem with access, and the examples that I think he's referring to are primarily business to business. There have been those situations-- I'm aware of one example in particular, in Bloomfield, where the migration went off site onto a residential property. There was a conflict essentially between the residences and the remediator because they didn't feel it was being done properly. So, bear in mind as you're drafting the language of that section, that we don't want to provide access to such an extreme that we're essentially forcing the off site people on the adjacent property to accept a remedial action which is not acceptable to them in terms of health and safety.

In this particular case, the remediation was not being done properly, and the neighbors nearby were essentially evicted from their property. Their whole yard was dug up, and

there was additional exposure as a result of a badly done remedial action. So, I'm just suggesting that you provide the access that's necessary, but also provide some ability for the offsite people to comment on it and have participation in the remedy that's selected.

SENATOR McNAMARA: Jorge?

DR. BERKOWITZ: Jorge Berkowitz, CIC. Two quick points relative to off site remediation. CIC's position is that we have no problems with off site remediation as long as that problem was caused by the current owner who's being asked to remediate the problem.

Secondly, we think it may be important to have an appeals board; an appeals board that's in and of the Department without triggering the formal appeal regulatory process -- the administrative process. There's going to be a lot of judgments here, particularly relative to certification: when certification's accurate, when it's complete, who did what to whom, and so forth. We think it would be a nice feature to have an appeals board that's constituted by the Commissioner or by the Legislature -- within the Department but not of the Department -- that can resolve these things before it triggers a formal appeal.

SENATOR McNAMARA: Any other comments?

ASSEMBLYMAN SMITH: One other suggestion, Mr. Chairman, if I might? I have to leave the meeting to attend two other meetings today, but I didn't hear while I was here, any discussion of the success of ECRA in terms of cleaning up the State of New Jersey. I assume that that did not happen. I respectfully ask that Mr. Miller provide for the public record, a summary of the successes of ECRA so that the record is balanced.

SENATOR McNAMARA: I think that, Assemblyman Smith, quite frankly, the position of the Committees -- the Joint Committees -- is a testimony to the success of ECRA.

Otherwise, we would have gone along with the recommendation of some that are rather radical and like to throw out the baby with the bath water. We do recognize and have -- and I believe even those testifying today -- did acknowledge--

ASSEMBLYMAN SMITH: Grudgingly.

SENATOR McNAMARA: Absolutely. Absolutely. You don't think they would be running forward and cheering. But we all recognize that the State of New Jersey, even though there were a number of hardships suffered in the evolution of what we have today, the State still benefited; so did the citizens. But I'm sure that Lance could accommodate your wishes.

ASSISTANT COMMISSIONER MILLER: I can provide some statistics.

ASSEMBLYMAN SMITH: I would suggest that you send a formal summary to the people with the public record so that it will be attached to the public record. One hundred years from now when people look back at Senator McNamara's work and Assemblyman Rooney's work, we want to make sure there's a balanced record to review.

SENATOR McNAMARA: Assemblyman, that's work, too. (laughter)

ASSISTANT COMMISSIONER MILLER: That's fine. I will do so, through the Chair. Then I could provide the most up-to-date--

ASSEMBLYMAN SMITH: Perhaps you could give us the 30-second summary?

ASSISTANT COMMISSIONER MILLER: The 30-second summary as of December 31 is what I happen to have in my package. The total number of cleanups in progress and cleanups completed number over 1900 at that time.

ASSEMBLYMAN SMITH: Completed?

ASSISTANT COMMISSIONER MILLER: Completed or in progress, with 1500 completed, with the expenditure of $540 million.

ASSEMBLYMAN SMITH: Private party moneys?

ASSISTANT COMMISSIONER MILLER: Private party moneys every time.

ASSEMBLYMAN SMITH: And if the State had to pay for it and had a bond for it, what would that $540 million represent?

ASSISTANT COMMISSIONER MILLER: More than $540 million.

