

CHAPTER 26B

ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT RULES

Authority

N.J.S.A. 13:1D-1 et seq., 13:1K-6 et seq., specifically N.J.S.A. 13:1K-10, and 58:10-23.11 et seq.

Source and Effective Date

R.1992 d.497, effective November 18, 1992.
See: 24 N.J.R. 2773(b), 24 N.J.R. 4524(a).

Executive Order No. 66(1978) Expiration Date

Chapter 26B, Environmental Cleanup Responsibility Act Rules, expires on November 18, 1997.

Chapter Historical Note

Chapter 26B, Environmental Cleanup Responsibility Act Rules, was originally adopted as R.1987 d.528, effective December 21, 1987 (operative January 1, 1988). See: 19 N.J.R. 681(a), 19 N.J.R. 2435(a). Pursuant to Executive Order No. 66(1978) Chapter 26B was readopted as R.1992 d.497, effective November 18, 1992. See: Source and Effective Date.

Law Review and Journal Commentaries

Overturing Environmental Regulations: A Primer on Breaching the Regulatory Walls. John A. McKinney, Jr., J. Wylie Donald, 160 N.J.Law. 48 (Mag.) (April 1994).

New Growth in Old Ground. Bernard A. Weintraub, 147 N.J.L.J. 761 No. 7, S-1 (1997).

Proving Bad Faith in Environmental Coverage Actions. Patrick Nucciarone, Jeffrey A. Cohen, Alexa Richman-La Londe, 149 N.J.L.J. 468 (1997).

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ACT

SUBCHAPTER 1. GENERAL PROVISIONS

7:26B-1.1 Scope and authority

This chapter constitutes the rules governing the implementation of the Environmental Cleanup Responsibility Act, P.L. 1983 c.330 (N.J.S.A. 13:1K-6 et seq.). The provisions of any law, rule or regulation to the contrary notwithstanding, the closing, terminating, or transferring of operations of an industrial establishment is subject to the provisions of this chapter and the Act.

7:26B-1.2 Construction

This chapter shall be liberally construed to allow the Department to implement fully its statutory functions pursuant to the Act.

Case Notes

Leaving materials in unguarded drums was not storage, for purposes of notice and reporting. Matter of Fabritex Mills, Inc., 231 N.J.Super. 224, 555 A.2d 649 (A.D.1989).

Cessation of substantially all operations triggers notice and reporting requirements. Matter of Fabritex Mills, Inc., 231 N.J.Super. 224, 555 A.2d 649 (A.D.1989).

7:26B-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

“ACO” means an Administrative Consent Order.

“Act” or “ECRA” means the Environmental Cleanup Responsibility Act, P.L. 1983, c.330 (N.J.S.A. 13:1K-6 et seq.).

“Agricultural commodity” means any plant or part thereof, or animal or animal product, produced by a person (including farmers, ranchers, vineyardists, plant propagators, Christmas tree growers, aquaculturists, floriculturists, orchardists, foresters, or other comparable persons) primarily for sale, consumption, propagation, or other use by man or animals.

“Authorized agent” means the person authorized to represent the owner or operator, or both, for matters covered by the Act and this chapter except as provided at N.J.A.C. 7:26B-1.13.

“Cessation of all or substantially all the operations” means the cessation of operations that involve the generation, manufacturing, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes, resulting in at least a 90 percent reduction in the total value of the units of product output from the entire industrial establishment. For industrial establishments that have an undefined unit of product output, the following criteria are to be applied:

1. Ninety percent reduction in number of employees; or
2. Ninety percent reduction in area of operations.

“Cleanup plan” means a plan for the cleanup of an industrial establishment and any contamination, including any off-site contamination which has emanated or is emanating from the industrial establishment, approved by the Department pursuant to this chapter, as required at N.J.A.C. 7:26B-5.3, including, but not limited to, a description of the location, types, and quantities of any and all hazardous substances and wastes that will remain at the industrial establishment and those hazardous substances and wastes to be removed; a description of the types, volume, and location of any storage vessels, surface impoundments, or landfills or any other structures, vessels, contrivances, or units containing hazardous substances and wastes; recommendations regarding the most practicable method of cleanup; a reasonable time schedule for cleanup plan implementation; and an accurate and detailed cost estimate to implement the cleanup plan. If the evaluation of an industrial establishment for cleanup purposes necessitates additional information, a cleanup plan may also include, at the discretion of the Department, graphic and narrative descriptions of the geographic, geologic, and hydrogeologic characteristics at the industrial establishment and an evaluation of all residual soil, groundwater, and surface water contamination.

“Closing, terminating, or transferring operations” means any one of the following:

1. The cessation of all or substantially all the operations of an industrial establishment, for a period of not less than two years, which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes;
2. Any changes in operations sufficient to change the primary SIC number of the industrial establishment from an SIC number that is subject to the Act to one that is not subject to the Act;
3. Any judicial proceeding or final agency action through which an industrial establishment becomes non-operational for health or safety reasons;
4. Termination of a leasehold interest at an industrial establishment by the owner or operator of the industrial establishment unless the lease is renewed by the same tenant without a disruption in operations;
5. Except for any corporate reorganization not substantially affecting ownership, any change in ownership of the industrial establishment including, but not limited to, transfer by any means of shares of a corporation which results in a change in the controlling interest in the owner or operator, the sale of stock in the form of a statutory merger or consolidation, sale of the controlling share of the assets, conveyance of the real property, transfer of real property through condemnation proceedings, dissolution of corporate identity, financial reorganization, and liquidation in bankruptcy or insolvency proceedings. See also N.J.A.C. 7:26B-1.5 and N.J.A.C. 7:26B-1.8.

“Compilation” means a presentation of financial information by a certified public accountant, based upon data supplied by the person who is the subject of such information, and presented without independent inquiry into the accuracy of such information by the accountant unless he or she has reason to believe that the data is in error or is incomplete.

“Consolidation” means the combination of two or more corporations into a newly created corporation whereby the two or more constituent corporations are extinguished.

“Controlling interest” means the interest held by the person or persons who own more than 50 percent of the voting stock of a corporation; it also means the interest held by the person or persons who own 50 percent or less of the voting stock of a corporation and who possess, directly or indirectly, the power to direct or cause the direction of the management and policies of a corporation except under the standards set forth at N.J.A.C. 7:26B-1.9.

“Corporate reorganization not substantially affecting ownership” means the restructuring or reincorporation by the

board of directors or the shareholders of a corporation, which, based on the standards in N.J.A.C. 7:26B-1.9, does not diminish the availability of assets for any environmental cleanup, diminish the Department’s ability to reach the assets, or otherwise hinder the owner’s or operator’s ability to clean up the industrial establishment, and where the purpose is merely as set forth in 1 to 3 below. Notwithstanding the reference to N.J.A.C. 7:26B-1.9, this definition does not require a person to submit an application for an applicability determination in order for a transaction or occurrence to qualify as a “corporate reorganization not substantially affecting ownership.”

1. To correct illegalities or defects in the original incorporation;
2. To broaden the scope of the powers of the organization including the amendment as well as extension or revival of charters; or
3. To reorganize for any other reason related financial, administrative or managerial convenience, or for any other legitimate business purpose.

“Department” means the New Jersey Department of Environmental Protection.

“Discharge” means any intentional or unintentional action or omission resulting in the releasing, **spilling, leaking, pumping, pouring, emitting, emptying or dumping** of hazardous substances and wastes into the waters or onto the lands of the State or into waters outside the jurisdiction of the State, when damage may result to the lands, waters, or natural resources within the jurisdiction of the State. The term discharge shall include spills.

“Dissolution of corporate identity” means the termination of the corporation’s corporate existence, except for the purpose of winding up its affairs, including, but not limited to, the ending of the capacity of the corporation to act as such and a liquidation and extinguishment of all legal relations existing with respect to the corporate enterprise.

“GIS” means General Information Submission described at N.J.A.C. 7:26B-3.2.

“Hazardous substances” means any substance defined as such pursuant to the Discharges of Petroleum and Other Hazardous Substances Regulations, N.J.A.C. 7:1E.

“Hazardous substances and wastes” means hazardous substances, hazardous wastes, or both.

“Hazardous waste” means any solid waste designated as hazardous waste pursuant to N.J.A.C. 7:26-8, or as otherwise provided by Federal or State law.

"Industrial establishment" means any place of business or real property at which such business is conducted, having the primary SIC major group number within 22-39 inclusive, 46-49 inclusive, 51 or 76 as designated in, and determined in accordance with, the procedures described in the SIC manual and engaged in operations on or after December 31, 1983, which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes on-site, above or below ground unless otherwise provided at N.J.A.C. 7:26B-1.8. Except as provided below for leased properties, the industrial establishment includes all of the block(s) and lot(s) upon which the business is conducted and those contiguous block(s) and lot(s) controlled by the same owner or operator that are vacant land, or that are used in conjunction with such business. For leased properties, the industrial establishment includes the leasehold and any external tanks, surface impoundments, septic systems, or any other structures, vessels, contrivances, or units that provide, or are utilized for, hazardous substances and wastes to or from the leasehold.

"Initial Notice" means both the completed GIS and the completed SES described at N.J.A.C. 7:26B-3.

"Merger" means the absorption of one corporation by another, the latter retaining its own identity and acquiring the assets, liabilities, franchises and powers of the former, whereby the absorbed corporation ceases to exist as a separate business entity.

"Net worth" means total assets minus total liabilities, other than contingent liabilities for cleanup of the industrial establishment and other compliance with the Act.

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

"Negative declaration" means an affidavit approved by the Department which is executed and certified in accordance with the provisions at N.J.A.C. 7:26B-1.13 stating that there has been no discharge of hazardous substances and wastes on or from the industrial establishment, or that any discharge on or from the industrial establishment has been cleaned up in accordance with procedures approved by the Department, and that there remain no hazardous substances and wastes at the industrial establishment except those that, upon written Department approval, will remain as part of the normal industrial or commercial operation pursuant to any written agreements, lease arrangements, or other contracts as part of the change in ownership or operation. See also N.J.A.C. 7:26B-5.

"Person" means corporations, companies, associations, societies, firms, partnerships, joint stock companies, any state, municipality, commission or political subdivision of any state, any interstate body, and individuals.

"Remedial action" means remedial action as defined in N.J.A.C. 7:26E-1.8.

"Remedial investigation" means remedial investigation as defined in N.J.A.C. 7:26E-1.8.

"Sale or transfer of the controlling share of the assets" means a transfer or sale not in the ordinary course of business, within any five year period since December 31, 1983 by an owner or operator of the industrial establishment, of more than 50 percent of the fair market value during the period of their respective ownership of the assets of the industrial establishment excluding real property. The term does not include a sale or transfer which satisfies these requirements based upon the transferor's demonstration pursuant to N.J.A.C. 7:26B-1.9(b)4. The term does not include the sale or transfer of equipment or machinery in order to replace, modify, or retool existing equipment or machinery.

"SES" means the Site Evaluation Submission described at N.J.A.C. 7:26B-3.2.

"SIC" means Standard Industrial Classification.

"SIC manual" means the most recent edition of the Standard Industrial Classification manual, prepared by the Office of Management and Budget in the Executive Office of the President of the United States.

"Site investigation" means site investigation as defined in N.J.A.C. 7:26E-1.8.

"Small business" means any business which is resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full time employees.

Amended by R.1989 d.403, effective August 7, 1989.
See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Definitions of "cessation of all or substantially all the operations" and "controlling interest" were added; deleted definition of "majority interest" and amended "closing, terminating or transferring operations", "corporate reorganization not substantially affecting ownership", "industrial establishment" and "sale or transfer of the controlling share of the assets".

INVALIDITY ANNOTATION: See 23 N.J.R. 1797(a).

Validity of the definition of "cleanup plan" affected by decision in In re Adoption of N.J.A.C. 7:26B, Dkt. Nos. A-2403-78T1, A-2521-87T1, A-2522-87T1, A-2523-87T1, A-2524-87T1 and A-364-89T3 (App. Div. May 6, 1991).

Amended by R.1993 d.3, effective January 4, 1993.
See: 24 N.J.R. 720(a), 25 N.J.R. 100(a).

"Department" and "hazardous substances" amended; "small business" added.

Amended by R.1993 d.137, effective April 5, 1993 (operative July 19, 1993).

See: 24 N.J.R. 720(a), 25 N.J.R. 1557(a), 25 N.J.R. 3155(b).

Changes made pursuant to In Re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189 (App.Div.1991).

Amended by R.1994 d.99, effective February 22, 1994.
See: 25 N.J.R. 1375(a), 26 N.J.R. 1142(a).

Law Review and Journal Commentaries

A Year's Worth of Lessons Learned about ISRA. Lisa M. Bromberg, Stephen L. Willis, 138 N.J.L.J. No. 8, S15 (1994).

Case Notes

Notice and reporting requirements applied to transaction by which parent corporation was liquidated and there was distribution of its interest in subsidiary, which owned contaminated facility, to shareholders. *Cooper Development Co., Inc. v. First Nat. Bank of Boston*, D.N.J.1991, 762 F.Supp. 1145.

“Owner” included subsidiary corporation owning contaminated real property. *Cooper Development Co., Inc. v. First Nat. Bank of Boston*, D.N.J.1991, 762 F.Supp. 1145.

Transferring “industrial establishment”, real property and plant, is contingent on implementation of Environmental Cleanup Responsibility Act. In re *Heldor Industries, Inc.*, Bkrcty.D.N.J.1991, 131 B.R. 578, motion to vacate denied 139 B.R. 290, reversed 989 F.2d 702.

Bankruptcy sale did not constitute “transfer of an industrial establishment”, could not be voided under Environmental Cleanup Responsibility Act. In re *Heldor Industries, Inc.*, Bkrcty.D.N.J.1991, 131 B.R. 578, motion to vacate denied 139 B.R. 290, reversed 989 F.2d 702.

Provisions attempting to limit bankruptcy were invalid under the Supremacy clause. In re *Torwico Electronics, Inc.*, Bkrcty.D.N.J.1991, 131 B.R. 561, decision reversed in part vacated in part 153 B.R. 24, affirmed 8 F.3d 146, certiorari denied 114 S.Ct. 1576, 128 L.Ed.2d 219.

Owners and operators who have no on-site discharges can not be required to disprove migration of wastes. In re *Adoption of N.J.A.C. 7:26B*, 128 N.J. 442, 608 A.2d 288 (1992).

Limited conveyance rule is valid. In re *Adoption of N.J.A.C. 7:26B*, 128 N.J. 442, 608 A.2d 288 (1992).

“Industrial establishment” includes contiguous parcels and auxiliary facilities. In re *Adoption of N.J.A.C. 7:26B*, 128 N.J. 442, 608 A.2d 288 (1992).

“Industrial establishment” included a place of business which had fuel oil for heating facility. *G & S Investors Frelinghuysen Ave., Inc. v. Aristocrat Leather Products, Inc.*, 256 N.J.Super. 495, 607 A.2d 682 (A.D.1992).

Cleanup responsibilities activated in absence of use of hazardous substances in industrial process. *G & S Investors Frelinghuysen Ave., Inc. v. Aristocrat Leather Products, Inc.*, 256 N.J.Super. 495, 607 A.2d 682 (A.D.1992).

“Corporate reorganization not substantially affecting the ownership of the industrial establishment” was not impermissibly narrowed by regulation. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining “any other transaction or proceeding through which an industrial establishment becomes nonoperational for health or safety reasons” was invalid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining “closing, terminating or transferring operations” was not invalid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining “controlling interest” was not invalid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

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Regulation defining “industrial establishment” was not invalid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining “sale of controlling sale of assets” of industrial establishment was valid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Hazardous substance cleanup regulation requiring plan for remedying contamination on property not owned by operator was invalid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation providing for triggering Environmental Cleanup Responsibility Act was not invalid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining “cessation of operations” to include substantially all was not invalid. In re *Adoption of N.J.A.C. 7:26B*, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

7:26B-1.4 Severability

If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operations to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which such judgment shall have been rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

7:26B-1.5 Applicability

(a) Owners or operators who plan to close, terminate or transfer operations of an industrial establishment shall submit an Initial Notice in accordance with the time requirements set forth at N.J.A.C. 7:26B-1.6.

(b) Unless otherwise provided in this chapter, closing, terminating, or transferring operations includes, but is not limited to, the following events:

1. Sale or transfer of stock in a corporation which directly owns or operates, or indirectly through any of its subsidiaries, owns or operates, an industrial establishment that results in any form of a merger or consolidation, unless the Department determines otherwise pursuant to N.J.A.C. 7:26B-1.9;

2. Sale or transfer of stock in a corporation which results in a change in the person or persons holding the controlling interest of a corporation which directly owns or operates, or indirectly through any of its subsidiaries, owns or operates an industrial establishment, unless the Department determines otherwise pursuant to N.J.A.C. 7:26B-1.9;

3. Sale or transfer of the controlling share of the assets of an industrial establishment, whether in one or several independent transactions, at the same or different times within a five year period, to one person or to different persons, unless the Department determines otherwise pursuant to N.J.A.C. 7:26B-1.9;

4. Sale or transfer of title to an industrial establishment unless otherwise provided at N.J.A.C. 7:26B-13;

5. Sale or transfer of title to any real property of an industrial establishment unless otherwise provided at N.J.A.C. 7:26B-13;

6. Dissolution of a corporation which directly owns or operates, or indirectly through any of its subsidiaries, owns or operates an industrial establishment, unless the Department determines otherwise pursuant to N.J.A.C. 7:26B-1.9;

7. Certain proceedings or events in connection with a receivership action under statutory or common law or bankruptcy proceedings under chapters 7, 11, or 13 of the Federal Bankruptcy Act, 11 U.S.C., §§ 101 et seq., by or against the owner or operator of an industrial establishment, as specified below at N.J.A.C. 7:26B-1.6(a)13 and 14;

8. Condemnation proceedings directed at an industrial establishment unless the transfer is a limited conveyance as provided at N.J.A.C. 7:26B-13;

9. Sale of an industrial establishment or sale or transfer of the controlling share of the assets of the industrial establishment pursuant to a foreclosure;

10. Sale or transfer (other than a sale or transfer satisfying the standards set forth in N.J.A.C. 7:26B-1.9(b)5) of the entire interest of any partner in a general partnership, the entire interest of a general partner in a limited partnership, or the entire interest of a limited partner in a limited partnership liable for the obligations of a limited partnership as provided at N.J.S.A. 42:2-9, 42:2-11, and 42:2A-27, such partnership or limited partnership owning or operating an industrial establishment. Notwithstanding the reference to N.J.A.C. 7:26B-1.9(b)5, this definition does not require that a person submit an application for an applicability determination in order for a transaction or occurrence to satisfy the standards set forth in N.J.A.C. 7:26B-1.9(b)5.