ASSEMBLYMAN SMITH: Probably one billion-and-a-half dollars. You pay twice as much back in interest. So, you've saved the taxpayers one billion-and-a-half dollars. Is that a fair statement?

ASSISTANT COMMISSIONER MILLER: The ECRA program has.

ASSEMBLYMAN SMITH: Not you personally. (laughter)

SENATOR McNAMARA: The way the State does some things it might have saved the State $3 billion.

ASSISTANT COMMISSIONER MILLER: Just think of all the litigation costs it would have saved.

SENATOR McNAMARA: $5 billion. (laughter)

SENATOR RICE: Mr. Chairman, I suspect when we're finished not only will we save the State dollars, we'll put a lot of people back to work, particularly in my District because I know where the cleanups have been. I also know who got the jobs out to clean up, and if you look at the unemployment lists, the State-- Every time they say they're doing better, it looks like I see them doing worse. So, when we finish here, we're going to save $540 million, and look at all those poor people coming back to work. And that's great.

SENATOR McNAMARA: If there's no other comments, I'll adjourn the hearing.

Thank you, very, very much. By the way, I really want to specifically mention that our OLS staff -- from the Assembly, I guess it's Kevil Duhon, the Senate, Ray Cantor and Judy Horowitz -- have put an abnormal amount of time on this particular project, and the partisan staff, Republican Assembly, Judy Jengo, Joe Devaney from the Democrats, Frieda

Phillips from the Senate, and Mark Smith. I want to thank all of them as well, because they have been working many, many, long hours with many of the same people that are before us today. Thank you very much.

(MEETING CONCLUDED)

APPENDIX

Submitted by KC

DRAFT ECRA LANGUAGE 9/21/92 - KHM

New definition - "Closing operations" shall mean:

(1) the complete closure of all operations of an industrial establishment for a period of two years, or more, by (a) voluntary act of the owner or operator thereof or (b) by a final judgment of a court of competent jurisdiction or regulatory authority, unless such judgment is duly stayed and appealed from; or

(2) the operations of the industrial establishment change so that its Standard Industrial Classification Number is one no longer subject to this Act.

(3) The post-closure continuation of normal caretaking operations at an industrial establishment otherwise closed shall not serve to prevent it from being deemed closed or terminated pursuant to this section.

Comment:

The current wording of the statute and regulations make it difficult to determine when a closure has occurred. This should not be a snare for the unwary (since, under current regulations, one can have a technical closure in circumstances where the industrial establishment remains in operation insofar as any lay person or non-ECRA attorney can understand) nor (and this is the DEPE's point) should people be allowed to close a facility in actuality while leaving enough on the site to keep it "open" under ECRA, such as usage of watchmen or the like.

New definition - "Transferring ownership or operations" shall mean:

(a) an event in which the owner or operator of an industrial establishment, if a corporation, (1) merges into or consolidates with another corporation within the meaning of 14A:10-1, 14A:10-2 or 14A:10-7;1 or (2) sells or otherwise disposes all or substantially all of the corporation's assets other than in the regular course of its business, within the meaning of 14A:10-11, except that no lease of such assets shall render this act applicable unless such lease is for a period of 99 years or more, or (3) dissolve, within the meaning of 14A:12-1; or (4) an amount of its shares of outstanding stock shall be sold, in a single transaction, sufficient to entitle the holder thereof at the time to elect a majority of the corporation's directors, without regard to voting power which may thereafter exist upon a default, failure or other contingency.

(b) an event in which the owner or operator of an industrial establishment, if a

limited partnership,

(1) dissolves, within the meaning of 42:2A-51;

(2) sells or otherwise disposes of all or substantially all of the limited partnership's assets other than in the regular course of its business; or

(3) all of the partnership interests in such limited partnership are assigned to a person or persons not a partner immediately before the sale or other disposition.

(c) an event in which the owner or operator of an industrial establishment, if a general partnership,

(1) dissolves, pursuant to or within the meaning of 42:1-29, 31, or 32;

(2) sells or otherwise disposes of all or substantially all of the general partnership's assets other than in the regular course of its business; or

(3) all of the partnership interests in such general partnership are assigned to a person or persons not a partner immediately before the sale or other disposition.

(d) an event in which the owner or operator of an industrial establishment, if a proprietorship of a natural person,

(1) shall sell all or substantially all of the assets of the proprietorship other than the regular course of business; or

(2) the proprietor shall sell or otherwise dispose of his or her interest in the industrial establishment.

Notwithstanding anything to the contrary herein contained, no transaction described below shall be deemed a "transferring of ownership or operations" by an owner or operator of an industrial establishment for purposes of this act:

(1) Transactions, including, without limitation, mergers, consolidations, or sales or transfers of stock or assets, (a) between or among subsidiaries or (b) between a subsidiary or subsidiaries and the domestic or foreign corporation who directly or indirectly owns an amount of such subsidiary or subsidiaries' outstanding shares sufficient to entitle the holder thereof at the time to elect a majority of its

directors without regard to voting power which may thereafter exist upon a default, failure or other contingency.

(2) Transactions between existing shareholders of a corporation having 25 or less shareholders immediately prior to such transaction; or

(3) Transfers to or from a trust;

(4) Transactions, including transfers or assignments of partnership interest or assets, between partners in a limited or general partnership who were partners therein immediately prior to such transactions;

(5) Transfers of assets between members of the same family;

(6) Any other corporate reorganization not substantially affecting ownership.

(7) Transfers by testate or intestate succession.

(8) Any transaction which would not result in a diminution of more than ten percent between (i) the net worth of the industrial establishment or, depending upon which is involved in the transaction, its owner or operator, immediately before the proposed transaction is to occur and (ii) the net worth of the industrial establishment or, depending upon which is involved in the transaction, its owner or operator, immediately after the proposed transaction is to occur. In determining whether such a diminution has occurred, the DEPE shall accept, as proof of net worth pursuant to the preceding, either (i) the audited financial statements of the industrial establishment, or its owner or operator, as applicable, or (ii) the statement, of the chief executive officer, chief operating officer, or chief financial officer of the industrial establishment, or its owner or operator, as applicable, of the net worth thereof.

Definitions:

"Net Worth" means the difference, as the same date, between the gross assets and the gross liabilities of, an industrial establishment, or its owner or operator, as applicable.

"Owner" means a corporation, general or limited partnership, proprietorship or other business entity which is the direct owner, of record of the real property on which the industrial establishment is situated or of the personal property used in its operations, or both. (substitute)

"Operator" shall mean the corporation, partnership, proprietorship, or other business

entity, if different than the owner of an industrial establishment, whose employees, officers, or both, are involved in the day-to-day operation of the industrial establishment on a constant basis and control the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes or the industrial establishment. (substitute)

"Remedial Action": Add at the end: "; provided, however, that the remedial action selected for each site subject hereto shall be that which best compromises the threat of hazardous substances on the site to the public and the economic impact on the site owner or operator, and the public in general, of implementation of the remedial action."

"Subsidiary" means a domestic or foreign corporation the outstanding shares of which are owned directly or indirectly by another domestic or foreign corporation in such number as to entitle the holder at the time to elect a majority of its directors without regard to voting power which may thereafter exist upon a default, failure or other contingency.

Comment:

The foregoing encompasses a simplification of ECRA "triggers" in phraseology that will be immediately understandable by most non-environmental lawyers, accountants, and reasonably sophisticated lay people. It does not have the asset diminution language contained in the present regulation because there is no real need for it; as the current recession has exemplified, assets have a way of fluctuating widely in value or becoming unsalable. ECRA's concerns with a shell game of subsidiaries is answered by a better definition of the term "operator" which follows the teaching of the Appellate Division decision in *In Re N.J.A.C. 7:26B, 250 N.J. Super 189 (App. Div. 1991) at 211.* There the Court said that ECRA liability could be conferred upon "indirect owners" under *Ventron.*

The foregoing tracks current corporate and partnership law in other ways. For example, it contains an exemption for "closely held" corporations which are largely thought to include companies with 25 or less shareholders *(14A:12-7)* and includes verbatim the New Jersey Business Corporation Act's definition of subsidiary.