11. Sale or transfer of title to an industrial establishment by exercising an option to purchase;

12. Sale or transfer of title to any real property of an industrial establishment by exercising an option to purchase;

13. Sale, transfer, or termination of a lease which results in the cessation of operations of an industrial establishment;

14. Any judicial proceeding or final agency action through which an industrial establishment becomes non-operational for health or safety reasons;

15. Cessations of all or substantially all the operations at an industrial establishment that is for a period of two years or longer (see N.J.A.C. 7:26B-1.8(a)7);

16. Transfer of an industrial establishment to a trust, except where grantor and beneficiary are identical or members of the same family. As used in this paragraph, "family" means an individual's siblings, spouse, children, grandchildren, parents, and grandparents;

17. Execution of a lease for a period of 99 years or longer; and

18. Any changes in operations sufficient to change the primary SIC number of an industrial establishment from an SIC number that is subject to the Act or this chapter to one that is not subject to the Act or this chapter.

(c) Any industrial establishment which remains under the same ownership as prior to December 31, 1983, and upon or at which remain containers, tanks, surface impoundments, or other types of storage facilities containing hazardous substances and wastes after December 31, 1983 shall be subject to the Act and this chapter upon the closing, terminating, or transferring of operations of the industrial establishment.

Amended by R.1989 d.403, effective August 7, 1989.

See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Reference to N.J.A.C. 7:26B-1.9 added to several paragraphs and at (b)15. Cessation of all or substantially all operations clarified by adding time of two years or more and at (b)14 an incident or event was clarified by examples.

INVALIDITY ANNOTATION: See 23 N.J.R. 1797(a).

Validity of N.J.A.C. 7:26B-1.5(b)10 and 14 affected by decision in In re Adoption of N.J.A.C. 7:26B, Dkt. Nos. A-2403-78T1, A-2521-87T1, A-2522-87T1, A-2523-87T1, A-2524-87T1 and A-364-89T3 (App. Div. May 6, 1991).

Amended by R.1993 d.137, effective April 5, 1993 (operative July 19, 1993).

See: 24 N.J.R. 720(a), 25 N.J.R. 1557(a), 25 N.J.R. 3155(b).

Changes made pursuant to In Re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189 (App.Div.1991).

Case Notes

Notice and reporting requirements applied to transaction by which parent corporation was liquidated and there was distribution of interest in subsidiary, which owned contaminated facility, to shareholders. *Cooper Development Co., Inc. v. First Nat. Bank of Boston*, D.N.J. 1991, 762 F.Supp. 1145.

"Owner" included subsidiary corporation owning contaminated real property. *Cooper Development Co., Inc. v. First Nat. Bank of Boston*, D.N.J. 1991, 762 F.Supp. 1145.

Regulation applying Environmental Cleanup Responsibility Act to partial and full condemnation was valid. In re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation exempting intrafamily transfers of industrial establishments from Environmental Act was valid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining phrase "any other transaction or proceeding through which an industrial establishment becomes nonoperational" was invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation requiring compliance with Environmental Act upon partial condemnation was not invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation triggering Environmental Act upon sale and transfer when partnership owned or operated industrial establishment was invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Environmental regulations did not violate Commerce Clause. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D. 1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulations triggering Environmental Act upon occurrences involving parent corporation were valid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation providing bright-line test for applicability of Environmental Act was valid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining "cessation of operations" to include "substantially all" operations was valid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Leaving materials in unguarded drums did not constitute "storage" under the Environmental Act. Matter of Fabritex Mills, Inc., 231 N.J.Super. 224, 555 A.2d 649 (A.D.1989).

"Cessation of all operations" under Environmental Act means substantially all activities. Matter of Fabritex Mills, Inc., 231 N.J.Super. 224, 555 A.2d 649 (A.D.1989).

7:26B-1.6 Initial Notice triggers

(a) The owner or operator of an industrial establishment shall submit the GIS of the Initial Notice required by N.J.A.C. 7:26B-3 no more than five days subsequent to any of the following events:

1. The signing of an agreement of sale, or the execution of a lease for a period of 99 years or longer, for the industrial establishment or the real property of the industrial establishment;
2. The effective time of corporate dissolution as specified at N.J.S.A. 14A:12-8 or upon the filing of a certificate of dissolution in the office of the Secretary of State, whichever occurs first;

3. Notice of the sale, transfer or termination of any lease involving an industrial establishment or the actual sale, transfer, or termination of any lease involving an industrial establishment, whichever event occurs first;

4. The change in operations sufficient to change the primary SIC number of an industrial establishment from a primary SIC number that is subject to the Act or this chapter to one that is not subject to the Act or this chapter.

5. The exercise of an option to purchase an industrial establishment or the real property of an industrial establishment;

6. The acceptance for payment of the majority of stock of a corporation which directly owns or operates, or indirectly through any of its subsidiaries owns or operates, an industrial establishment pursuant to a tender offer;

7. Merger or consolidation, or the execution of a merger or consolidation agreement, whichever occurs first, by a corporation which directly owns or operates, or indirectly through any of its subsidiaries owns or operates, an industrial establishment;

8. The sale or transfer, or execution of an agreement to sell or transfer, whichever occurs first, of:

- i. Stock resulting in a change in the controlling interest of the industrial establishment;
- ii. The controlling share of assets of an industrial establishment; or
- iii. The entire interest of any partner in a general partnership, the entire interest of a general partner in a limited partnership, or the entire interest of a limited partner in a limited partnership liable for the obligations of a limited partnership as provided at N.J.S.A. 42:2-9, 42:2-11 and 42:2A-27.

9. Receipt by the owner or operator of an offer letter to purchase issued by a condemning authority;

10. The date fixed in a judgment or final agency action (or, if such judgment or final agency action is stayed, the expiration or any stay thereof) entered in a judicial or regulatory proceeding through which the industrial establishment becomes non-operational for health or safety reasons as described at N.J.A.C. 7:26B-1.5(b)14;

11. The public release of the decision to cease all or substantially all operations or upon the cessation of all or substantially all the operations at the industrial establishment, whichever occurs first, except as otherwise provided at N.J.A.C. 7:26B-1.5(b)14;

12. The following proceedings or events in any bankruptcy proceeding:

- i. The entry of an Order for Relief in bankruptcy pursuant to Chapter 7 of the Federal Bankruptcy Code (11 U.S.C. §§ 701 et seq.);

ii. The filing of a plan of liquidation pursuant to Chapter 11 of the Federal Bankruptcy Code (11 U.S.C. §§ 1101 et seq.) or Chapter 13 of the Federal Bankruptcy Code (11 U.S.C. §§ 1301 et seq.); or

iii. Events covered by 1 through 12 above or 14 below; and

13. The appointment by a court of a receiver or liquidating trustee or execution of a deed of assignment for the benefit of creditors, in connection with dissolution (unless the event at (a)2 above has already occurred), liquidation or insolvency proceedings under statutory or common law as to the owner or operator of an industrial establishment.

14. Receipt by the owner or operator of the determination by the Department, that the Act is applicable to an industrial establishment pursuant to N.J.A.C. 7:26B-1.9, when the applicability determination is requested by the owner or operator in accordance with N.J.A.C. 7:26B-1.8(a)7.

(b) The owner or operator required to submit the GIS shall submit the SES as required in N.J.A.C. 7:26B-3.

Amended by R.1989 d.403, effective August 7, 1989.

See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

(a)3. deleted, 4.-14. recodified, new 14. added and at new (a)8., new iii, added.

Amended by R.1993 d.137, effective April 5, 1993 (operative July 19, 1993).

See: 24 N.J.R. 720(a), 25 N.J.R. 1557(a), 25 N.J.R. 3155(b).

Changes made pursuant to In Re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189 (App.Div.1991).

Case Notes

Environmental statute limiting effect of bankruptcy violated supremacy clause. In re Torwico Electronics, Inc., Bkrcty.D.N.J.1991, 131 B.R. 561, decision reversed in part vacated in part 153 B.R. 24, affirmed 8 F.3d 146, certiorari denied 114 S.Ct. 1576, 128 L.Ed.2d 219.

7:26B-1.7 Liability for ECRA compliance

(a) Notwithstanding the provisions of N.J.A.C. 7:26B-3.3 and 7:26B-5.5(d), both the owner and operator of the industrial establishment shall be strictly liable without regard to fault.

Amended by R.1989 d.403, effective August 7, 1989.

See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

(b) deleted as unnecessary to expressly assign responsibility to party initiating hostile takeover.

Case Notes

Motion granted for order authorizing turnover by trustee of collateral which constituted substantially all of debtor's assets and motion (granted) of trustee seeking approval of court for turnover without complying with terms of N.J. ECRA. In Re: Corona Plastics, Inc., 99 B.R. 231 (Bkrcty., D.N.J.1989).

Environmental Act provides for sanctions and is a no-fault statute. Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management, 237 N.J. Super. 359, 568 A.2d 75 (A.D. 1989).

7:26B-1.8 Operations and transactions not subject to ECRA

(a) Operations or transactions not subject to the provisions of this chapter include, but are not limited to, the following:

1. Those portions of solid waste or hazardous waste facilities subject to operational closure or post-closure maintenance requirements pursuant to the following:

i. The Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.;

ii. The Major Hazardous Waste Facilities Siting Act, N.J.S.A. 13:1E-49 et seq., or

iii. The Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq., the Resource Conservation and Recovery Act of 1976, Pub.L. 94-580, and the Hazardous and Solid Waste Amendments of 1984, Pub.L. 98-616;

2. Any office located on a separate tax lot and block from the industrial establishment it serves and engaged in general administrative, personnel, supervisory, accounting, purchasing, engineering and systems planning, advertising, legal, financial sales or other related management functions; provided, this "office" exemption shall not apply where separate lots and blocks are or have been established after December 31, 1983, at the site of an existing industrial establishment;

3. Any business entity engaged primarily in the production or distribution of agricultural commodities;

4. Corporate reorganization not substantially affecting the ownership or control of the industrial establishment;

5. Any individual stock transaction that does not, or series of stock transactions that do not, change the controlling interest in the stock of a corporation that directly owns or operates, or indirectly through any of its subsidiaries owns or operates, an industrial establishment;

6. A sale or transfer of assets of an industrial establishment that is in the ordinary course of business;

7. A cessation, except as provided at N.J.A.C. 7:26B-1.5(b)14, for a period of less than two years of all or substantially all the operations at an industrial establishment. If such cessation will exceed three months, the owner or operator of the industrial establishment may, within five days of the public release of the decision to cease all or substantially all the operations, or upon the cessation, whichever occurs first, request an applicability determination from the Department pursuant to N.J.A.C. 7:26B-1.9.

i. In order to receive a letter of non-applicability, the owner or operator shall demonstrate to the satisfaction of the Department that such cessation will be for a period of less than two years.

- ii. If the owner or operator fails to demonstrate, to the Department's satisfaction, that the cessation will be for a period of less than two years, the Department may deny the letter of non-applicability, and deem the cessation to be a cessation pursuant to N.J.A.C. 7:26B-1.6(a)12.
 - iii. If the owner or operator receives a letter of non-applicability in accordance with this subsection, and thereafter, if the conditions in the affidavit supporting such letter of non-applicability change, the owner or operator shall notify the Department in writing of such changes. If the conditions change so as to render the cessation a cessation for more than two years, the owner or operator shall comply with N.J.A.C. 7:26B-1.6(a) and obtain a negative declaration or a cleanup plan approval.
8. Execution of a lease for a period of less than 99 years;
 9. Transfers made to confirm or correct any deficiencies in the recorded title of an industrial establishment;
 10. Transfers releasing a contingent or reversionary interest;
 11. Retail gasoline stations with a SIC major group number of 55;
 12. Automobile repair and automobile body shops with a SIC major group number of 75;
 13. Agricultural land and associated structures;
 14. Virgin, undeveloped, and unused land provided no industrial establishment has operated or is operating on the site or any portion of the site;
 15. Land on which there has not been an operating industrial establishment on or after December 31, 1983, except as provided at N.J.A.C. 7:26B-1.5(c);
 16. Facilities engaged in the retail sale of fuel oil with a SIC major group number of 59;
 17. Execution of any mortgage, filing of any lien, granting of any security interest, assignment of a lease to secure a loan, or refinancing of any debt not including a sale and lease back, by the owner or operator of an industrial establishment;
 18. Facilities engaged in the retail sale of goods with a SIC major group number of 52-59;
 19. Sale of single and multi-family houses used primarily for residential purposes;
 20. Transfer of an industrial establishment by devise or intestate succession;
 21. Transfer of an industrial establishment where the transferor or the transferee are members of the same family. As used in this paragraph, "family" means a

- person's siblings, spouse, children, grandchildren, parents, and grandparents;
22. Transfer to a beneficiary pursuant to the terms of a trust;
 23. Operations engaged in the wholesale distribution of durable goods with a SIC major group number of 50 including, but not limited to, the following:
 - i. Motor vehicles and automotive parts;
 - ii. Furniture;
 - iii. Lumber;
 - iv. Metals;
 - v. Electrical goods;
 - vi. Sporting goods;
 - vii. Hardware;
 - viii. Machinery; and
 - ix. Jewelry;
 24. Granting or terminating an easement on or a license to any portion of an industrial establishment;
 25. Construction loans obtained by the owner or operator of an industrial establishment;
 26. The termination of a lease of an industrial establishment where the lease is renewed by the same tenant without a disruption in operations; and
 27. A change in SIC number as the result of a change in the SIC manual without a change in the operations of the industrial establishment.

(b) The following subgroups or classes of operations within those sub-groups in the Standard Industrial Classification major group numbers 22-39 inclusive, 46-49 inclusive, 51 or 76 are exempt from the provisions of this chapter:

SIC Industry Number	Description
1. 4724	Travel Agencies
2. 4725	Tour Operators
3. 4729	Arrangement of Passenger Transportation, Not Elsewhere Classified
4. 4731	Arrangement of Transportation of Freight and Cargo
5. 4785	Fixed Facilities and Inspection and Weighing Services for Motor Vehicles (Highway bridges, operation of; Toll bridge operation; Toll roads, operation of; Tunnel operation, vehicular; only)
6. 4812	Radio Communications
7. 4813	Telephone Communications, Except Radio Telephone
8. 4822	Telegraph and Other Message Communications
9. 4832	Radio Broadcasting
10. 4833	Television Broadcasting
11. 4841	Cable and Other Pay Television Services
12. 4899	Communication Services, Not Elsewhere Classified
13. 4941	Water Supply
14. 4952	Sewage Systems
15. 4953	Refuse Systems (Landfills, sanitary: operations of, only)

SIC Industry Number	Description
16. 4971	Irrigation System
17. 5111	Wholesale Distribution of Printing & Writing Paper
18. 5112	Wholesale Distribution of Stationery Supplies
19. 5113	Wholesale Distribution of Industrial & Personal Service Paper
20. 5131	Piece Goods, Notions, and Other Dry Goods
21. 5136	Wholesale Distribution of Men's and Boys' Clothing
22. 5137	Wholesale Distribution of Women's, Children's & Infants' Clothing
23. 5139	Wholesale Distribution of Footwear
24. 5141	Wholesale Distribution of Groceries, General Line
25. 5142	Wholesale Distribution of Frozen Food
26. 5143	Wholesale Distribution of Dairy Products
27. 5144	Wholesale Distribution of Poultry Products
28. 5145	Wholesale Distribution of Confectionery
29. 5146	Wholesale Distribution of Fish
30. 5147	Wholesale Distribution of Meats
31. 5148	Wholesale Distribution of Fresh Fruits and Vegetables
32. 5149	Wholesale Distribution of Groceries and Related Products, Not Elsewhere Classified
33. 5153	Wholesale Distribution of Grain
34. 5154	Wholesale Distribution of Livestock
35. 5159	Wholesale Distribution of Farm Products, Raw Materials, Not Elsewhere Classified
36. 5181	Wholesale Distribution of Beer & Ale
37. 5182	Wholesale Distribution of Wine
38. 5192	Books, Periodicals, and Newspapers
39. 5193	Flowers, Nursery Stock, and Florists' Supplies
40. 5199	Wholesale Distribution of Nondurable Goods, Not Elsewhere Classified
41. 7622	Radio and Television Repair Shops
42. 7631	Watch, Clock & Jewelry Repair
43. 7699	Repair Shops & Related Services, Not Elsewhere Classified (Only the following repair services under 7699 are exempt from the Act and this chapter. All other repair services under 7699 not listed below remain subject to the Act and this chapter):
	i. Awning Repair
	ii. Bicycle Repair Shops
	iii. Binoculars and Other Optical Goods Repair
	iv. Camera Repair
	v. Harness Repair Shops
	vi. Horseshoeing
	vii. Key Duplicating Shops
	viii. Lawn Mower Repair Shop
	ix. Leather Goods Repair Shops
	x. Lock Parts Made to Individual Order
	xi. Locksmith Shops
	xii. Luggage Repair Shops
	xiii. Musical Instrument Repair Shops
	xiv. Organ Tuning & Repair
	xv. Piano Tuning & Repair
	xvi. Picture Framing to Individual Order (Not Connected with Retail Stores)
	xvii. Pocketbook Repair Shops
	xviii. Precision Instrument Repair
	xix. RENEEDLING WORK
	xx. Repair of Optical Instruments

SIC Industry Number	Description
xxi.	Repair of Photographic Equipment
xxii.	Repair of Speedometers
xxiii.	Rug Repair Shops (Not Combined with Cleaning)
xxiv.	Saddlery Repair Shops
xxv.	Scale Service Repair
xxvi.	Sewing Machine Repair
xxvii.	Tent Repair Shops
xxviii.	Tuning of Pianos & Organs
xxix.	Typewriter Repair (Including Electric)
xxx.	Venetian Blind Repair Shops
xxxi.	Window Shade Repair Shops

Amended by R.1989 d.403, effective August 7, 1989.

See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Reference to "majority" changed to "controlling" interest, procedures for applicability determinations set out at (a)7. for cessation of operation for period greater than three months but less than two years. Amended by R.1993 d.137, effective April 5, 1993 (operative July 19, 1993).

See: 24 N.J.R. 720(a), 25 N.J.R. 1557(a), 25 N.J.R. 3155(b).

Changes made pursuant to In Re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189 (App.Div.1991).

Case Notes

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Regulation exempting certain intrafamily transfers from Environmental Act was not invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Detinning plant was not subject to Solid Waste Management Act. Matter of Vulcan Materials Co., ECRA Case No. 84379, 225 N.J. Super. 212, 542 A.2d 25 (A.D.1988).

7:26B-1.9 Applicability determinations

(a) In order to obtain a determination from the Department concerning the applicability of the Act or this chapter to a specific facility or transaction a person shall:

1. Submit a completed and notarized applicability determination form available from the Department, executed by the owner or operator, to the address specified at N.J.A.C. 7:26B-1.11;

2. Submit the fee set forth at N.J.A.C. 7:26B-1.10 required for applicability determinations;

3. Grant written permission allowing the Department to enter and inspect the site and operations for which the applicability determination is requested pursuant to N.J.A.C. 7:26B-1.12; and

4. Demonstrate to the Department's satisfaction, that the Act or this chapter is not applicable. As part of such demonstration, all applicable requirements of (b) below shall be satisfied.

(b) For applicability determinations requested for a transaction of any of the types described at N.J.A.C. 7:26B-1.5(b)1, 2, 3, 6 or 10 or N.J.A.C. 7:26B-1.8(a)4, the person requesting the applicability determination shall comply with the procedural requirements set forth in (a) above, and shall satisfy the following requirements:

1. As to applicability determinations under N.J.A.C. 7:26B-1.5(b)1, 2 and 6, the applicant shall demonstrate to the Department that:

i. The corporation which is to be dissolved, or the shares or assets of which are to be sold or transferred, as the case may be, is an indirect owner or operator of the industrial establishment within the meaning thereof in N.J.A.C. 7:26B-1.5(b)1, 2 and 6 (an "indirect owner"); and

ii. Based upon the existence of all of the following circumstances, and upon the statement required under (b)1iii below, the assets of the indirect owner would not have been available for the cleanup of the industrial establishment because the indirect owner has not exercised control over the industrial establishment or the direct owner or operator thereof:

(1) The indirect owner has not exerted fiscal control over the owner including, but not limited to, imposing any restriction upon the financing, borrowing, budgeting, dividends and cash management of the owner;

(2) Officers, directors and employees of the indirect owner do not constitute a majority of the directors of the owner or such smaller number of directors as is sufficient to effectively direct the management and policies of the corporation;

(3) No officers, directors and employees of the indirect owner are involved in the day-to-day operations of the owner relevant to the generation, handling, storage or disposal of hazardous substances or hazardous wastes; and

(4) The indirect owner does not have the ability to control the activities, policies or decisions of the owner relevant to the generation, handling, storage or disposal of hazardous substances or hazardous wastes; and

iii. The application for the applicability determination includes the following:

(1) A statement by the indirect owner that the indirect owner has not exercised control, at any time, over the industrial establishment or the direct owner or operator thereof, based on the criteria listed in (b)1ii above, as supplemented under (b)1ii(2) below; and

(2) In lieu of certifying that all criteria listed in (b)1ii above are satisfied, an identification of any criteria which the indirect owner is excluding from

the certification, together with a description of the circumstances relevant to such criteria. The Department shall determine whether those circumstances satisfy the criteria.

2. The Department shall determine that a transaction is a corporate reorganization not substantially affecting the ownership of the industrial establishment, and therefore not subject to the Act, if the requirements set forth in (b)2i and ii below, and the requirements set forth in either (b)2iii or iv below are satisfied:

i. The transaction involves the transfer of stock, assets, or both, solely among corporations under common ownership or control and/or the shareholders of such corporations. For the purposes of this subsection, a transaction between related corporations that prepare financial statements or tax returns on a consolidated basis will be presumed to be among corporations under common ownership or control; and

ii. The transaction will not result in an aggregate diminution of more than 10 percent in the net worth of the industrial establishment, or of the person directly owning or operating the industrial establishment. All transactions occurring within the five years period preceding the date of the proposed transaction are included in the calculation of the aggregate diminution; and

iii. With respect to any indirect owner transferring any direct or indirect interest in the stock or assets of the industrial establishment, the assets of such indirect owner would not have been available for the cleanup of the industrial establishment, based upon the criteria set forth in (b)1ii and iii; or

iv. With respect to any indirect owner described in (b)2iii above, for which the Department cannot determine that the assets would have been unavailable for the cleanup of the industrial establishment:

(1) The transferee of the indirect owner's interest has a net worth equal to at least 90 percent of the net worth of the transferor;

(2) The transferee of the indirect owner's interest agrees with the Department in writing to assume any liability which the transferor may have for the cleanup of the industrial establishment or for any compliance with the Act. No such assumption is required if the transaction is a merger or consolidation for which the applicable statute provides that as a matter of law, the merged or consolidated entity assumes the liabilities of the parties to the transaction. No such assumption shall constitute or be construed to constitute an admission that the transferor, or any other party, is or may be liable for the cleanup of the industrial establishment or for any compliance with the Act. Neither shall such assumption affect any liability of the transferee to any person or entity other than the Department with respect to the cleanup of the industrial establishment or compliance with

the Act. Neither shall such assumption be deemed a submission to the jurisdiction of the Department or any other agency, court or tribunal; and

(3) If the transferor is required by law to have a registered agent in New Jersey upon whom process against the transferor may be served, then the transferee shall have a registered agent in New Jersey upon whom process against the transferee may be served.

3. As to applicability determinations under N.J.A.C. 7:26B-1.5(b)2:

i. The transferor shall certify to the Department that it is transferring 50 percent or less of the voting stock of the corporation, and that if the transferor holds a controlling interest in the corporation, the transferor will continue to hold a controlling interest after the transfer; and

ii. Any transferee of more than five percent of the voting stock of the corporation shall certify to the Department that no voting trust, shareholders agreement or proxy exists which would enable the transferee of the stock to elect a majority of the board of directors or a smaller number of directors sufficient to effectively direct the management and policies of the corporation.

4. As to applicability determinations under N.J.A.C. 7:26B-1.5(b)3, the sale or transfer of assets will not be considered a sale or transfer of the controlling share of the assets of the industrial establishment, if the transferor complies with (b)4i, ii and iii below and thereby establishes that the sale or transfer does not fall within the definition of "sale or transfer of the controlling share of the assets" in N.J.A.C. 7:26B-1.3:

i. The transferor includes in the applicability application a complete list of asset transfers and sales not in the ordinary course of business (as that term is used in N.J.S.A. 12A:6-102(1) for the five years preceding the date of the applicability application) which list shall include a statement of the fair market value of the assets included in such asset sales;

ii. The transferor includes in the applicability application a compilation of the total fair market value of the transferor's assets at the time of the applicability application; and

iii. The transferor certifies in the applicability application that the transfer or sale of assets is not part of a plan to sell all of the assets of the industrial establishment.

5. For applicability determinations under N.J.A.C. 7:26B-1.5(b)10, the following requirements are satisfied:

i. The applicant demonstrates to the Department that:

(1) The selling or transferring general partner holds no more than 50 percent of the voting interest in the partnership; and

(2) The sale or transfer of the partnership interest, whether in one or several independent transactions occurring within the five years preceding the proposed transaction, will not result in an aggregate diminution of the net worth of the partnership and the general partners by more than 10 percent; and

ii. The transferee of the interest of the selling or transferring general partner agrees with the Department in writing to assume any liability of the selling or transferring general partner with respect to the cleanup of any industrial establishments directly or indirectly owned or operated by the partnership, or for compliance with the Act by the partnership. No such assumption shall constitute or be construed to constitute an admission that the transferor, or any other party, is or may be liable for any compliance with the Act or cleanup of an industrial establishment, nor affect in any manner the transferee's liability to any person or entity other than the Department in respect of the Act or of an industrial establishment. No person entering into such an assumption shall be deemed thereby to have submitted itself to the jurisdiction of the Department or of any other agency, court or tribunal.

(c) If the applicant for an applicability determination is required under (b) above to provide information concerning the net worth of any person, the applicant shall submit with its applicability application form a statement signed by a certified public accountant in accordance with (c)1 through 4 below. The certified public accountant shall be licensed to practice in the state in which he or she practices. The certified public accountant may be an officer or employee of the applicant or of another party to the transaction for which the applicability determination is sought. The certified public accountant shall state the following:

1. That the transaction which is the subject of the applicability determination will not reduce the net worth of the person in question by more than 10 percent, and in combination with one or several previous independent transactions, will not result in a diminution of more than 10 percent in the net worth of the industrial establishment itself, or of its direct owner or operator;

2. That the conclusion set forth in (c)1 above is based upon the accountant's compilation of information supplied by the applicant regarding the subject transaction, regarding other transactions occurring within the five years preceding the subject transaction, and regarding the persons whose net worth is at issue;

3. That the accountant has no reason to believe that the information listed in (c)2 above is in error or is incomplete; and

4. That in reaching the conclusion set forth in (c)1 above, the accountant has assumed that between the date of the statement and the date the transaction closes there will be no material change in the value of the assets transferred to or from any party to the transaction, in the extent of any liabilities created, reduced, or assumed in connection with the transaction, or in any other assets or liabilities of the parties.

(d) If the applicant for an applicability determination is required under this section to provide information concerning the net worth of any person, the applicant shall include in its applicability application form a statement that the information provided to the accountant under (c)1 above is true, accurate and complete.

(e) If the applicant for an applicability determination is required by either (b)2iv2 or (b)5ii above to provide a certification by a transferee, the document shall be an affidavit executed in accordance with the provisions outlined in N.J.A.C. 7:26B-1.13(b)2i(1) through (3) and certified as set forth below:

“The undersigned, [name of transferee] (“Transferee”), hereby agrees with the Department of Environmental Protection (“Department”) to assume any liability which [name of transferor] (“Transferor”) may have for the cleanup of [identify the industrial establishment] (the “Industrial Establishment”). The assumption shall not constitute or be construed to constitute an admission that Transferor, or any other person or entity, is or may be liable for any cleanup of the Industrial Establishment or compliance with the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq. Neither shall this assumption affect any liability of Transferee to any person or entity other than the Department with respect to the cleanup of the Industrial Establishment or Compliance with the Environmental Cleanup Responsibility Act. Neither shall this assumption be deemed a submission to the jurisdiction of the Department or any other agency, court or tribunal.”

(f) The Department will, within 45 days after receipt of a complete application for an applicability determination, advise the applicant of its decision. Any person who requests an applicability determination pursuant to this chapter and does not receive a written response from the Department within the deadlines imposed by this subchapter shall not be entitled to assume that the application was found not subject to the Act.

Amended by R.1989 d.403, effective August 7, 1989.
See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Language changed to clarify procedure.

Amended by R.1993 d.137, effective April 5, 1993 (operative July 19, 1993).

See: 24 N.J.R. 720(a), 25 N.J.R. 1557(a), 25 N.J.R. 3155(b).

Changes made pursuant to In Re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189 (App.Div.1991).

Law Review and Journal Commentaries

A Year's Worth of Lessons Learned about ISRA. Lisa M. Bromberg, Stephen L. Willis, 138 N.J.L.J. No. 8, S15 (1994).

Case Notes

Case law holding that regulation regarding what had to be set forth in applicant's letter of nonapplicability of Environmental Cleanup Responsibility Act was unduly vague did not abrogate statutory requirements of ECRA or excuse blatant misconduct of industrial property seller who deliberately withheld material information. Matter of Cadgene Family Partnership, 286 N.J.Super. 270, 669 A.2d 239 (A.D.1995), certification denied 143 N.J. 330, 670 A.2d 1070.

Regulation defining “corporate reorganization” not substantially affecting ownership of the industrial establishment” was not invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation requiring applicant to “demonstrate to the Department's satisfaction” that Environmental Act was not applicable was not sufficiently objective. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation governing the triggering of Environmental Act upon transfer of stock changing controlling interest of corporation was not invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation governing the triggering of Environmental Act upon transfer of stock changing controlling interest of corporation was not invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Environmental regulations affecting interstate transactions did not violate commerce clause. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulations triggering Environmental Act upon sale, transfer or dissolution of parent corporation were not invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation governing triggering of Environmental Act and establishing bright-line test was not invalid. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Regulation defining term “cessation of operations” was not invalid under Environmental Act. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

Voluntary abandonment of claim to possession of property rendered moot determination that Environmental Act did not apply. Matter of 970 Realty Associates, 234 N.J.Super. 348, 560 A.2d 1259 (A.D.1989).

7:26B-1.10 Fee schedule

(a) The owner or operator shall pay all applicable fees required by this section upon submittal to the Department of each submission for negative declaration, negative decla-

ration amendment, applicability determination, de minimus quantity exemption, Certificate of Limited Conveyance, ACO, ACO Amendment, confidentiality claim or Initial Notice, except as provided at (e)2 below. The applicable fee required by this section shall be submitted with each and every submittal made to the Department. The fees required by this section are not one time fees but rather the fees required to perform the review of the specific submittals to the Department.

(b) The owner or operator shall pay all fees required by this section by certified check, attorney check, money order, or by personal check if received 60 days prior to the issuance of any document specified in (a) above. Checks and money orders shall be made payable to "Treasurer, State of New Jersey." All fees shall be mailed to the address specified at N.J.A.C. 7:26B-1.11.

(c) Fees for those Departmental services listed below shall be as follows:

	Standard	Small Business
1. Initial Notice Review	\$1,000.00	\$ 750.00
2. Negative Declaration Review	500.00	250.00
3. Negative Declaration Amendment	100.00	100.00
4. Applicability Determination	200.00	200.00
5. De Minimus Quantity Exemption	300.00	300.00
6. Limited Conveyance Review	500.00	500.00
7. Administrative Consent Order	2,000.00	2,000.00
8. ACO Amendment	500.00	500.00
9. Confidentiality Claim	350.00	350.00

(d) Any applicant filing as a small business shall file an affidavit (on a form provided by the Department) certifying that it is such a business. This affidavit shall be certified in accordance with N.J.A.C. 7:26B-1.13.

(e) The schedule for submission of fees shall be as follows:

1. The initial notice review fee shall be submitted with the GIS.

2. The Department may require that the owner or operator submit a fee with the negative declaration or negative declaration amendment submission pursuant to (c)3 or 4 above or may charge the owner or operator for the costs to review the negative declaration or negative declaration amendment pursuant to (f) below. The Department shall base this decision on the anticipated complexity of the initial notice, remedial investigation workplan, or remedial action workplan submissions by the owner or operator. The fee for simpler submissions will be imposed pursuant to (c)3 or 4 above and the fees for more complex submissions will be imposed pursuant to (f) below.

3. Any request for an applicability determination shall be accompanied by the appropriate fee.

4. Any request for a de minimus quantity exemption shall be accompanied by the appropriate fee.

5. Any request for a Certificate of Limited Conveyance shall be accompanied by the appropriate fee.

(f) The owner or operator shall submit the remediation oversight fee to the Department within 30 calendar days after receipt from the Department of a summary of the Department's oversight costs for the period being charged for all oversight activities including and subsequent to the review of the sampling plan. The Department shall include the following information in the summary: description of work performed, staff member(s) performing work, number of hours performed by the staff member(s) and staff member's hourly salary rate. The remediation oversight fee schedule shall be as follows:

1. The Department will bill the owner or operator at regular intervals throughout the duration of the remediation based on the formula in (f)2 below to recover its costs.

2. Direct billing fees are based on the Department's costs of working on activities for an industrial establishment. This fee is based upon the following formula:

$$\text{Administrative Costs} = A + B$$

where A = (Number of coded hours) x (Hourly Salary Rate) x (Salary Additive Rate) x (Fringe Benefit Rate) x (Indirect Cost Rate) and B = (Sampling costs) + (Costs for contractor Assistance).

i. Number of coded hours represents the sum of hours each employee has coded to the site-specific project activity code (PAC) for the case. Actual hours for all State employees including, without limitation, case managers, geologists, technical coordinators, samplers, inspectors, supervisors, section chiefs, using the specific PAC, will be included in the formula calculations.

ii. The hourly salary rate is each employee's annual salary divided by the number of working hours in a year.

iii. The salary additive rate represents the prorated percentage of charges attributable to NJDEP employees' reimbursable "down time." This time includes vacation time, administrative leave, sick leave, holiday time, and other approved "absent with pay" allowances. The calculation for the salary additive is the sum of the reimbursable leave salary divided by the net Department regular salary for a given fiscal year. The direct salary charges (number of coded hours x hourly salary rate) are multiplied by the calculated percentage and the result is added to the direct salaries to determine the total reimbursable salary costs for a particular case.

iv. The fringe benefit represents the Department's charges for the following benefits: pension, health benefits including prescription drug and dental care program, workers compensation, temporary disability insurance, unused sick leave and FICA. The fringe benefit rate is developed by the Department of the Treasury's Office of Management and Budget (OMB). OMB negotiates the rate with the United States Department of Health and Human Services on an annual basis. The rate is used by all state agencies for estimating and computing actual charges for fringe benefit costs related to Federal, dedicated and Non-State funded programs.

v. The indirect cost rate represents the rate which has been developed for the recovery of indirect costs in the Site Remediation Program. This indirect rate is developed by the Department on an annual basis in accordance with the New Jersey Department of Treasury OMB Circular Letter 86-17 and the Federal OMB Circular A-87, "Cost Principles for State and Local Governments." Indirect costs are defined as those costs which are incurred for a common or joint purpose benefitting more than one cost objective and not readily assignable to the cost objectives specifically benefitted without effort disproportionate to the results achieved.

(1) The components of the indirect cost rate include operating and overhead expenses that cannot be coded as direct salary charges for a particular case, such as the salary and non-salary costs incurred by the Division of Publicly Funded Site Remediation and the Division of Responsible Party Site Remediation. In addition, the indirect rate includes the Site Remediation Program's proportionate share of the costs associated with the Offices of the Commissioner, Assistant Commissioner for Site Remediation, Division Directors and Assistant Directors, the Division of Financial Management and General Services and the Division of Personnel.

(2) The indirect rate also includes operating costs such as office and data processing equipment, and telephones as well as building rent and the Department's share of Statewide costs as determined by the Department of Treasury in the Statewide Cost Allocation Plan. The Statewide Cost Allocation Plan pertains to central services costs which are approved on a fixed basis and included as part of the costs of the State Department during a given fiscal year ending June 30.

(3) The total of these indirect costs is divided by the total direct costs of the Site Remediation Program to determine the indirect cost rate.

vi. Direct costs represent any non-salary direct, site-specific costs including, but not limited to, laboratory analysis or contractor expenses. These costs will be billed directly as a formula add on.

vii. The Department shall develop on an annual basis and publish notice of the salary additive rate, fringe benefit rate and the indirect cost rate to be used by the Site Remediation Program for the fiscal year in the New Jersey Register.

(g) The Department shall impose fees pursuant to (f) above on the owner or operator of an industrial establishment that paid an Oversight of Cleanup Plan Implementation fee if the Department's cost associated with that case exceed the previously paid fee.

(h) Any request for an ACO or ACO amendment shall be accompanied by the appropriate fee.

(i) The owner or operator shall not receive a full compliance or negative declaration letter from the Department unless all fees for work previously billed by the Department to the industrial establishment are paid. The Department may discontinue review or oversight of a submittal from the owner or operator of the industrial establishment unless all fees for work previously billed are paid. In addition, the Department may consider the failure to pay a fee to be a violation of the Act.

(j) Any fee under this section that is subject to N.J.A.C. 7:1L shall be payable in installments in accordance with N.J.A.C. 7:1L.

Amended by R.1989 d.27, effective January 3, 1989.

See: 20 N.J.R. 2000(a), 21 N.J.R. 57(a).

Amended by R.1993 d.3, effective January 4, 1993.

See: 24 N.J.R. 720(a), 25 N.J.R. 100(a).

Clarified in (a) that fees are not one-time fees but are required for each submittal reviewed; (d) recodified to definition section and replaced with small business affidavit requirement.

Amended by R.1994 d.99, effective February 22, 1994.

See: 25 N.J.R. 1375(a), 26 N.J.R. 1142(a).

Amended by R.1995 d.205, effective April 17, 1995.

See: 26 N.J.R. 3922(a), 27 N.J.R. 1576(b).