Section 16 - The last sentence in Section 16 should be deleted *in toto.*

Section 34 bars the "sunset" of existing ECRA regulations. This is probably a bad idea, since virtually all of the applicability regulations have been either stricken or remanded with no substitute. The Department has succeeded in getting an extension of the Appellate Division's time to complete rulemaking until October 19. The DEPE appears to be hoping that the statute will clarify ECRA's applicability and, thereby, do away with the need for any

applicability regulations. In any event, I think that Section 34 should be deleted and the following substituted in its stead as a "savings" clause:

"34.(a) No person or transaction previously exempt from this act or as to which this act has been determined to be inapplicable by the DEPE shall be deemed hereafter to be subject to this act by reason of any of the provisions hereof." No Industrial Establishment, or portion thereof, which has been investigated, remediated, or both, pursuant to the provisions of (a) this act or (b) any other state or federal environmental law, rule, or regulation, shall be subject to the provisions of this act, except to the extent of operations conducted after such investigation or remediation."

(b) The DEPE shall promulgate no regulations with regard to the applicability of this act. Any dispute or question with regard to the applicability of this act shall be resolved in an action before the Superior Court, which shall have jurisdiction thereof, as a summary proceeding pursuant to *R. 4:67.*

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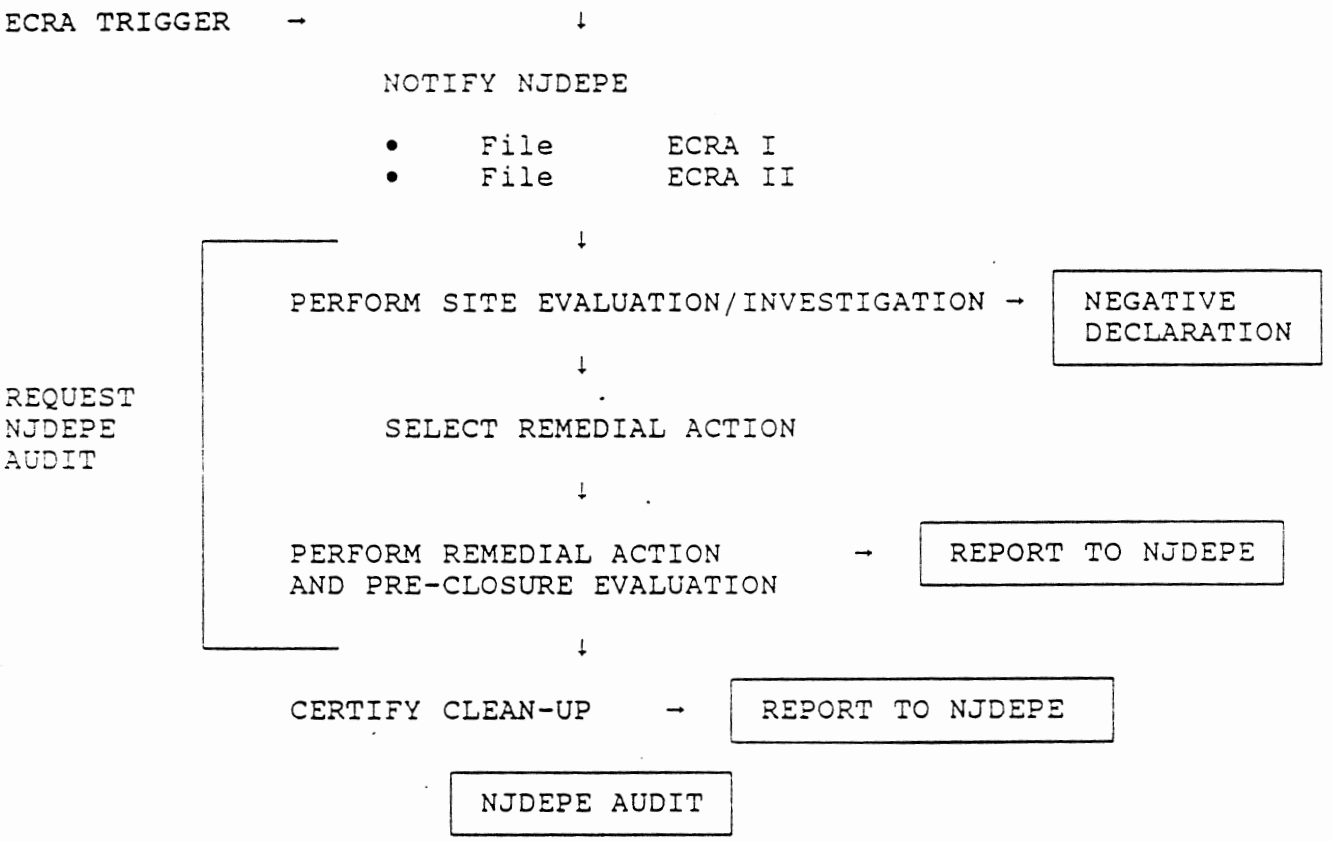
Submitted by DC