7:26B-1.11 Forms

Any forms, fees or other information required to be submitted by this chapter shall be obtained from and returned to the New Jersey Department of Environmental Protection, Industrial Site Evaluation Element, CN 028, Trenton, New Jersey, 08625-0028. Courier and hand deliveries may be made to 401 East State Street, 5th Floor East, Trenton, New Jersey 08625.

Amended by R.1994 d.99, effective February 22, 1994.

See: 25 N.J.R. 1375(a), 26 N.J.R. 1142(a).

7:26B-1.12 Right of entry and inspection

(a) The owner or operator of the industrial establishment shall expressly consent in each submittal made to the Department pursuant to the Act and this chapter to entry of the industrial establishment by the Department and its authorized representative(s), upon the presentation of credentials, to inspect the site, buildings and records and to take samples from the site, in which case the owner or

operator shall be provided with split samples upon his or her request, photograph the site and the buildings, and to make copies of the records.

(b) The buyer or transferee of the industrial establishment that has been sold subsequent to obtaining an approved cleanup plan or Administrative Consent Order from the Department shall:

1. Allow the Department and its authorized representative(s), upon the presentation of credentials, to enter the transferred premises to inspect the site, buildings and records, and to take samples from the site, photograph the site and the buildings and to make copies of the records; where the Department takes samples from the site, the buyer or transferee shall be provided with split samples upon his or her request; and
2. Allow access to the transferred premises by the authorized representative(s) of the seller or transferor to implement a duly approved cleanup plan or comply with the conditions of an ACO.

(c) The owner, operator, or other person subject to ECRA compliance or who is a party to an ACO shall:

1. Have appropriate technical, scientific, and engineering representative(s) accompany the Department and its authorized representative(s) during the inspection; and
2. Provide all assistance through appropriate technical, scientific and engineering representative(s) to the Department and its authorized representative(s) of the Department during any site inspection.

7:26B-1.13 Certification and signatories

(a) The following documents required to be submitted to the Department shall be executed and certified as set forth in (b) below:

1. Affidavit for small business filing fee (see N.J.A.C. 7:26B-1.10(d));
2. GIS (see N.J.A.C. 7:26B-3.2);
3. SES (see N.J.A.C. 7:26B-3.2);
4. Corrected information on a GIS or SES (see N.J.A.C. 7:26B-3.2(g));
5. Affidavit of withdrawal (see N.J.A.C. 7:26B-3.4);
6. Affidavit for a negative declaration and changes to an approved negative declaration (see N.J.A.C. 7:26B-5.2 and 5.4);
7. Proposed cleanup plan and corrections thereto (see N.J.A.C. 7:26B-5.3);
8. Final cleanup plan report and corrections thereto (see N.J.A.C. 7:26B-5.7);

9. Affidavit for a de minimus quantity exemption, including the transferor's affidavit (see N.J.A.C. 7:26B-10.1); and

10. Application and affidavit for a Certificate of Limited Conveyance (see N.J.A.C. 7:26B-13.1).

(b) All documents listed in (a) above shall contain the following signatures and two-part certification which provides the following:

1. "I certify under penalty of law that the information provided in this document is true, accurate and complete. I am aware that there are significant civil penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of N.J.S.A. 13:1K-6 et seq., I am personally liable for the penalties set forth at N.J.S.A. 13:1K-13."

i. The certification required by (b)1 above shall be signed by the highest ranking individual at the site with overall responsibility for that site or activity to which the information pertains. Where there is no individual at the site with overall responsibility for that site or activity, this certification shall be signed by the individual having responsibility for the overall operation of the site or activity.

2. "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant civil penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of N.J.S.A. 13:1K-6 et seq., I am personally liable for the penalties set forth at N.J.S.A. 13:1K-13."

i. The certification required by (b)2 above shall be signed as follows:

- (1) For a corporation, by a principal executive officer of at least the level of vice president;
- (2) For a partnership or sole partnership, by a general partner or the proprietor, respectively; or
- (3) For a municipality, State, Federal or other public agency, by either a principal executive officer or ranking elected official.

(c) The following documents required to be submitted to the Department shall be executed and certified as set forth in (d) below:

1. Applicability determination form (see N.J.A.C. 7:26B-1.9);
2. Sampling plan results (see N.J.A.C. 7:26B-4.3);
3. Cleanup plan progress reports (see N.J.A.C. 7:26B-5.6);
4. Affidavit from chief financial officer, certified audit of the corporation, certified public accountant report, and self-bonding agreement (see N.J.A.C. 7:26B-6.5(d), (f) and (g)); and
5. Application for an ACO (see N.J.A.C. 7:26B-7.2).

(d) All documents listed in (c) above shall be signed by a person described in (b)2i above who shall make the certification set forth in (b)2 above, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

1. The authorization is made in writing by a person described in (b)2i above;
2. The authorization specifies either an individual or a position having responsibility for the overall operation of the site or activity, such as the position of plant manager, or a superintendent or person of equivalent responsibility (a duly authorized representative may thus be either a named individual or any individual occupying a named position); and
3. The written authorization is submitted to the Department;
4. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of this subsection shall be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.
5. A duly authorized person shall make the following certification:
 - i. "I certify under penalty of law that the information provided in this document is true, accurate and complete. I am aware that there are significant civil penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of N.J.S.A. 13:1K-6 et seq., I am personally liable for the penalties set forth at N.J.S.A. 13:1K-13."

(e) All signatures required by this section shall be notarized.

Notice of Correction: Error in N.J.S.A. cite should read 13:1K-13.
See: 20 N.J.R. 816(a).
Amended by R.1993 d.3, effective January 4, 1993.
See: 24 N.J.R. 720(a), 25 N.J.R. 100(a).

Added requirement of affidavit for small business filing fee.

7:26B-1.14 Fee review

(a) To contest a fee imposed pursuant to N.J.A.C. 7:26B-1.10(f), the objector shall, within 30 days after the objector's receipt of the bill for the fee from the Department, submit to the Department a written request for a fee review pursuant to (d) below. An objector may contest the fee based on the following:

1. The Department has no factual basis to sustain the charges assessed in the fee;
2. The activities for which the fee was imposed did not occur;
3. The charges are false or duplicative; or
4. The charges were not properly incurred because they were not associated with the Department's oversight or remediation of the case.

(b) An objector may not contest a fee if the challenge is based on the following:

1. An employee's hourly salary rate;
2. The Department's salary additive rate, indirect rate, or fringe benefit rate; or
3. Management decisions of the Department, including decisions regarding who to assign to a case, how to oversee the case or how to allocate resources for case review.

(c) The objector shall submit a fee review request to the Department at the following address:

Office of Legal Affairs
Attention: Fee Review Requests
DEPE
CN 402
Trenton, NJ 08625-0402

(d) An objector shall include the following in a request for a fee review:

1. A copy of the bill;
2. Payment of all uncontested charges, if not previously paid;
3. A list of the specific fee charges contested;
4. The factual questions at issue in each of the contested charges;
5. The name, mailing address and telephone number of the person making the request;
6. Information supporting the request or other written documents relied upon to support the request;
7. An estimate of the amount of time required for an informal meeting with Department representatives or an

adjudicatory hearing before the Office of Administrative Law; and

8. A request, if necessary, for a barrier free hearing location for physically disabled persons.

(e) If the objector fails to include any information or the payment required by (d) above, the Department may deny a request for a fee review or an adjudicatory hearing on the fee.

(f) Upon the Department's receipt of a request for a fee review, the Department shall attempt to resolve any of the factual issues in dispute. If the Department determines that a fee imposed was incorrect, the Department shall adjust the fee and issue a new bill which shall be due and payable within 30 days after receipt.

(g) The Department may, if it determines that the factual issues involving a fee dispute cannot be resolved informally, determine the matter to be a contested case, transfer it to the Office of Administrative Law for an adjudicatory hearing. An adjudicatory hearing shall be conducted pursuant to N.J.S.A. 52:14B-1 et seq.

(h) The Department, if it denies a hearing request, shall briefly state the reasons for such denial. Such denial shall be considered final agency action.

(i) If the objector does not file a request for a fee review within 30 days after the objector's receipt of the bill for the fee from the Department, the full amount of the fee shall be due and owing. If the bill is not paid, the Department may take any action in accordance with N.J.A.C. 7:26B-1.10(i).

New Rule, R.1994 d.99, effective February 22, 1994.
See: 25 N.J.R. 1375(a), 26 N.J.R. 1142(a).

SUBCHAPTER 2. EXEMPTION PROCEDURES

7:26B-2.1 Procedure for obtaining SIC exemptions from ECRA

(a) Any person may petition the Department in writing for an exemption as a sub-group or class of operations within those sub-groups within the Standard Industrial Classification major group numbers 22-39 inclusive, 46-49 inclusive, 51 or 76 from the requirements of the Act and this chapter. In support of the petition, such person shall submit all relevant supporting documentation and any other evidence to the Department.

(b) Upon a finding that a SIC sub-group or class of operations within those subgroups above does not pose a risk to the public health, safety, or the environment, the Department may, in response to an exemption petition or on its own initiative, pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., exempt the sub-group or class of operations within those subgroups from the provisions of the Act and this chapter through amendment to the list at N.J.A.C. 7:26B-1.8(b).

(c) Exemptions shall not be granted for a specific industrial establishment but shall only be available for a subgroup or class of operations within a subgroup.

SUBCHAPTER 3. INITIAL NOTICE SUBMISSIONS

7:26B-3.1 Pre-Notice filing conference

The Department will, upon request of any owner or operator with an impending transaction or a closing which will render the industrial establishment subject to ECRA, meet with representatives of the owner or operator of the industrial establishment to discuss compliance with the provisions of the Act and this chapter.

7:26B-3.2 Initial Notice requirements

(a) Any owner or operator of an industrial establishment who is closing, terminating, or transferring the industrial establishment may initiate the ECRA process by submitting the General Information Submission (GIS) and the Site Evaluation Submission (SES) described in (b) and (c) below. The owner or operator of the industrial establishment is encouraged to file the GIS and SES prior to the decision to close or terminate operations or execution of an agreement to sell or transfer the industrial establishment. The owner or operator of any industrial establishment who submits an Initial Notice in anticipation of closing, terminating or transferring operations shall comply with all of the provisions of this chapter, except for the submittal of the sales agreement unless the owner or operator withdraws from the ECRA review process in accordance with the provisions at N.J.A.C. 7:26B-3.4.

(b) The owner or operator of an industrial establishment subject to the Act and this chapter shall submit to the Department the GIS of the Initial Notice containing all the information in this subsection, no more than five days subsequent to the occurrence of an ECRA trigger (see N.J.A.C. 7:26B-1.6) and may submit any additional information required in (c) below available at that time. All information shall be submitted in triplicate on GIS forms available from the Department at the address specified at N.J.A.C. 7:26B-1.11. The owner or operator of the industrial establishment shall include the following information on the GIS:

1. Identification of the subject industrial establishment:
 - i. Name and location of the industrial establishment, including street address, municipality, county and zip code;
 - ii. Tax block and lot numbers of the industrial establishment;

iii. Applicable SIC number of the subject industrial establishment;

iv. Real property owner, including name, address and telephone number;

v. Business operator of the industrial establishment, including name, address and telephone number;

vi. Business owner of the industrial establishment, including name, address and telephone number; and

vii. Identification of any previous ECRA submissions made for the industrial establishment or any prior industrial establishments occupying any of the same tax block and lot number including date, ECRA case number, and current status.

2. Description of the transaction requiring compliance with the Act and this chapter;

3. The date of public release of the closure or termination decision and a copy of the appropriate public announcement, if any;

4. The date of execution of the agreement of transfer, sale or option to purchase, the name and address of the other parties to the transfer or sale, and a copy of the agreement of transfer or sale or option to purchase agreement, as applicable;

5. The proposed date for closing, terminating or transferring operations; and

6. The name, address and telephone number of the authorized agent. The owner or operator shall notify the Department in writing of any change of identity, address, or telephone number of the authorized agent. Where the Department is required by this chapter to notify or otherwise communicate with an owner or operator, notice to or communication with the authorized agent by the Department shall be sufficient.

(c) The owner or operator of an industrial establishment subject to ECRA and this chapter shall submit to the Department the SES of the Initial Notice containing all the information in this subsection no more than 45 days subsequent to the occurrence of an ECRA trigger (see N.J.A.C. 7:26B-1.6). All information shall be submitted in triplicate on SES forms available from the Department at the address specified at N.J.A.C. 7:26B-1.11. The owner or operator of the industrial establishment shall include the following information on the SES:

1. To the extent available from diligent inquiry, the site history since January 1, 1940 including:

- i. Names of owners and operators;
 - ii. Dates of ownership of each owner;
 - iii. Dates of operation of each operator;
 - iv. Current addresses of each owner and operator;
- and

v. Brief description of each past operation conducted.

2. A list of all Federal, State and local environmental permits including, to the extent available from diligent inquiry, permits for all previous owners or operators, applied for or received, or both, for the site since 1960, including:

- i. Application date;
- ii. Date of approval, denial, or status of application;
- iii. Reason for denial, revocation or suspension if applicable;
- iv. Permit expiration date;
- v. Permit identification number;
- vi. Reason for permit; and
- vii. Name and address of permitting agency;

3. Copies of all Departmental or other enforcement actions for violations of any applicable Federal, State or local environmental laws or regulations occurring during the period of ownership of the current owner, and operations by the current operator of the industrial establishment, and a list of each enforcement action including:

- i. Type of enforcement action;
- ii. Date of enforcement action;
- iii. Description of violation; and
- iv. Final resolution or current status of the enforcement action if not resolved;

4. A scaled site map identifying:

- i. All areas in, on, or under the industrial establishment where hazardous substances or wastes have been or currently are generated, manufactured, refined, transported, treated, stored, handled or disposed;
- ii. All containers, tanks, surface impoundments, landfills, septic systems, or any other structure, vessels, contrivance or unit that contain or previously contained hazardous substances and wastes;
- iii. All known areas of discharges that occurred during current and past operations; and
- iv. Property boundaries, site improvements and adjacent land usage;

5. A detailed description of all current and, to the extent available from diligent inquiry, all past operations and processes occurring at the industrial establishment designed to guide the Department step-by-step through plant operations, with particular emphasis on areas of the process stream where hazardous substances and wastes are or were generated, manufactured, refined, transported, treated, stored, handled or disposed, at the industrial establishment above and below ground;

6. The current and, to the extent available from diligent inquiry, the historical means of heating the facility, including dates and description of any fuel oil tank decommissioning;

7. Identification of all current and, to the extent available from diligent inquiry, all previous sanitary and industrial discharges to a publicly owned treatment works, or community or on-site disposal system, including the dates and nature of such discharges, and the name and address of the public or community collection, disposal or treatment system;

8. A description of the types, ages, dimensions and locations of containers, tanks, surface impoundments, landfills, septic systems or any other structure, vessel, contrivance or unit that contain or previously contained hazardous substances and wastes;

9. A complete and current inventory, description and location of hazardous substances and wastes generated, manufactured, refined, transported, treated, stored, handled or disposed at the industrial establishment above and below ground, and a description of the location, types and quantities of hazardous substances and wastes currently used or generated on an annual basis, and a description of the location, types, and quantities of hazardous substances and wastes that will remain subsequent to the transfer or sale of the industrial establishment;

10. A detailed description of any known discharge of hazardous substances and wastes that occurred during current and, to the extent available from diligent inquiry, past operations of the site and, to the extent available from diligent inquiry, a detailed description of any remedial actions undertaken to handle any discharge of hazardous substances and wastes;

11. A detailed sampling or other environment evaluation measurement plan, including soil, ground water, surface water, sediment, hazardous waste, chip, wipe and air sampling, proposed as appropriate for the industrial establishment by the owner or operator of the industrial establishment for review and approval by the Department. A sampling plan shall be designed to determine the presence of and delineate any contamination, including any off-site contamination which is emanating or has emanated from the industrial establishment. The sampling plan shall take into consideration the site history and the current use and shall include, but not be limited to, the following:

i. Graphic and narrative descriptions of geographic, soil, geologic, and hydrogeologic characteristics of the industrial establishment and any proposed evaluation of all environmental media;

ii. Environmental setting of the industrial establishment including, but not limited to:

(1) A United States Geological Survey quad map marked to identify the specific site location;

(2) The latitude and longitude of the industrial establishment to the nearest second;

(3) A description of local land use;

(4) A scaled site map;

(5) An overview of the history of the industrial establishment as related to intended sampling activities;

(6) A description of soils, topography and drainage of the industrial establishment; and

(7) A description of hydrogeology of the area;

iii. A discussion of each area of potential environmental concern including, but not limited to, intended sampling locations, sampling frequency, and analytical parameters;

iv. A description of quality assurance/quality control practices which shall be employed during implementation of the sampling plan including, but not limited to:

(1) Sampling equipment, procedures and sample handling;

(2) The identity of the analytical laboratory, certified in accordance with N.J.A.C. 7:18 or recognized by the Department; and

(3) The identity of the laboratory procedures, methods and detection limits certified in accordance with N.J.A.C. 7:18 or recognized by the Department;

v. A detailed discussion of health and safety practices to be employed during implementation of the sampling plan; and

vi. A schedule of activities, including a schedule for submission of status reports on the progress of sampling and analytical activities leading up to the submittal of sampling results in accordance with N.J.A.C. 7:26B-4.3.

12. A detailed description of the procedures to be used to decontaminate, or decommission, or both, equipment and buildings involved with the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes including the name and location of the ultimate disposal facility;

13. Copies of all soil, sediment, chip, wipe, air emission, ground water, and surface water sampling results, including effluent quality monitoring, conducted at the industrial establishment, on-site or off-site, during the period of ownership by the owner or period of operations by the operator, and a detailed description of the location, methodology, analyses, identity of laboratory, and other factors involved in preparation of the sampling results. If the data would be exceedingly voluminous to submit, contact the Department for instructions; and

14. Other information requested in writing by the Department for the purpose of implementing the Act and this chapter.

(d) The owner or operator of an industrial establishment may propose to the Department that no sampling plan need be developed and implemented for the industrial establishment pursuant to N.J.A.C. 7:26B-3.2(c)11 by providing full documentation of the justification to the Department for review and approval with the SES. Economic considerations are not sufficient justification to support a request to be relieved of the requirement to develop, submit, and implement a sampling plan.

(e) The Department shall notify the owner or operator of the industrial establishment of any deficiencies in the GIS or SES. The owner or operator of the industrial establishment shall correct the deficiencies within the time frame specified by the Department.

(f) The Department shall notify the owner or operator of the industrial establishment when the GIS and SES are administratively complete.

Case Notes

For property tax purposes, adjustment of value of taxpayer's commercial property for environmental contamination warranted; property was not in use as of assessment date, taxpayer had submitted detailed site evaluation submissions, soil and groundwater testing were substantially complete, some results of that testing were available enabling taxpayer to estimate amount of contamination and cost of cleanup, and taxpayer established reserve in amount of estimated cleanup costs. *Badische Corp. (BASF) v. Town of Kearny*, 288 N.J.Super. 171, 672 A.2d 186 (A.D.1996).

Lessee was not entitled to relief from cleanup requirements on basis of reliance. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

Lessee was not entitled to exemption from sampling plan requirement under Environmental Act. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

Lessee was not prejudiced by absence of toxicity standards. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

7:26B-3.3 Landlord-tenant responsibility for Initial Notice compliance

(a) Where the owner of an industrial establishment is a landlord and the operator of an industrial establishment is a tenant, both parties shall be strictly liable, without regard to fault, for compliance with the Act and this chapter. Notwithstanding retention by the Department of the right to compel any liable party to comply with the Act and this chapter, as between the landlord and tenant, the Department shall require compliance with the Initial Notice provisions in accordance with the following:

1. Except as provided below at (a)2, the landlord shall be responsible for the submittal of Initial Notice, provided the tenant shall be responsible for providing all information, to the extent available from diligent inquiry by the tenant, that is requested by the landlord, but not available from diligent inquiry by the landlord, or all information requested by the Department for the purpose of satisfying the Initial Notice requirements.

2. Where the tenant plans to close, terminate or transfer its operations at an industrial establishment, gives

written notice of termination of a lease agreement, files a petition in bankruptcy or brings a receivership action, or if a bankruptcy petition or receivership action is filed against the tenant, the tenant shall be responsible for the submittal of Initial Notice, provided the landlord shall be responsible for providing all information, to the extent available from diligent inquiry by the landlord, that is requested by the tenant, but not available from diligent inquiry by the tenant, or all information requested by the Department for the purpose of satisfying the Initial Notice requirements.

Amended by R.1989 d.403, effective August 7, 1989.

See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Phrase "jointly and severally" deleted in (a), internal cite in (a)1 completed.

Case Notes

Motion of creditor granted for order authorizing turnover by trustee of its collateral which constituted substantially all of debtor's assets and motion (granted) of trustee seeking approval of court for turnover without complying with terms of N.J. ECRA. In Re: *Corona Plastics, Inc.*, 99 B.R. 231 (Bkrcty, D.N.J.1989).

7:26B-3.4 Withdrawal procedure

If, after filing the GIS or SES, or both, the owner or operator does not close, terminate or transfer operations, the owner or operator may notify the Department and withdraw from the ECRA review process. Notice for such withdrawal shall be in the form of an affidavit stating the reason(s) for the withdrawal and executed and certified by the owner or operator in accordance with the provisions at N.J.A.C. 7:26B-1.13.

7:26B-3.5 Department inspection and records review

(a) In accordance with N.J.A.C. 7:26B-1.12, the department shall schedule and conduct site inspections of any industrial establishment submitting an Initial Notice pursuant to this subchapter.

(b) The Department may conduct a review of its records and the available records of the United States Environmental Protection Agency, other State agencies, and the appropriate county and municipal files pertaining to the industrial establishment to confirm and further supplement the information submitted concerning the history, operations and practices of the industrial establishment.

SUBCHAPTER 4. APPROVAL IMPLEMENTATION AND SUBMITTAL OF RESULTS FROM THE SAMPLING PLAN

7:26B-4.1 Sampling plan approval

(a) After the Department's review of the sampling plan required by N.J.A.C. 7:26B-3, the Department will send a letter to the owner or operator of the industrial establishment concerning the adequacy of the sampling plan submitted pursuant to N.J.A.C. 7:26B-3.2(c)11.

(b) The owner or operator of the industrial establishment shall develop and resubmit any revision or addendum of a sampling plan required by the Department to the Department for final review and approval in the time frame specified by the department after consultation with the owner or operator.

7:26B-4.2 Sampling plan implementation

(a) After written Departmental approval of the sampling plan and prior to submission of the negative declaration or cleanup plan, the owner or operator of the industrial establishment shall implement the sampling plan for the industrial establishment. The Department will be available to advise the owner or operator or the industrial establishment concerning such plan implementation.

(b) The owner or operator of the industrial establishment shall provide the Department with notice and site access to observe all sampling.

(c) The Department may obtain samples as it determines to be necessary during the implementation of the sampling plan and the owner or operator shall not prohibit or otherwise prevent the Department from taking such samples. The Department shall provide split samples to the owner or operator upon request by the owner or operator of the industrial establishment.

7:26B-4.3 Submission of sampling results

(a) The owner or operator of the industrial establishment shall submit to the Department the sampling results performed in accordance with the approved sampling plan. The results shall be accompanied by:

1. A proposed negative declaration;
2. A proposed cleanup plan; or
3. A revised sampling plan to further delineate the extent and degree of contamination on or from the industrial establishment.

(b) If the Department determines that additional sampling and analysis is necessary, the owner or operator shall complete the additional sampling and analysis in the time frame specified by the Department prior to the approval of its proposed negative declaration or proposed cleanup plan.

Case Notes

Lessee was not entitled to relief from cleanup requirements on basis of Environmental Act. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

Lessee was not entitled to exemption from sampling plan requirements under Environmental Act. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

SUBCHAPTER 5. CRITERIA FOR NEGATIVE DECLARATION AND CLEANUP PLAN APPROVAL AND DEFERRAL OF CLEANUP

7:26B-5.1 Timing of cleanup plan or negative declaration submission and approval or ACO execution as condition precedent to title transfer

(a) The owner or operator of the industrial establishment may submit a proposed negative declaration or proposed cleanup plan for review after the Department conducts its preliminary site inspection and the owner or operator has received the results therefrom.

(b) The Department shall not approve any proposed cleanup plan or proposed negative declaration submitted pursuant to this chapter until the requirements of N.J.A.C. 7:26B-3 and 7:26B-4 have been satisfied and an inspection of the industrial establishment has been conducted by the Department.

(c) The owner or operator of an industrial establishment shall not sell or otherwise transfer the industrial establishment until a negative declaration or a cleanup plan has been approved by the Department or an ACO has been executed.

Case Notes

Railroad could not be required to accelerate environmental procedures as prerequisite to conveyance. *In re Morristown & Erie R. Co.*, C.A.3 (N.J.) 1989, 885 F.2d 98, rehearing denied.

Company was entitled to court hearing before cleanup criteria finally determined. *Avon Products, Inc. v. New Jersey Dept. of Environmental Protection*, 243 N.J.Super. 375, 579 A.2d 831 (A.D.1990).

Department of Environmental Protection could correct prior determination. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

7:26B-5.2 Requirements for proposed negative declaration submission; approval

(a) A proposed negative declaration shall be an affidavit executed and certified in accordance with the provisions at N.J.A.C. 7:26B-1.13 indicating the location, and tax block and lot number of the industrial establishment, transaction, and buyer and seller, if applicable, and stating that there has been no discharge of hazardous substances and wastes on or from the industrial establishment or that any such discharge on or from the industrial establishment has been cleaned up to the current satisfaction of the Department. In the case of a sale or transfer of an industrial establishment, if any hazardous substances and wastes are to remain at the industrial establishment in any containers, tanks, surface impoundments, or any other structures, vessels, contrivances, or units, the seller or transferor of the industrial establishment shall provide documentation to the Department which evidences that the purchaser or transferee has been notified that these hazardous substances and wastes are to remain at the site.

(b) Unless already submitted in accordance with other provisions of this chapter and identified as to submittal, the proposed negative declaration shall include the following information:

1. Description of cleanup actions taken at the industrial establishment including, but not limited to, activities involving the removal of hazardous substances and wastes, copies of completed manifest forms, name and address of disposal site utilized, quantities and descriptions of hazardous substances and wastes removed, and itemization of costs incurred;
2. Any sampling results from the detailed soil, ground water, surface water, sediment, hazardous waste, chip, wipe and air sampling prepared by the owner or operator of the industrial establishment, if not submitted previously to the Department; and
3. Any other information required by the Department to review the proposed negative declaration.

(c) The department shall within 45 days of submission of a proposed negative declaration approve or disapprove the proposed negative declaration after evaluation of the proposed negative declaration, the initial notice, inspection reports, existing Departmental records, or any other information available to the Department.

(d) If the proposed negative declaration is disapproved by the Department, the owner or operator or both of the industrial establishment shall be notified by the Department of the reason(s) for disapproval.

1. Any deficiencies in the proposed negative declaration shall be corrected and a revised negative declaration shall be submitted to the Department in the time frame specified by the Department in the disapproval.
2. If the Department determines that a cleanup plan is required, a draft cleanup plan shall be submitted to the Department by the owner or operator for review in the time frame specified by the Department.

Amended by R.1989 d.403, effective August 7, 1989.
See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Language added in (a) requiring documentation that seller/transferor has notified purchaser/transferee of hazardous substances will remain at the site.

Case Notes

Lessee was not prejudiced by absence of toxicity standards. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

Department of Environmental Protection could correct prior incorrect decision. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

Lessee was not entitled to relief from environmental requirements on basis of reliance. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

7:26B-5.3 Requirements for proposed cleanup plan submission; approval

(a) Unless already submitted in accordance with other provisions of this chapter and identified as to submittal, a proposed cleanup plan, including but not limited to the following information, shall be submitted to the Department for written approval:

1. A description of the location, types, and the quantities of any and all hazardous substances and wastes that will remain on the industrial establishment and those hazardous substances and wastes to be removed;
2. A description of the types, volume, and location of any containers, tanks, surface impoundments, landfills, or any other structures, vessels, contrivances, or units containing hazardous substances and wastes that will remain at the industrial establishment;
3. The sampling results from the sampling plan prepared by the owners or operators of the industrial establishment;
4. An evaluation of sampling plan findings, migration paths and exposure routes of any discharges of hazardous substances and wastes;
5. An evaluation of remedial measures including proposed actions to remediate any contamination, including any off-site contamination which is emanating or has emanated from the industrial establishment, and recommendations regarding the most practicable method of cleanup;
6. Cleanup levels, criteria, standards of performance, or other measures of compliance with environmental rules to be achieved for all environmental media consistent with N.J.A.C. 7:26B-1.11 and in accordance with the cleanup plan;
7. A schedule of activities for completion of the cleanup including milestones, progress reports from cleanup plan approval through completion and post remediation monitoring; and
8. An accurate and detailed estimate of costs of implementation of proposed cleanup plan including, but not limited to:
 - i. Capital costs;
 - ii. Operation and maintenance costs;
 - iii. Monitoring system costs;
 - iv. Laboratory costs;
 - v. Engineering, legal and administrative costs; and
 - vi. Contingency costs.

(b) The Department shall evaluate the proposed cleanup plan, the Initial Notice, inspection reports, existing Departmental records, and any other information available to the

Department prior to approval or disapproval of a proposed cleanup plan.

(c) If the Department disapproves the proposed cleanup plan, the Department shall notify the owner or operator of the industrial establishment of its reasons for disapproval. The owner or operator shall correct any deficiencies in the time frame specified by the Department.

7:26B-5.4 Issuance and duration of negative declaration approval

(a) If the Department determines that the requirements of N.J.A.C. 7:26B-5.2 have been satisfied, the Department will issue a written approval of the negative declaration.

(b) A negative declaration approval shall be effective only for so long as all the information submitted pursuant to N.J.A.C. 7:26B-3.2 remains unchanged but, in any event, shall not be effective for a period to exceed 120 days.

(c) Where there is a change in the information required in the Initial Notice prior to the expiration of the 120-day period, the owner or operator of the industrial establishment shall immediately notify the Department of the change and request an amended negative declaration approval. The amended negative declaration approval shall be effective for a period not to exceed the remainder of the original 120-day period.

Amended by R.1993 d.3, effective January 4, 1993.
See: 24 N.J.R. 720(a), 25 N.J.R. 100(a).

Changed effective periods from 60 to 120 days.

7:26B-5.5 Issuance of cleanup plan approval and implementation

(a) If the Department determines that the requirements of N.J.A.C. 7:26B-5.3 have been satisfied, the Department shall issue a written approval of the cleanup plan.

(b) Within 14 days after receipt of notice from the Department that the cleanup plan is approved, the owner or operator of the industrial establishment shall obtain and furnish to the Department financial assurance in conformance with N.J.A.C. 7:26B-6 in an amount at least equal to the cleanup plan cost estimate approved by the Department.

(c) Upon receipt of written approval of the cleanup plan from the Department, the owner or operator of the industrial establishment, except as provided in (d) below, shall begin and complete implementation of the cleanup plan according to the schedule for implementation contained therein, unless implementation of the cleanup plan has been deferred pursuant to N.J.A.C. 7:26B-5.8 or the industrial establishment obtains the prior written approval of the Department to modify the schedule in the cleanup plan.

(d) With the approval of the Department, the cleanup plan may be implemented by a purchaser, transferee, mortgagee, or other party to a transfer of an industrial establishment; such party shall be strictly liable, jointly and severally with the owner or operator, for implementation of the cleanup plan.

(e) The owner or operator of an industrial establishment may request a modification of the cleanup plan schedule. The Department shall approve or disapprove the modification within 30 days of receipt of the request.

Case Notes

Motion of creditor granted for order authorizing turnover by trustee of its collateral which constituted substantially all of debtor's assets and motion (granted) of trustee seeking approval of court for turnover without complying with terms of N.J. ECRA. In Re: Corona Plastics, Inc., 99 B.R. 231 (Bkrcty., D.N.J.1989).

7:26B-5.6 Cleanup plan progress reports

(a) The owner or operator of the industrial establishment shall submit cleanup plan progress reports to the Department in the time frame specified by the cleanup plan approval letter.

(b) The progress reports shall contain, but not be limited to, the following information:

1. Any changes in the approved cleanup plan schedule;
2. Actual costs of cleanup incurred to date;
3. Completed cleanup work to date;
4. Percent of total cleanup work completed to date; and
5. Cleanup plan work outstanding.

7:26B-5.7 Inspection and approval of cleanup

(a) The Department shall conduct inspections of the industrial establishment that is subject to a cleanup plan to determine compliance with the cleanup plan.

(b) After the cleanup plan is fully implemented, the owner or operator of the industrial establishment shall submit a final report to the Department. The final cleanup report shall:

1. Detail the actual cleanup actions performed, the total costs associated with the investigation of the industrial establishment, and final cleanup costs;
2. Compare the proposed cleanup actions scheduled in the cleanup plan and actual actions undertaken to perform the cleanup; and
3. Detail dates of cleanup activities, additional sampling results and other pertinent information.

(c) If the Department determines that the cleanup plan has not been fully complied with, the owner or operator of the industrial establishment shall correct any deficiencies, and amend the final report, in the time frames specified by the Department.

(d) The Department, upon satisfactory completion of (a) through (c) above and submittal of all fees required by N.J.A.C. 7:26B-1.10, shall notify in writing the owner or operator of the industrial establishment that the cleanup plan has been fully implemented.

(e) The Department shall release the financial assurance required pursuant to N.J.A.C. 7:26B-6 after the letter approving the implementation of the cleanup has been issued.

7:26B-5.8 Deferral of implementation of cleanup plan

(a) If the industrial establishment will be subject to substantially the same use by the purchaser, transferee, mortgagee or other party to the transfer, the owner or operator of the industrial establishment may apply in writing to the Department for approval to defer implementation of the cleanup plan until the use changes or until the purchaser, transferee, mortgagee or other party to the transfer closes, terminates or transfers operations.

(b) The owner or operator of the industrial establishment applying for a deferral as described in (a) above shall submit an affidavit signed by the person(s) identified in N.J.A.C. 7:26B-1.13(d) and an affidavit by the other party(ies) to the transfer and both shall be certified in accordance with N.J.A.C. 7:26B-1.13(d) stating that the industrial establishment shall be subject to substantially the same use by any other party(ies) to the transfer and detailing the proposed operations of that other party(ies).

(c) The Department shall, within 60 days of the owner's or operator's compliance with the financial assurance requirements for the cleanup plan pursuant to N.J.A.C. 7:26B-5.5 and the written certification required in (b) above, either approve, conditionally approve, or disapprove the written certification for the deferral of implementation of the cleanup plan.

(d) If the Department approves the deferral application, the owner or operator of the industrial establishment may defer implementation of the cleanup plan until the use of the industrial establishment changes, until any other party(ies) to the transfer closes, terminates or transfers operations, or until the Department determines that continued deferral of cleanup plan implementation poses a threat of actual or potential harm to the public health or environment.

(e) The Department shall not approve the deferral of cleanup plan implementation until the owner or operator proves to the satisfaction of the Department that the deferral of cleanup plan implementation poses only an insignificant threat of actual or potential harm to the public health or the environment.

(f) The Department's authority to defer implementation of the cleanup plan set forth in this section shall not be construed to limit, restrict or prohibit the Department from directing cleanup nor limit the liabilities of the owner or operator or past owners or operators under any other statute, rule or regulation or order, but shall be solely applicable to the obligations of the owner or operator of the industrial establishment pursuant to the Act and this chapter.

(g) If the Department denies a deferral, the owner or operator of the industrial establishment shall immediately implement the cleanup plan pursuant to the provisions of this chapter and the Act.

SUBCHAPTER 6. FINANCIAL ASSURANCE

7:26B-6.1 General requirements

(a) Within 14 days after receipt of written notice from the Department that the cleanup plan is approved, or as specified in an ACO, the owner or operator of the industrial establishment shall obtain and provide to the Department financial assurance in the form of a surety bond, performance bond, letter of credit, self bonding, or fully funded trust fund, in accordance with Appendix A of this chapter and in the amount at least equal to the cleanup cost estimate in the cleanup plan or the amount specified in an ACO. For a surety bond, performance bond, and letter of credit, a standby trust agreement is also required.

(b) The financial assurance required by this subchapter is the responsibility of the owner or operator of the industrial establishment except that the purchaser, transferee, mortgagee or other parties to the transfer may assume the financial assurance requirements for cleanup as specified in this subchapter upon the Department's prior written approval of any appropriate agreement to be executed between the parties in accordance with N.J.A.C. 7:26B-5.5.

Case Notes

Railroad could not be required to accelerate environmental procedures as prerequisite to conveyance. In re Morristown & Erie R. Co., C.A.3 (N.J.) 1989, 885 F.2d 98, rehearing denied.

7:26B-6.2 Surety bond guaranteeing payment into a standby trust fund

(a) An owner or operator of an industrial establishment may satisfy the requirements of this subchapter by obtaining a surety bond guaranteeing payment into a standby trust fund which conforms to the requirements of this section and by having the bond delivered to the Department by certified mail, courier service or hand delivery, within 14 days after receipt of notice from the Department of the cleanup plan approval or as specified in an ACO.

1. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal bonds in the most recent version of Circular 570 issued by the U.S. Department of the Treasury which is published annually on July 1 in the Federal Register.

(b) The wording of the surety bond shall be identical with the wording in the "Wording of Instruments" document specified in Appendix A of this chapter.

(c) The owner or operator of an industrial establishment who uses a surety bond to satisfy the requirements of this subchapter shall also establish a standby trust fund by the time the bond is submitted to the Department. Under the terms of the surety bond, all payments made thereunder shall be deposited directly into the standby trust fund in accordance with instructions from the Department. The wording of the standby trust fund shall be identical with the wording in the "Wording of Instruments" document specified in Appendix A of this chapter. A copy of the executed trust agreement shall be submitted to the Department with the surety bond. The owner or operator shall establish the trust fund with a nominal initial payment by the time the bond and trust fund agreement are submitted to the Department.