NJDEPE PROMULGATES DETAILED PROCEDURES

DESCRIBING ECRA TECHNICAL STANDARDS FOR

SITE INVESTIGATION, REMEDIATION, CLOSURE



Key Concepts

- No NJDEPE Approvals
- Audits at the request of the private party at any point
- Mandatory Closure Audit
- Detailed Technical Standards Permitted by NJDEPE

NEW JERSEY STATE
CHAMBER OF COMMERCE
ONE STATE STREET SQUARE
50 WEST STATE STREET - SUITE 1110
TRENTON, NEW JERSEY 08608

Statement of the New Jersey State Chamber of Commerce

on S-1070 & A-1727

Before the Senate Environment Committee &

the Assembly Energy and Hazardous Waste Committee

September 21, 1992

By Ronald B. Johnson
Manager
Governmental Relations

The New Jersey State Chamber of Commerce applauds the Senate Environment Committee and the Assembly Energy and Hazardous Waste Committee for holding today's hearing on ECRA reform. ECRA reform has remained a top priority of the State Chamber for many years. The State Chamber commends the sponsors of the legislation for not just focusing on ECRA, but instead, exploring ways to make all of the state's hazardous discharge remediation programs more efficient.

The State Chamber supports the original intent of the ECRA Law that industrial sites, when purchased, be "environmentally clean." Liability for site cleanup was indeed too risky to allow potential purchasers to gamble on the environmental quality of a new site. We believe ECRA can be an effective insurance policy against that risk.

As we are all aware, however, the administration of the ECRA program has not allowed the mass clean-ups of industrial sites in New Jersey. The Chamber argues that the reverse has occurred. ECRA remains a major impediment to economic development in New Jersey; especially in the State's urban centers.

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Business and property owners, financial institutions and local governments have been living this bureaucratic nightmare since 1983. As a result, sites do not get cleaned up and vital economic development is stifled.

The State Chamber commends the sponsors of this legislation for attempting to settle the age-old question, "How clean is clean?" The State Chamber supports the adoption of cleanup standards for all site remediation activities performed pursuant to the State's environmental laws. The State Chamber is especially supportive of the provisions to allow differential standards for sites and that those standards be based on exposure risk. The State Chamber looks forward to more debate on this particular issue so that science and public policy can meld to form better environmental laws for New Jersey.

The State Chamber of Commerce is pleased to offer these comments to the committees today and will provide more detailed comments at future committee meetings.

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IN REPLY PLEASE REFER
TO FILE NO.