(d) The surety bond shall guarantee that if the Department determines that the owner or operator has failed to perform the obligations of this chapter, the surety shall fund the standby trust fund in an amount equal to the penal sum of the bond.

(e) The surety shall be liable on the bond obligation when the Department determines that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond. Following the Department's determination that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond, the surety shall deposit the amount of the penal sum of the bond into the standby trust fund.

(f) The penal sum of the bond shall be in an amount equal to or greater than the cost estimate approved by the Department in the cleanup plan or as specified in an ACO.

(g) Whenever the cleanup plan cost estimate increases as specified in N.J.A.C. 7:26B-5 to an amount greater than the amount of the surety bond, the owner or operator shall, within 60 days after the increase, cause the amount of the surety bond to be increased to an amount at least equal to the new estimate and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternative financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount of the surety bond. Thereafter, the surety bond may be decreased to the amount of the new estimate only upon written approval by the Department to the surety. Notice of an increase or decrease in the amount of the surety bond shall be sent by the surety to the Department by certified mail within 60 days after the change.

(h) The bond shall contain the following provisions concerning cancellation:

1. The surety shall not, in the absence of a request by the owner or operator, cancel or otherwise terminate the bond unless the surety sends a written notice of cancellation by certified mail to the owner or operator and to the Department at least 120 days prior to cancellation.

2. The surety shall not, on the basis of a request from the owner or operator, cancel the bond until it has received written approval of the Department to do so.

(i) Within 30 days after receipt of a notice of cancellation, the owner or operator shall provide alternative financial assurance in accordance with this subchapter. In the event that the owner or operator does not provide alternative financial assurance within 60 days after receipt of the notice of cancellation, the Department may thereafter instruct the surety to place the penal sum of the bond in the standby trust fund.

(j) The owner or operator shall not cancel the bond until the Department has given written approval to do so.

(k) The Department will return the original surety bond to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department provides written notification to the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.3 Surety bond guaranteeing performance (performance bond)

(a) An owner or operator of an industrial establishment may satisfy the requirements of this subchapter by obtaining a surety bond guaranteeing performance (a performance bond) which conforms to the requirements of this section and by having the bond delivered to the Department by certified mail within 14 days after receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

1. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal bonds in the most recent version of Circular 570 issued by the U.S. Department of the Treasury which is published annually on July 1 in the Federal Register.

(b) The wording of the performance bond shall be identical with the wording in the "Wording of Instruments" document specified in Appendix A of this chapter.

(c) The owner or operator of an industrial establishment who uses a performance bond to satisfy the requirements of this subchapter shall also establish a standby trust fund by the time the bond is submitted to the Department. Under the terms of the performance bond, all payments made thereunder shall be deposited directly into the standby trust fund, in accordance with instructions from the Department. The wording of the standby trust fund shall be identical with the "Wording of Instruments" document specified in Appendix A of this chapter. A copy of the executed trust agreement shall be submitted to the Department with the performance bond. The owner or operator shall establish the trust fund with a nominal initial payment by the time the bond and trust fund agreement are submitted to the Department.

(d) The performance bond shall guarantee that the owner or operator of an industrial establishment shall perform the cleanup in accordance with the approved cleanup plan.

(e) The surety shall become liable on the bond obligation when the Department determines that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond. Following the Department's determination that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond, the surety shall implement the cleanup plan or shall deposit the amount of the penal sum of the bond into the standby trust fund.

(f) The penal sum of the bond shall be in an amount equal to or greater than the cost estimate approved by the Department in the cleanup plan or as specified in an ACO.

(g) Whenever the cleanup plan cost estimate increases as specified in N.J.A.C. 7:26B-5 to an amount greater than the amount of the performance bond, the owner or operator shall, within 60 days after the increase, cause the amount of the performance bond to be increased to an amount at least equal to the new estimate and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternative financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount of the performance bond. Thereafter, the performance bond may be decreased to the amount of the new estimate only upon written approval by the Department to the surety. Notice of an increase or decrease in the amount of the surety bond shall be sent by the surety to the Department by certified mail within 60 days after the change.

(h) The bond shall contain the following provisions concerning cancellation:

1. The surety shall not, in the absence of a request by the owner or operator, cancel or otherwise terminate the

bond unless the surety sends a written notice of cancellation by certified mail to the owner or operator and to the Department at least 120 days prior to cancellation.

2. The surety shall not, on the basis of a request from the owner or operator, cancel the bond until it has received the written approval of the Department to do so.

(i) Within 30 days after receipt of a notice of cancellation, the owner or operator shall provide alternative financial assurance in accordance with this subchapter. In the event that the owner or operator does not provide alternative financial assurance within 60 days after receipt of the notice of cancellation, the Department may thereafter instruct the surety to place the penal sum of the bond in the standby trust fund.

(j) The owner or operator shall not cancel the bond until the Department has given written consent to do so.

(k) The surety will not be liable for deficiencies in the performance of cleanup by the owner or operator after the owner or operator has been notified by the Department that the owner or operator is no longer required by this subchapter to maintain financial assurance for cleanup of the facility.

(l) The Department will return the original performance bond to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department provides written notification to the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.4 Letter of credit

(a) An owner or operator may satisfy the requirements of this subchapter by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section and by having it delivered to the Department by certified mail within 14 days after receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

(b) The issuing institution shall be an entity which has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(c) The wording of the letter of credit shall be identical to the wording in the "Wording of Instruments" document specified in Appendix A of this chapter.

(d) An owner or operator who uses a letter of credit to satisfy the requirements of this subchapter shall also establish a standby trust fund by the time the letter of credit is

submitted to the Department. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Department shall be deposited promptly and directly by the issuing institution into the standby trust fund. The wording of the standby trust fund shall be identical to the wording in the "Wording of Instruments" document specified in Appendix A of this chapter. A copy of the executed trust agreement shall be submitted to the Department with the letter of credit. The owner or operator shall establish the trust fund with a nominal initial payment by the time the letter of credit and trust fund agreement are submitted to the Department.

(e) The letter of credit shall be irrevocable, issued for a period of at least one year, and shall be automatically extended for a period of at least one year. In the event that the issuing institution is subject to Title 17 of the Revised Statutes of New Jersey, the letter of credit shall not be automatically renewable, but shall be renewable yearly by the owner or operator or alternative financial assurances as specified in this subchapter shall be obtained.

(f) If the issuing institution decides not to extend or renew the letter of credit beyond the then-current expiration date, it shall notify both the owner or operator and the Department by certified mail of that decision at least 120 days before the then-current expiration date. The 120-day period shall begin on the date of receipt by the Department as shown on the signed return receipt.

(g) The letter of credit shall be issued for an amount equal to or greater than the cost estimate approved by the Department in the cleanup plan or as specified in an ACO.

(h) Whenever the cleanup plan cost estimate as specified in N.J.A.C. 7:26B-5 increases to an amount greater than the amount of the letter of credit, the owner or operator shall, within 60 days after the increase, cause the amount of the letter of credit to be increased to an amount at least equal to the new estimate and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternative financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount of the letter of credit. Thereafter, the letter of credit may be decreased to the amount of the new estimate only upon written approval by the Department to the issuing institution. Notice of an increase or decrease in the amount of the letter of credit shall be sent by the issuing institution to the Department by certified mail within 60 days after the change.

(i) Following the Department's determination that the owner or operator has failed to perform the obligations under this chapter, the Department may draw upon the letter of credit and the issuing institution shall deposit the amount of the letter of credit into the standby trust fund.

(j) The letter of credit shall contain the following provisions concerning cancellation:

1. The issuing institution shall not, in the absence of a request by the owner or operator, cancel or otherwise terminate the letter of credit unless the issuing institution sends a written notice of cancellation by certified mail to the owner or operator and to the Department at least 120 days prior to cancellation.

2. The issuing institution shall not, on the basis of a request from the owner or operator, cancel the letter of credit until it has received the written approval of the Department to do so.

(k) Within 30 days of receipt of a notice of termination or cancellation or the like, the owner or operator shall provide alternative financial assurance as specified in this subchapter. In the event that the owner or operator does not provide alternative financial assurance within 60 days after receipt of the notice, the Department may draw upon the letter of credit, and the issuing institution shall deposit the amount of the letter of credit into the standby trust fund.

(l) The Department will return the original letter of credit to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department provides written notification to the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.5 Self-bonding

(a) A corporate owner or operator of an industrial establishment may satisfy the requirements of this subchapter by complying with (b), (c), (d), (f), and (j) below within 14 days after receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

(b) A corporate owner or operator may qualify for self-bonding only if it meets the following financial test:

1. The approved cleanup plan cost estimate or financial assurance amount specified by an ACO is less than or equal to five percent of tangible net worth;

2. The corporation has net working capital at least six times the approved cleanup plan cost estimate or six times the financial assurance amount specified by an ACO;

3. The corporation has assets located in the United States amounting to at least 90 percent of total assets or at least six times the approved cleanup plan cost estimate or six times the financial assurance amount specified by an ACO;

4. The ratio of net worth to total liabilities is greater than 0.5;

5. The ratio of current assets to current liabilities is greater than 1.5; and

6. The ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities is greater than 0.1.

(c) A parent corporation may be the self-bonder for a subsidiary only if the parent corporation owns at least 50 percent of the voting stock of the subsidiary corporation, meets the financial test provided at (b) above, and submits the documentation required by (d) below for the parent corporation.

(d) The owner or operator shall demonstrate that the corporation can meet the financial test described at (b) above submitting the following items to the Department:

1. An affidavit from the chief financial officer (CFO) which:

i. Certifies that the corporation meets or exceeds the levels of the required financial test as provided for at (b) above and as supported by the corporation's attached independently audited year end financial statements for the corporation's most recently completed fiscal year;

ii. Lists all operations in the United States owned or operated by the corporation involved in any form of environmental cleanup or closure and the associated approved cleanup or closure plan costs for these operations; and

iii. Contains a corporate resolution stating that the CFO or his or her successor has continuing authority to make payments from the corporation to the Department if the Department determines that the owner or operator has failed to perform the obligations under this chapter.

2. A certified audit, conducted by an independent certified public accountant in accordance with standards established by the American Institute of Certified Public Accountants, documenting the corporation's financial statements for the latest completed fiscal year; and

3. A comparison report from an independent certified public accountant stating:

i. That he or she has compared the affidavit of the CFO with the independently audited, year-end financial statements for the latest fiscal year and with the financial requirements of the Department's self-bonding policy; and

ii. That in connection with the comparison at i above, no matters have come to his or her attention which cause him or her to believe that the data specified by the CFO should be adjusted.

(e) If the independent certified public accountant's opinion contained in his or her comparison report on examination of the corporation's financial statements is an adverse opinion or contains a disclaimer of opinion as to the future stability of the corporation, the corporation shall not be allowed to use self-bonding to comply with the financial assurance requirements. The Department may also disallow use of self-bonding based on any other adverse qualifications expressed in the independent certified public accountant's opinion.

(f) The owner or operator shall execute a self-bonding agreement available from the Department.

(g) To continue to utilize self-bonding as a financial assurance mechanism, the owner or operator shall submit the following reports to the Department:

1. An affidavit from the CFO that the corporation meets or exceeds the levels of the required financial test every six months;

2. Every year the company shall renew its self-bonding by complying with (b), (c), (d), above and (j) below within 90 days subsequent to the end of the corporation's fiscal year.

(h) Upon the request of the Department, the corporation shall immediately submit a review of the corporation's financial status to determine the ability of the corporation to continue self-bonding.

(i) Upon determining that the owner or operator has failed to perform its obligations under this chapter, the Department shall give written notice to the corporation, and, within five days of receipt of the notice, the owner or operator shall pay to the Department the current cleanup plan cost estimate or financial assurance amount specified in an applicable ACO.

(j) In determining whether to accept self-bonding in satisfaction of the financial assurance requirements, the Department may consider the competency, reliability and integrity of the corporation and its parent corporation. Notwithstanding the provisions of (a) through (i) above, the Department may disallow the use of self-bonding where it determines that a corporation or its parent corporation lacks adequate competency, reliability or integrity.

7:26B-6.6 Fully funded trust fund

(a) An owner or operator may satisfy the requirements of this subchapter by establishing a fully funded trust which conforms to the requirements of this section and by having an originally signed duplicate of the trust agreement delivered to the Department by certified mail within 14 days of receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

(b) The trustee must 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.

(c) The wording of the fully funded trust agreement shall be identical with the "Wording of Instruments" document specified in Appendix A of this chapter, and shall be accompanied by a certification of acknowledgment as specified in Appendix A of this chapter.

(d) The fully funded trust shall be in an amount equal to or greater than the cost estimate approved by the Department for the cleanup plan or as specified in ACO and for a term not less than the actual duration of cleanup plan implementation.

(e) Whenever the cleanup plan cost estimate increases as specified in N.J.A.C. 7:26B-5 to an amount greater than the amount of the fully funded trust, the owner or operator 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 and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternating financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount in the fully funded trust. Thereafter, the fully funded trust may be decreased to the amount of the new estimate only upon written approval by the Department to the trustee. Notice of an increase or decrease in the amount of the fully funded trust shall be sent by the trustee to the Department by certified mail within 60 days after the change.

(f) The owner or operator, or the trustee, or both, shall not cancel or otherwise terminate the fully funded trust until the Department has given written approval to do so.

(g) The trustee shall release to the owner or operator only such funds as the Department specified in writing.

(h) The trustee will not be liable for deficiencies in the performance of cleanup by the owner or operator after the owner or operator has received written notification by the Department that the owner or operator is no longer required by this subchapter to maintain financial assurance for cleanup of the industrial establishment.

(i) Following a written determination that the owner or operator has failed to perform its obligations under this chapter, the Department may draw on the fully funded trust.

(j) The Department will return the original fully funded trust agreement to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department notifies the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.7 Standby trust

(a) An owner or operator who uses a surety bond or letter of credit to satisfy the requirements of this subchapter shall also establish a standby trust and deliver a copy of the executed standby trust agreement to the Department by certified mail within 14 days after receipt of notice from the Department of the cleanup plan approval or as specified in an ACO.

(b) 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.

(c) The wording of the standby trust agreement shall be identical with the "Wording of Instruments" document specified in Appendix A of this chapter, and shall be accompanied by a formal certification of acknowledgement as specified in Appendix A of this chapter.

(d) Under the terms of any surety bond or letter of credit, all payments made thereunder shall be deposited by the surety or the issuing institution, as applicable, directly into the standby trust fund in accordance with instructions from the Department.

(e) Where the surety has funded the standby trust or the issuing institution has deposited the amount of the letter of credit into the standby trust fund, the owner or operator shall, within 30 days after Departmental notice of an increase of the cleanup plan cost estimate, additionally fund the standby trust in the amount of the increase. Notice of an increase in the amount of the standby trust fund shall be sent by the trustee to the Department by certified mail within 60 days after the change.

(f) The trustee shall not cancel or otherwise terminate the standby trust until the Department has given written approval to do so.

(g) The Department will send written notification to the trustee releasing the trustee from the obligations of the standby trust agreement after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department notifies the owner or operator that the owner or operator is no longer required by this subchapter to maintain financial assurance for cleanup of the industrial establishment.

(h) The Department may draw on the standby trust fund at such time that it is funded by any surety bond or letter of credit.

SUBCHAPTER 7. ADMINISTRATIVE CONSENT ORDERS

7:26B-7.1 Criteria

(a) In the circumstances listed in (a)1 through 10 below, the Department may, in its discretion, enter into an ACO with the owner or operator of an industrial establishment so that the closing, terminating or transferring of operations may occur provided that compliance with the Act and this chapter is assured as specified in the ACO.

1. If there is a stock tender offer, either friendly or hostile;
2. If there is a public offering of securities traded or to be traded on federally regulated stock exchanges;
3. If the industrial establishment is required to develop a detailed sampling or cleanup plan, or both, and it is determined by the Department that a negative declaration or cleanup plan approval pursuant to N.J.A.C. 7:26B-5 will not be granted within four months from the time the Initial Notice is submitted;
4. If there is a sale or transfer to a New Jersey State, county, or municipal department, agency, or authority with the power of eminent domain;
5. If the owner or operator demonstrates that bankruptcy or insolvency is likely to occur if this transaction does not take place prior to implementation of the provisions of the Act and this chapter;
6. If the owner or operator demonstrates that layoffs of employees by either the seller or buyer are likely to occur if the transaction does not take place prior to implementation of the provisions of the Act and this chapter;
7. If there is a transaction involving one or more industrial establishment(s) in New Jersey, that is a part of a transaction involving multiple places of business at least one of which is not located in New Jersey;
8. If financing is provided by the New Jersey Economic Development Authority or other governmental department, authority or agency;
9. If a tenant requests an ACO due to lease termination by its landlord in which the tenant has fewer than 180 days notice of termination; or
10. If a landlord requests an ACO due to lease termination by its tenant in which the landlord has fewer than 180 days notice of termination.

(b) The applicant shall demonstrate that the circumstances described in (a) above will occur or have occurred and, therefore, that an ACO is necessary or advisable.

Case Notes

Company was entitled to hearing on environmental cleanup criteria. *Avon Products, Inc. v. New Jersey Dept. of Environmental Protection*, 243 N.J.Super. 375, 579 A.2d 831 (A.D.1990).

7:26B-7.2 Application forms

The owner or operator of an industrial establishment, or the purchaser, transferee, mortgagee, or other party to the transfer, shall submit an application for an ACO on forms available from the Department and accompanied by fees as described at N.J.A.C. 7:26B-1.10.

7:26B-7.3 ACO financial assurance requirements

(a) The owner or operator of an industrial establishment, or the purchaser, transferee, mortgagee, or other party to the transfer, shall provide financial assurance in accordance with N.J.A.C. 7:26B-6 in an amount equal to or greater than the Department's current estimate of the cost cleanup.

(b) In no case shall the amount of financial assurance for an ACO be less than \$100,000, unless the Department determines the cost of cleanup is less than \$100,000 based upon the submission of sampling data and a complete SES.

Case Notes

Railroad could not be required to accelerate environmental procedures as prerequisite to conveyance. *In re Morristown & Erie R. Co.*, C.A.3 (N.J.) 1989, 885 F.2d 98, rehearing denied.

7:26B-7.4 Stipulated penalties

(a) All ACOs shall contain a provision for the payment of stipulated penalties in the amounts and for the violations set forth in N.J.A.C. 7:26B-9; for violations of this chapter, the Act, or the ACO which are not listed at N.J.A.C. 7:26B-9, the stipulated penalties shall not be less than \$1000.00 nor more than \$5000.00 per day per violation.

(b) The party(ies) to the ACO shall waive their rights to contest the Department's discretion concerning the amount of stipulated penalties assessed by the Department under stipulated penalty provision of the ACO.

7:26B-7.5 ACO signatories and liability

(a) All ACO's must be signed by the owner or operator of the industrial establishment.

(b) In the Department's discretion, a purchaser, transferee, mortgagee, or other party to the transaction may sign an ACO with the Department and the owner or operator; however, the owner or operator, as well as any other non-Department signatories, shall be strictly liable, jointly and severally, for compliance with this chapter, the Act, and the ACO. If the operator signs an ACO and the owner does

not, or if the owner signs an ACO and the operator does not, the owner and the operator remain strictly liable, jointly and severally, with the signatories to the ACO, for compliance with ECRA and this chapter.

(c) If a signatory to an ACO is executing the ACO on behalf of an entity other than that individual, the ACO shall be accompanied by documentary evidence (such as a corporate resolution, a partnership resolution, a power of attorney, or the like) authorizing the signatory to bind the entity to the provisions of the ACO.

Amended by R.1989 d.403, effective August 7, 1989.
See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Modified in recognition that persons, other than owners or operators, may be signatories to an Administrative Consent Order.

7:26B-7.6 Site access

The owner or operator of an industrial establishment who enters into an ACO shall provide to the Department appropriate documentation that the purchaser, transferee, mortgagee, operator or other party to the transaction shall allow access by the Department and the transferor to the industrial establishment for all purposes of the Act and this chapter.

SUBCHAPTER 8. PROTECTION OF CONFIDENTIAL INFORMATION

7:26B-8.1 Confidentiality claims

(a) Any owner or operator of an industrial establishment required to submit any information pursuant to the Act or this chapter which in the owner's or operator's opinion constitutes trade secrets, proprietary information, specific information regarding the ECRA-subject transaction other than the fact that an ECRA-subject transaction has occurred and the general nature of such transaction, or information related to national security, may assert a confidentiality claim by following the procedures set forth in this subchapter and by paying the fee set forth in N.J.A.C. 7:26B-1.10(f).

(b) Any owner or operator submitting any information to the Department and asserting a confidentiality claim covering any information contained therein shall submit two documents to the Department. One document shall contain all the information required by the Act or this chapter including any information which the owner or operator alleges to be entitled to confidential treatment. The second document shall be identical to the first except that it shall contain no information which the owner or operator alleges to be entitled to confidential treatment. The second document can be a photocopy of the first, with the allegedly confidential material blacked out.

(c) The top of each page of the first document containing the information which the owner or operator alleges to be entitled to confidential treatment shall display the heading "CONFIDENTIAL" in bold type, or stamp.

(d) All parts of the text of the first document which the owner or operator alleges to be entitled to confidential treatment shall be underscored or highlighted in a clearly identifiable manner. This manner of marking confidential information shall be such that both the allegedly confidential information and the underscoring or highlighting is reproducible on photocopying machines.

(e) The first document, containing the information which the owner or operator alleges to be entitled to confidential treatment, shall be sealed in an envelope which shall display the word "CONFIDENTIAL" in bold type or stamp on both sides. This envelope, together with the second, non-confidential document (which may or may not be enclosed in a separate envelope, at the option of the owner or operator), shall be enclosed in another envelope for transmittal to the Department. The outer envelope shall bear no marking indicating the confidential nature of contents.

(f) To ensure proper delivery, the complete package should be sent by certified mail, return receipt requested, or by other means which will allow verification of receipt. Ordinary mail may be used, but the Department will assume no responsibility for packages until they are actually received at the address provided at N.J.A.C. 7:26B-1.11.

7:26B-8.2 Access to information; non-disclosure

(a) Until such time as a final confidentiality determination has been made, access to any information for which a confidentiality claim has been made will be limited to Department employees, representatives, and contractors, whose activities necessitate such access and as provided at N.J.A.C. 7:26B-8.5 and 8.8.

(b) No disclosure of information for which a confidentiality claim has been asserted shall be made to any other persons except as provided in this subchapter.

(c) Nothing in this section shall be construed as prohibiting the incorporation of confidential information into compilations of data subject to disclosure as public records, provided that such disclosure is not in a form that would foreseeably allow persons, not otherwise having knowledge of such confidential information, to deduce from it the confidential information or the identity of the owner or operator who supplied it to the Department.

7:26B-8.3 Confidentiality determinations

(a) Information for which a confidentiality claim has been asserted will be treated by the Department as entitled to confidential treatment, unless the Department determines that the information is not entitled to confidential treatment as provided in this section and N.J.A.C. 7:26B-8.4.

(b) The Department shall act upon a confidentiality claim and determine whether information is or is not entitled to confidential treatment whenever the Department:

1. Receives a request under N.J.S.A. 47:1A-1 et seq. to inspect or copy such information; or
2. Desires to determine whether information in its possession is entitled to confidential treatment; or
3. Desires for any reason in the public interest to disclose the information to persons not authorized by this subchapter to have access to confidential information.

(c) The Department shall make the initial determination whether information is or is not entitled to confidential treatment.

1. If the Department determines that information is not entitled to confidential treatment, it shall so notify the owner or operator who submitted the information.

2. The notice required under this subsection shall be sent by certified mail, return receipt requested and shall state the reasons for the Department's initial determination.

3. An owner or operator who wishes to contest a determination by the Department shall, within 30 days of notification of the determination, submit evidence to support the owner's or operator's contention that the Department's initial determination was incorrect. The evidence may include, but need not be limited to, a statement indicating:

- i. The period of time for which confidential treatment is desired by the owner or operator (for example, until a certain date, until the occurrence of a specified event, or permanently);

- ii. The measures taken by the owner or operator to guard against undesired disclosure of the information to others;

- iii. The extent to which the information has been disclosed to others, and the precautions taken in connection therewith; and

- iv. The extent to which disclosure of the information would result in substantial damage to the owner or operator, including a description of the damage, an explanation of why the damage would be substantial, and an explanation of the relationship between disclosure and the damage.

4. Failure of an owner or operator to furnish timely comments or exceptions waives the owner's or operator's confidentiality claim.

5. The owner or operator may assert a confidentiality claim to any information submitted to the Department by an owner or operator as part of its comments pursuant to 3 above.

6. The Department may extend the time limit for submitting comments pursuant to 3 above for good cause shown by the owner or operator and upon receipt of a request in writing.

(d) After receiving the evidence, the Department shall review its initial determination and make a final determination.

1. If, after review, the Department determines that the information is not entitled to confidential treatment, the Department shall so notify the owner or operator by certified mail, return receipt requested. The notice shall state the basis for the determination, that it constitutes final agency action concerning the confidentiality claim, and that the Department shall make the information available to the public on the 14th day following receipt by the owner or operator of the written notice.

2. If, after review, the determination is made that information is entitled to confidential treatment, the information shall not be disclosed, except as otherwise provided by this subchapter. The owner or operator shall be notified of the Department's determination by certified mail, return receipt requested. The notice shall state the basis for the determination and that it constitutes final agency action.

7:26B-8.4 Substantive criteria for use in confidentiality determinations

(a) When the owner or operator satisfies each of the following substantive criteria, the Department shall determine that the information for which a confidentiality claim has been asserted is confidential:

1. The owner or operator has asserted a confidentiality claim which has not expired by its terms, been waived or withdrawn;

2. The owner or operator has shown that reasonable measures have been taken to protect the confidentiality of the information and that the owner or operator intends to continue to take such measures;

3. The information is not, and has not been, available or otherwise disclosed to other persons without the owner's or operator's consent (other than by subpoena or by discovery based on a showing of special need in a judicial or quasi-judicial proceeding, as long as the information has not become available to persons not involved in the proceeding);

4. No statute specifically requires disclosure of the information; and

5. Except for information related to national security, the owner or operator has shown that disclosure of the information would be likely to cause substantial damage to its competitive position.

7:26B-8.5 Disclosure of confidential information to other public agencies

(a) The Department may disclose confidential information to persons other than Department employees, representatives, and contractors only as provided in this section or N.J.A.C. 7:26B-8.7.

(b) The Department may disclose confidential information to any other State agency or to a Federal agency if:

1. The Department receives a written request for disclosure of the information from a duly authorized officer or employee of the other agency;

2. The request sets forth the official purpose for which the information is needed;

3. The Department notifies the other agency of the Department's determination that the information is entitled to confidential treatment, or of any unresolved confidentiality claim covering the information;

4. The other State or Federal agency has first furnished to the Department a written formal legal opinion from the agency's chief legal officer or counsel stating that under applicable law the agency has the authority to compel the person who submitted the information to the Department to disclose such information to the other agency; and

5. The other agency agrees not to disclose the information further unless:

i. The other agency has statutory authority both to compel production of the information and to make the proposed disclosure; or

ii. The other agency has obtained the consent of the affected owner or operator to the proposed disclosure; and

6. The other agency has adopted regulations or operates under statutory authority that will allow it to preserve confidential information from unauthorized disclosure.

(c) Except as otherwise provided in N.J.A.C. 7:26B-8.7, the Department shall notify in writing the owner or operator who supplied the confidential information of:

1. Its disclosure to another agency;
2. The date on which disclosure was made;
3. The name of the agency to which disclosed; and
4. A description of the information disclosed.

7:26B-8.6 Disclosure of confidential information to contractors

(a) The Department may disclose confidential information to a contractor of the Department when the contractor's activities necessitate such access.

(b) No information shall be disclosed to a contractor unless the contract in question provides that the contractor and the contractor's employees, agents and representatives shall use the information only for the purpose of carrying out the work required by the contract, shall not disclose the information to anyone not authorized in writing by the Department, shall store the information in locked cabinets in secure rooms, and shall return to the Department copies of the information, and any abstracts or extracts therefrom, upon request by the Department or whenever the information is no longer required by the contractor for the performance of the work required by the contract.

(c) Disclosure in violation of this subchapter or the contractual provisions described in (b) above shall constitute grounds for debarment or suspension as provided in "Debarment, Suspension and Disqualification from Department Contracting", N.J.A.C. 7:1-5, in addition to whatever other remedies may be available to the Department at equity or law.

7:26B-8.7 Disclosure by consent

(a) The Department may disclose any confidential information to any person if it has obtained the written consent of the owner or operator to such disclosure.

(b) The giving of consent by an owner or operator to disclose shall not be deemed to waive a confidentiality claim with regard to further disclosures unless the authorized disclosure is of such nature as to make the disclosed information accessible to the general public.

7:26B-8.8 Imminent and substantial danger

(a) Upon a finding that disclosure of confidential information would serve to alleviate an imminent and substantial danger to public health and the environment, the Department may:

1. Prescribe and make known to the owner or operator such shorter comment period (N.J.A.C. 7:26B-8.3(c)4), post-determination waiting period (N.J.A.C. 7:26B-8.3(d)1), or both, as it finds necessary under the circumstances; or

2. Disclose confidential information to any person whose role in alleviating the danger to public health and the environment necessitates that disclosure. Any such disclosure shall be limited to information necessary to enable the person to whom it is disclosed to carry out the activities in alleviating the danger.

(b) Any disclosure made pursuant to this section shall not be deemed a waiver of a confidentiality claim, nor shall it of itself be grounds for any determination that information is no longer entitled to confidential treatment.

(c) The Department will notify the owner or operator of any disclosure made pursuant to this section as soon as is feasible.

7:26B-8.9 Security procedures under ECRA

(a) Submissions to the Department pursuant to the Act and this chapter will be opened only by persons authorized by the Department engaged in administering the Act and this chapter.

(b) Only those Department employees whose activities necessitate access to information for which a confidentiality claim has been made, shall open any envelope which is marked "CONFIDENTIAL" and is addressed as provided at N.J.A.C. 7:26B-1.11.

(c) All submissions entitled to confidential treatment as determined at N.J.A.C. 7:26B-8.3 shall be stored by the Department or its contractors only in locked cabinets.

(d) Any record made or maintained by Department employees, representatives, or contractors which contains confidential information shall contain appropriate indicators identifying the confidential information.

7:26B-8.10 Wrongful access or disclosure; penalties

(a) A person shall not disclose, seek access to, obtain or have possession of any confidential information obtained pursuant to the Act or this chapter, except as authorized by this subchapter.

(b) Every Department employee, representative, and contractor who has custody or possession of confidential information shall take appropriate measures to safeguard such information and to protect against its improper disclosure.

(c) A Department employee, representative, or contractor shall not disclose, or use for his or her private gain or advantage, any information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position of employment or contractual relationship with the Department.

(d) If the Department finds that any person has violated the provisions of this subchapter, it may:

1. Commence a civil action in Superior Court for a restraining order and an injunction barring that person from further disclosing confidential information.
2. Pursue any other remedy available by law.

(e) In addition to any other penalty that may be sought by the Department, violation of this subchapter by a Department employee shall constitute grounds for dismissal, suspension, fine or other adverse personnel action.

(f) Use of any of the remedies specified under this section shall not preclude the use of any other remedy.

SUBCHAPTER 9. VIOLATIONS AND PENALTY PROVISIONS**7:26B-9.1 Voiding of the sale or transfer of an industrial establishment by the transferee or the Department**

(a) Failure of the transferor of an industrial establishment to comply with any of the provisions of the Act or this chapter shall be grounds for the transferee's voiding the sale or transfer of an industrial establishment or any real property utilized in connection therewith.

(b) Failure of an owner or operator of an industrial establishment to submit a negative declaration or cleanup plan pursuant to the provisions of the Act, this chapter, or an ACO shall be grounds for the Department's voiding the sale of the industrial establishment or any real property utilized in connection therewith.

7:26B-9.2 Recovery of damages; liability for cleanup and removal costs and damages

(a) The transferee shall be entitled to recover damages from the transferor due to the voiding of the sale.

(b) Failure to comply with any provisions of the Act or this chapter shall render the owner and operator of an industrial establishment strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages resulting from the failure to implement any cleanup plan necessary.

Amended by R.1989 d.403, effective August 7, 1989.
See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Phrase "jointly and severally" deleted from (b).

Case Notes

Private right of action. Cooper Development Co., Inc. v. First Nat. Bank of Boston, D.N.J.1991, 762 F.Supp. 1145.

Suit for environmental damages would not void transaction. Dixon Venture v. Joseph Dixon Crucible Co., 235 N.J.Super. 105, 561 A.2d 663 (A.D.1989), certification granted 118 N.J. 204, 570 A.2d 965, affirmed as modified 122 N.J. 228, 584 A.2d 797.

7:26B-9.3 Civil penalties

(a) Any person who knowingly gives or causes to be given any false information or who fails to comply with the provisions of the Act or this chapter shall be liable for a civil penalty of not more than \$25,000 for each offense. If the violation is of a continuing nature, each day during which it continues shall constitute an additional and separate offense.

(b) Penalties shall be collected in a civil action by a summary proceeding under the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq.

(c) Any officer or management official of an industrial establishment who knowingly directs or authorizes the violation of any provision of the Act or this chapter shall be

personally liable for any penalties provided by the Act or this chapter.

(d) The schedule in 1 to 7 below indicates the amounts which the Department may accept for the following violations:

1. Unless otherwise provided in 2 to 7 below:

Days from date required to date received	Notification/ Submissions required by Regulations/ Legislation (per day)	Submissions Required by letter(s) from DEP pursuant to the Regulations/ Legislation (per day)	Violations of any ACO Requirement (per day)
1-14 Days	\$ 250.00	\$ 500.00	\$1,000.00
15-29 Days	500.00	1,000.00	2,000.00
30-44 Days	750.00	1,500.00	3,000.00
45-59 Days	1,000.00	2,000.00	4,000.00
more than 59	1,250.00	2,500.00	5,000.00

2. Failure to allow the Department access: \$2,500 per day;
3. Failure to secure and maintain the required financial assurance: \$5,000 per day;
4. Failure to implement an approved sampling plan: \$15,000 per day;
5. Failure to implement an approved cleanup plan: \$25,000 per day;
6. Failure to fund the standby trust fund or fully-funded trust fund: \$25,000 per day; and
7. Failure to pay the Department in accordance with N.J.A.C. 7:26B-6.5(i): \$25,000 per day.

(e) In its discretion, the Department may compromise and settle any claim for a penalty pursuant to the Act or this chapter.

(f) Nothing in (d) above shall limit or otherwise prohibit the Department from seeking the maximum penalties provided by the Act for the violations listed in (d) above or for any other violation of the Act, this chapter, or an ACO not listed in (d) above, in a summary action under the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq.

Case Notes

Environmental Act carries sanctions. *Chemos Corp. v. State Dept. of Environmental Protection Div. of Hazardous Waste Management*, 237 N.J.Super. 359, 568 A.2d 75 (A.D.1989).

SUBCHAPTER 10. DE MINIMUS STANDARDS

7:26B-10.1 De minimus quantity exemption

(a) The owner or operator of an industrial establishment who is granted a de minimus quantity exemption from the Department shall be exempt from the provisions of the Act and this chapter except as provided at N.J.A.C. 7:26B-1.10 based on de minimus quantities of hazardous substances stored or handled at the industrial establishment.

(b) The de minimus quantity exemption shall be granted by the Department subject to (e) below only if (c) and (d) below and all of the following criteria of this subsection are met:

1. In the case of a mixture of hazardous substances stored or handled at the industrial establishment:

i. The total quantity of hazardous substances stored or handled at any one time is not in excess of one percent of the mixture, with the total quantity of hazardous substances not in excess of 500 pounds;

ii. Any mixture containing hazardous substances is present in the same form and concentration as a product packaged for distribution or use by the general public and this mixture is used by the industrial establishment in a manner similar to that of the general public;

iii. Any mixture containing hazardous substances is used solely in routine office operations; or

iv. Any mixture containing hazardous substances is in final product form for wholesale or retail distribution.

2. Any paints and varnishes containing hazardous substances are used for buildings and grounds maintenance purposes only and are not used as part of the business operations except as provided below at 3;

3. The quantity of paints, inks (except those actually used or to be used in office copying equipment, adhesives and varnishes containing hazardous substances that are used annually in the business operations of the industrial establishment amount to five gallons or less;

4. The quantity of lubricating and hydraulic oils used for maintenance purposes shall not be more than 55 gallons per year, and the total quantity present at the industrial establishment shall not be more than 110 gallons at any one time;

5. The quantity of petroleum products, other than lubricating and hydraulic oils, stored at the industrial establishment at any one time shall not be more than 11 gallons; and

6. Pesticides are present in the same form and concentration as packaged for distribution or use by the general public, provided these products are used in accordance with the manufacturer's instructions for pesticide application and are not designated as "prohibited" or "restricted" at N.J.A.C. 7:30 pursuant to the New Jersey Pesticide Control Act of 1971, N.J.S.A. 13:1F-1 et seq.

(c) The de minimus quantity exemption shall be granted only if:

1. The owner or operator of the industrial establishment has been and continues to be the sole and original owner or operator of the industrial establishment from the date of construction of the facility on the property;

2. The most recent prior owner of the real property of the industrial establishment received a negative declaration, a cleanup plan approval, or a de minimus quantity exemption from the Department; or

3. The owner or operator of the industrial establishment has obtained and submitted to the Department an affidavit from his or her transferor that the transferor was the sole and original owner or operator at the industrial establishment from the date of construction of the facility on the property and that the transferor met the criteria set forth in (b) above, for the entire period of ownership or operation by the transferor.