September 21, 1992

The Honorable Henry P. McNamara
New Jersey State Senate
Senate Environment Committee
State House
Trenton, NJ

Re: Senate Bill No. S-1070

Dear Senator McNamara:

We are writing to you on behalf of our client Amax of Carteret, New Jersey relative to Senate Bill No. 1070 which you have sponsored. Amax supports your efforts to reform the Environmental Clean-up Responsibility Act and more specifically the changes proposed to that Act in your bill. After careful review of that Bill we offer for your consideration and the consideration of the other members of the Senate Environment Committee two amendments which we believe will help clarify the standards and improve the Department of Environmental Protection and Energy's efficiency in remediating contaminated sites by assuring the equivalency of the clean-up standards applied from one program area to another.

Amax, like other property owners in New Jersey, is voluntarily cleaning-up a site in this State pursuant to an oversight document, i.e. Administrative Consent Order, approved by the Department of Environmental Protection and Energy (the "Department"). Amax is remediating specific contaminates at the site to levels established by the Department on a case-by-case basis. It would be inequitable to require Amax or any other company who voluntarily remediates its site in good faith based upon an existing program implemented pursuant to an Administrative Consent Order or other oversight document with the Department to subsequently have to conduct further remediation in order to comply with different minimum clean-up standards established by the Department at a future date. The

two amendments that we propose for consideration are indicated in bold face type on pages 5 and 37 of S-1070, copies of which are enclosed.

Your consideration in this matter is greatly appreciated.

Respectfully yours,

FRANK X. McDERMOTT

FXM/mjf

cc: Hon. Randy Corman (w/enc.)
Hon. C. Louis Bassano (w/enc.)
Hon. Jack Sinagra (w/enc.)
Hon. John H. Adler (w/ecn.)
Hon. Ronald L. Rice (w/enc.)

"No further action letter" means a written determination by the department that based upon an evaluation of the historical use of the industrial establishment and the property, and any other investigation or action the department deems necessary, there are no discharged hazardous substances or hazardous wastes present at the site of the industrial establishment, at any other site to which a hazardous discharge originating at the industrial establishment has migrated, or that any discharged hazardous substances or hazardous wastes present at the industrial establishment or that have migrated from the industrial establishment are below the applicable cleanup standards;

"Indirect owner" means a corporation that owns any subsidiary that owns or operates an industrial establishment;

"Direct owner or operator" means a corporation that directly owns or operates an industrial establishment;

"Area of concern" means any existing or former location where hazardous substances or hazardous wastes are or were known or suspected to have been discharged, generated, manufactured, refined, transported, stored, handled, treated, disposed, or where hazardous substances or hazardous wastes have or may have migrated;

"Cleanup standards" means the combination of numeric and narrative standards to which hazardous substances or hazardous waste must be cleaned up as established by the department pursuant to section 30 of P.L. , c. (C.)(now before the Legislature as this bill);

"Feasibility study" means a study to develop and evaluate options for remedial action using data gathered during the remedial investigation to develop possible remedial action alternatives, to evaluate those alternatives and create a list of feasible alternatives, and to analyze the engineering, scientific, institutional, human health, environmental, and cost of each selected alternative;

"Owner" means any person who owns the real property of an industrial establishment or who owns the industrial establishment;

"Operator" means any person, including users, tenants, occupants, or trespassers, having and exercising direct actual control of the operations of an industrial establishment;

"OVERSIGHT DOCUMENT" MEANS ANY DOCUMENT THE DEPARTMENT ISSUES TO DEFINE THE ROLE OF A PERSON CONDUCTING THE REMEDIATION OF A CONTAMINATED SITE, AND MAY INCLUDE, WITHOUT LIMITATION, AN ADMINISTRATIVE ORDER, ADMINISTRATIVE CONSENT ORDER, DIRECTIVE, MEMORANDUM OF UNDERSTANDING, OR MEMORANDUM OF AGREEMENT.

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seq.), the "Water Pollution Control Act," P.L. 1977, c.74 (C.58:10A-1 et seq.), P.L. 1986, c.102 (C.58:10A-21 et seq.), the "Environmental Cleanup Responsibility Act," P.L. 1983, c.330 (C.13:1K-6 et seq.), the "Solid Waste Management Act," P.L. 1970, c.39 (C.13:1E-1 et seq.), the "Comprehensive Regulated Medical Waste Management Act," P.L. 1989, c.34 (C.13:1E-48.1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L. 1981, c.279 (C.13:1E-49 et seq.), the "Sanitary Landfill Facility Closure and Contingency Fund Act," P.L. 1981, c.306 (C.13:1E-100 et seq.), the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," P.L. 1987, c.333 (C.13:1E-177 et seq.), or any other law or regulation by which the State may compel a person to perform remediation activities on contaminated property.

The cleanup standards shall be developed to ensure that the potential for harm to public health and safety and to the continued viability of special ecological receptors is minimized to the maximum extent practicable, taking into consideration the location, surroundings, the intended use of the property, the potential exposure to the discharge, and the surrounding ambient conditions, whether naturally occurring or man made. Until the minimum standards described herein are adopted, the department shall establish cleanup standards for contaminants at a site on a case by case basis.

ACCORDINGLY, ALL REMEDIATIONS OF INDUSTRIAL ESTABLISHMENTS BEING PERFORMED PURSUANT TO AN EXISTING PROGRAM REGULATION OR OVERSIGHT DOCUMENT EQUIVALENT TO THE PROVISIONS OF P.L. 1983, c.330 WHICH HAS BEEN APPROVED BY THE DEPARTMENT ON OR BEFORE THE EFFECTIVE DATE HEREOF SHALL NOT BE SUBJECT TO ANY MINIMUM CLEANUP STANDARDS ADOPTED AFTER THE EFFECTIVE DATE HEREOF.

The department shall not propose or adopt cleanup standards protective of special ecological receptors pursuant to this subsection until two years following the effective date of this act or until recommendations are made by the Ecology Advisory Task Force pursuant to section 31 of P.L. , as (C.)(now before the Legislature as this bill).

b. The Department of Environmental Protection may provide for differential cleanup standards pursuant to subsection a. of this section based upon the intended use of a property or an area of a property. The department may not, however, as a condition of allowing a differential cleanup standard based on intended use, require the owner of that property to restrict the use of that property through the filing of a deed covenant, condition, or other similar restriction. Where the department provides for a differential cleanup standard based on the intended use of the property, it shall, as a condition of permitting a remediation to occur that would leave contamination at the property at levels or concentrations above the most protective standards established by the department:

(1) require the owner or operator, discharger, person in any way responsible, or other relevant person, to take any remedial action reasonably necessary to prevent exposure to the contaminants, to maintain, as necessary,

State of New Jersey
Department of Environmental Protection and Energy
Site Remediation Program
CN 028
Trenton, NJ 08625-0028
Tel. # 609-292-1250
Fax. # 609-633-2360

Scott A. Weiner
Commissioner

Lance R. Miller
Assistant Commissioner

October 5, 1992

Dear Chairman McNamara and Chairman Rooney:

At the request of Assemblyman Smith, I am enclosing a summary of the Environmental Cleanup Responsibility Act (ECRA) total program accomplishments for the record.

I hope that you will find this information interesting and informative.

Sincerely,

Lance R. Miller

c: Senator Corman
Senator Adler
Senator Bassano
Senator Rice
Senator Sinagra
Assemblyman Oros
Assemblyman Albohn
Assemblyman Impreveduto
Assemblyman Russo
Assemblyman R. Smith
Assemblywoman Wright

13X

TOTAL PROGRAM
ACCOMPLISHMENTS

- 8,194 Applications Filed
- 5,690 Negative Declarations Approved
- 857 Cleanup Plans Approved
- 475 Completed - $89.4 Million to Complete
- 379 In Progress - Estimated $443.6 Million to Complete
- 1,288 Completed "At Peril" Cleanups - $58.7 Million to Complete
- 1,395 Administrative Consent Orders - $642.8 Million in Financial Assurance
- 35,175 Letters of Non-Applicability Issued

ECRA - 6/30/92