(d) To apply for a de minimus quantity exemption, the owner or operator of the industrial establishment shall submit the following to the Department:

i. An affidavit stating that there has been no discharge(s) of hazardous substances and wastes on site or that any discharge(s) of hazardous substances and wastes on or from the industrial establishment has been cleaned up to the current satisfaction of the Department; and

ii. The appropriate fee specified in N.J.A.C. 7:26B-1.10.

(e) The Department may require the owner or operator to submit a sampling plan for the industrial establishment when it has reason to believe that contamination may exist. In cases where a sampling plan has been required, the Department may issue a de minimus quantity exemption only where the owner or operator has complied with all applicable provisions of this section and where the results of an approved sampling plan indicate that there is no contamination from hazardous substances and wastes or where the Department has made a determination that no sampling plan is necessary.

Amended by R.1989 d.403, effective August 7, 1989. See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

At (d) the requirements recodified to i and ii and new (e) added requiring possible submission of a sampling plan.

SUBCHAPTER 11. ECRA CLEANUP STANDARDS

7:26B-11.1 Standards for detoxification

Until adoption of the minimum standards required pursuant to Section 5(a) of the Act, N.J.S.A. 13:1K-10, the Department shall review, approve or disapprove negative declarations and cleanup plans on a case-by-case basis for soil, ground water and surface water quality necessary for the cleanup of the industrial establishment, including buildings and equipment, to ensure that the potential for harm to public health and the environment is minimized to the maximum extent practicable, taking into consideration the

location of the industrial establishment, surrounding ambient conditions, and other relevant factors.

Case Notes

Taxpayer's estimate of \$5,296,000 for decommissioning expenses was not probative. *Badische Corp. (BASF) v. Kearny Town*, 14 N.J.Tax 219 (1994).

Taxpayer's projected cleanup cost of \$10 million lacked probative value. *Badische Corp. (BASF) v. Kearny Town*, 14 N.J.Tax 219 (1994).

SUBCHAPTER 12. (RESERVED)

SUBCHAPTER 13. LIMITED CONVEYANCE

7:26B-13.1 Certificate of Limited Conveyance

(a) A conveyance of title to a portion of an industrial establishment may be allowed pursuant to a Certificate of Limited Conveyance issued by the Department. The granting of a Certificate of Limited Conveyance allows the conveyance to occur without the owner conducting a complete review of the entire industrial establishment pursuant to the Act and this chapter.

(b) The Certificate of Limited Conveyance shall be granted only where:

1. The sales price of the real property to be conveyed, together with the diminution in value to the remaining property, is not more than 20 percent of the total appraised value of the real property of the industrial establishment;

2. The appraisal has occurred as close to the application for a Certificate of Limited Conveyance from the Department as possible, but in no case more than one year prior to submittal of the application for the Certificate of Limited Conveyance;

3. The real property conveyed pursuant to this subchapter has never been involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes on-site, above or below ground.

(c) The owner(s) may convey any number of parcels of real property provided that the sum of the percentages attributed to each limited conveyance determined in accordance with (b)1 above shall not exceed 20 percent during the period of ownership by the applicant.

(d) To apply for a Certificate of Limited Conveyance the owner or operator shall submit the following to the Department:

1. Appropriate application form available from the Department;

2. A map delineating total area of the industrial establishment as of December 31, 1983, areas previously conveyed pursuant to this limited conveyance provision, and total acreage presently proposed for conveyance;

3. A copy of the sales agreement specifying the agreed upon price for the real property presently proposed for conveyance or, in the case of an acquisition by a condemning authority where no agreement has been reached, an affidavit from the owner specifying the compensation, including any damages, sought by the owner and the current appraised value;

4. Current appraisal of the real property of the industrial establishment;

i. Appraisals shall be conducted by a designated Member, Appraisal Institute (American Institute of Real Estate Appraisers), Senior Real Estate Analyst (Society of Real Estate Appraisers), or Senior Member (American Society of Appraisers);

5. An affidavit certifying that no material change has occurred since the date of the appraisal that would in any way materially alter the appraised value. The affidavit shall also certify that the portion of the industrial establishment to be conveyed has never been involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes on-site, above or below ground;

6. Copies of all prior Certificates of Limited Conveyance(s) if any, issued for the subject industrial establishment;

7. The fee specified at N.J.A.C. 7:26B-1.10; and

8. Any other information as required by the Department.

(e) The Department may require the owner or operator to submit a sampling plan for the portion of the industrial establishment proposed for conveyance when it has reason to believe that contamination may exist. In cases where a sampling plan has been required, the Department may issue a Certificate of Limited Conveyance only where the results of an approved sampling plan indicate that there is no contamination from hazardous substances and wastes on the portion being conveyed, or emanating from or that has emanated from the portion to be conveyed, or where the Department has made a determination that no sampling plan is necessary.

Amended by R.1989 d.403, effective August 7, 1989.
See: 21 N.J.R. 402(a), 21 N.J.R. 2367(a).

Spelling correction of "diminution".

Amended by R.1993 d.3, effective January 4, 1993.
See: 24 N.J.R. 720(a), 25 N.J.R. 100(a).

Changed time frame in (b)2. from 60 days to one year; added language regarding what the affidavit would be certifying.

Case Notes

Entire site could be review when more than 20% was conveyed. In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 608 A.2d 288 (1992).

Partial condemnation could trigger Environmental Act requirements. In re Adoption of N.J.A.C. 7:26B, 250 N.J.Super. 189, 593 A.2d 1193 (A.D.1991), certification granted 126 N.J. 385, 599 A.2d 162, certification granted 126 N.J. 387, 599 A.2d 163, affirmed in part, reversed in part 128 N.J. 442, 608 A.2d 288.

SUBCHAPTER 14. ADDITIONAL REQUIREMENTS

7:26B-14.1 Additional requirements

(a) Nothing in the Act or this chapter shall be construed to limit, restrict, or prohibit the Department from directing immediate cleanup under any other statute, rule or regulation.

(b) No obligations imposed by the Act or this chapter shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding.

(c) All obligations imposed by the Act or this chapter shall constitute continuing regulatory obligations imposed by the State of New Jersey for the purpose of 11 U.S.C. 362 § (b)(4).

(d) Nothing in the Act or this chapter shall constitute relief, implied or expressed, of the requirements imposed under any other approval, permit or authorization.

APPENDIX A

WORDING OF INSTRUMENTS DOCUMENT FOR FINANCIAL ASSURANCE REQUIRED PURSUANT TO THE ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT

N.J.S.A. 13:1K-6 et seq. ("ECRA")

LETTER OF CREDIT

A letter of credit, as specified in N.J.A.C. 7:26B-6.4, issued pursuant to ECRA, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Irrevocable Standby Letter of Credit

_____, Commissioner

New Jersey Department of Environmental Protection

CN 028

Trenton, New Jersey 08625

ATTN: Assistant Director, Industrial Site Evaluation Element

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT
ECRA CASE # _____

SURETY BOND

Dear Sir or Madam: We hereby establish our irrevocable standby Letter of Credit No. ___ in your favor, at the request and for the account of [owner's or operator's of the industrial establishment name and address] up to the aggregate amount of [in words] U.S. dollars ___, available upon presentation by you of (1) your sight draft, bearing reference to this irrevocable standby Letter of Credit No. ___, and (2) your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to the authority of the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq. (P.L. 1983, C. 330) ("ERCA") and the ECRA Regulations, N.J.A.C. 7:26B.

This Letter of Credit is effective as of [insert month, day, and year] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of at least one (1) year on [date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both NJDEP's Industrial Site Evaluation Element, CN-028, Trenton, New Jersey 08625 and [name of owner or operator of industrial establishment] by certified mail that we have decided not to extend this Letter of Credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after date of receipt by both NJDEP and [name of owner or operator of industrial establishment], as shown on the signed return receipts.

Whenever this Letter of Credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [name of owner or operator of industrial establishment] in accordance with your instructions.

We certify that the wording of this Letter of Credit is identical to the wording specified in N.J.A.C. 7:26B (Appendix A), as such regulations were constituted on the date shown immediately below.

[Name of issuing institution] shall not cancel this Letter of Credit on the basis of a request from [name of owner or operator of industrial establishment] until it has received written authorization from NJDEP.

This irrevocable standby Letter of Credit is subject to [insert the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce, or "the Uniform Commercial Code"].

Very truly yours,

[Name of Issuing Institution]
[Signature and Title of Official]
[Printed Name of Official]
[Date] _____

A surety bond guaranteeing payment into a trust fund, as specified in N.J.A.C. 7:26B6.2, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Financial Guarantee Bond

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT
ECRA CASE # _____
Date bond executed: _____
Effective date: _____

Principal: [Legal name and business address of owner or operator of the industrial establishment]

Type of organization [insert "individual", "joint venture", "partnership", or "corporation"]

State of incorporation: _____

[Insert name, current ownership, Standard Industrial Classification number, location of industrial establishment, including lot and block number, municipality and county, and ECRA cleanup amount(s) for each industrial establishment guaranteed by this bond. Indicate NJDEP-approved ECRA cleanup amount]:

Total penal sum of bond: _____

Surety bond number: _____

Know All Persons by These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the New Jersey Department of Environmental Protection, hereinafter NJDEP, in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrator, successors and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

* * *

[Next Paragraph For Use by Principal With ECRA Administrative Consent Order Only]

WHEREAS, said Principal has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Principal has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, said Principal is required to provide financial assurance in an amount equal to or greater than the cost estimate for implementation of the cleanup plan approved by NJDEP on [date] and required as a precondition to any closure or sale or transfer of an industrial establishment in accordance with the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.*, hereinafter "ECRA", and the ECRA Regulations, N.J.A.C. 7:26B, and

WHEREAS, the condition of this obligation is such that, if the Principal shall promptly and faithfully perform its obligations under the provisions of ECRA, then this obligation shall be null and void; otherwise the surety bond shall remain in full force and effect to assure performance of the obligations under ECRA and to otherwise assure and guarantee the performance and implementation of the ECRA cleanup plan approved by NJDEP on [date];

WHEREAS, said Principal shall establish a standby trust fund as is required by N.J.A.C. 7:26B-6.2(c) when a surety bond is used to provide a mechanism for access by NJDEP to assure payment for the implementation of the ECRA cleanup plan approved by NJDEP on [date];

NOW, THEREFORE, the conditions of this obligation are such that if the Principal shall faithfully perform its obligations under ECRA, whenever required to do so, regarding such industrial establishment for which this surety bond guarantees performance, then this obligation shall be null and void otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the NJDEP that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall place funds in the amount guaranteed for the industrial establishment into the standby trust fund as directed by the NJDEP within ten (10) days of receipt of NJDEP's notification.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the NJDEP Industrial Site Evaluation Element, CN-028, Trenton, N.J., 08625; provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NJDEP Industrial Site Evaluation Element, as evidenced by the return receipts, nor shall cancellation occur while a compliance procedure is pending, as defined in N.J.A.C. 7:26B-6.2(h).

The Principal may terminate this bond by sending written notice to the Surety(ies); provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NJDEP.

In Witness Whereof, the Principal and Surety(ies) have executed this Financial Guarantee Bond and have affixed their seals on the date set forth below.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the Wording of Instruments document referred to in N.J.A.C. 7:26B-6.2(b) as constituted on the date the bond was established.

Principal
 [Signature(s)]
 [Date]
 [Name(s)]
 [Title(s)]
 [Corporate seal]
 [Name and address]
 State of incorporation: _____
 Liability limit: _____
 [Signature(s)]
 [Date]
 [Name(s) and title(s)]
 [Corporate seal]
 [For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]
 Bond premium: _____

PERFORMANCE BOND

A surety bond guaranteeing performance of ECRA cleanup or payment into a standby trust fund, as specified in N.J.A.C. 7:26B-6.3, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Performance Bond

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT
 ECRA CASE # _____
 Date bond executed: _____
 Effective date: _____

Principal: [legal name and business address of owner or operator of the industrial establishment]

Type of organization: [insert "individual", "joint venture", "partnership", or "corporation"]

State of incorporation: _____

Surety(ies): [name(s) and business address(es)]

[Insert name, current ownership, Standard Industrial Classification number, location of industrial establishment, including lot and block number, municipality and county, and ECRA cleanup amount(s) for each industrial establishment guaranteed by this bond. Indicate NJDEP-approved ECRA Cleanup amount]:

Total penal sum of bond: _____

Surety bond number: _____

Know All Persons by These Presents, That we, the Principal and Surety(ies) hereto, are firmly bound to the New Jersey Department of Environmental Protection, hereinafter NJDEP, in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of penal sum.

[Next Paragraph For Use by Principal With ECRA Administrative Consent Order Only]

WHEREAS, said Principal has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Principal has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, said Principal is required to provide financial assurance in an amount equal to or greater than the cost estimate for implementation of the cleanup plan approved by NJDEP on [date] and required as a precondition to any closure or sale or transfer of an industrial establishment in accordance with the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., hereinafter "ECRA" and the ECRA Regulations, N.J.A.C. 7:26B;

WHEREAS, the condition of this obligation is such that, if the Principal shall promptly and faithfully perform its obligations under the provisions of ECRA, then this obligation shall be null and void; otherwise, the surety bond shall remain in full force and effect to assure performance of the obligations under ECRA and to otherwise assure and guarantee the performance and implementation of the ECRA cleanup plan approved by NJDEP on [date];

WHEREAS, said Principal shall establish a standby trust fund as is required by N.J.A.C. 7:26B-6.3(c) when a surety bond is used to provide a mechanism for access by NJDEP to all or part of such financial assurance required by ECRA to assure performance of the implementation of the ECRA cleanup plan and/or Consent Order approved by NJDEP on [date];

NOW, THEREFORE, the conditions of this obligation are such that if the Principal shall faithfully perform its obligations under ECRA, whenever required to do so, regarding each facility for which this surety bond guarantees performance, then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the NJDEP that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall either perform the monitoring and cleanup in accordance with the NJDEP-approved cleanup plan [or, if appropriate, delete "NJDEP-approved cleanup plan" and insert "Consent Order"] or place funds in the amount guaranteed for the cleanup of the industrial establishment into the standby trust fund as directed by the NJDEP. The Surety(ies) shall notify NJDEP within ten (10) days of receipt of NJDEP's notification of the Surety(ies) intentions to either perform the monitoring and cleanup at the industrial establishment in accordance with the NJDEP approved cleanup plan or Consent Order or place the funds in the amount guaranteed into the standby trust fund.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the NJDEP Industrial Site Evaluation Element, CN-028, Trenton, N.J., 08625; provided, however, the cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NJDEP, as evidenced by the return receipts, nor shall cancellation occur while a compliance procedure is pending, as defined in N.J.A.C. 7:26B-6.3(i).

The Principal may terminate the bond by sending written notice to the Surety(ies); provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NJDEP.

In Witness Whereof, the Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth below.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and the Surety(ies) and that the wording of this surety bond is identical to the Wording of Instruments document referred to in N.J.A.C. 7:26B-6.3(b).

Principal
[Signature(s)]

[Date]
 [Name(s)]
 [Title(s)]
 [Corporate seal]
 [Name and address]
 State of incorporation: _____
 Liability limit: _____
 [Signature(s)]
 [Date]
 [Name(s) and title(s)]
 [Corporate seal]
 [For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]
 Bond premium: _____

STANDBY TRUST AGREEMENT

A Standby Trust Fund established pursuant to a Standby Trust Agreement shall be required along with and in addition to a financial assurance option selected by the owner or operator of an industrial establishment pursuant to this Wording of Instruments document (see N.J.A.C. 7:26B-6.2(b) for Surety Bond; N.J.A.C. 7:26B-6.3(b) for Performance Bond; and N.J.A.C. 7:26B-6.4(b) for Letter of Credit). NJDEP requires a Standby Trust Agreement for a Standby Trust Fund to provide a mechanism for access by NJDEP to all or part of such financial assurance required by ECRA to assure the successful implementation of any ECRA-cleanup plan approved by NJDEP.

A standby trust agreement for a cleanup plan approval or an Administrative Consent Order shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Standby Trust Agreement

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT ECRA CASE # _____

This Standby Trust Agreement, hereinafter "Agreement", entered into as of [date] by and between [name and address of the owner or operator of the industrial establishment], a New Jersey [insert "corporation", "partnership", "association", or "proprietorship"], hereinafter "Grantor" and [name and address of corporate trustee], [insert "incorporated in the State of" or "a national bank"], hereinafter "Trustee".

WHEREAS, the New Jersey Department of Environmental Protection, hereinafter "NJDEP", an agency of the State of New Jersey, has established the Environmental Cleanup Responsibility Act Regulations, N.J.A.C. 7:26B, pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.*, hereinafter "ECRA", applicable to the Grantor, requiring that certain procedures be followed by industrial establishments to ensure adequate preparation and implementation of acceptable cleanup procedures as a precondition of any closure, sale or transfer of any industrial establishment in accordance with ECRA.

* * *

[Next Paragraph For Use by Grantor With ECRA Administrative Consent Order Only]

WHEREAS, the Grantor has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Grantor has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, the Grantor is required within 14 days of written approval of the ECRA-cleanup plan by NJDEP to provide a surety bond or other financial security pursuant to N.J.A.C. 7:26B-6 in an amount equal to or greater than the cost of said approved cleanup plan;

WHEREAS, The Grantor, acting through its duly authorized officer or management official, has selected the Trustee under this Agreement, and the Trustee is willing to act as Trustee.

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

(a) The term "Grantor" means the owner or operator of the industrial establishment entering into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into the Agreement and any successor Trustee.

Section 2. Identification of Industrial Establishment and Cost Estimates.

This Agreement pertains to the industrial establishments and cost estimates identified on Attachment A. [On Attachment A, for each industrial establishment list the name, cleanup plan cost estimates, current ownership, Standard Industrial Classification number, location of the industrial establishment, tax lot and block number, municipality and county for which financial assurance is demonstrated by this Agreement.]

Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, hereinafter the "Fund", for the benefit of NJDEP. The Grantor and the Trustee intend that no third party shall have access to the Fund except as herein provided. The Fund is established initially as consisting of the total sum of [dollar amount] which is acceptable to the Trustee and NJDEP. Such property and any other property subsequent transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the NJDEP.

Section 4. Payment for ECRA Cleanup.

The Trustee shall make payment from the Fund as the NJDEP Commissioner, or his designee, shall direct, in writing, to provide for the payment of the ECRA cleanup costs of the industrial establishment [as appropriate add "pursuant to the Administrative Consent Order dated [date]" or "covered by the ECRA cleanup approved by NJDEP on [date]"] and this Agreement. The Trustee shall reimburse the Grantor or other persons, as specified by the NJDEP, from the Fund for ECRA cleanup expenditures in such amounts as the NJDEP shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts the NJDEP specifies in writing. Upon refund such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management.

At such time as the corpus of the Fund is funded with more than one dollar, the Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee shall discharge his duties with respect to the Fund solely in the interest of the NJDEP as the beneficiary and with the care, skill, prudence and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities or any of their affiliates, as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment of distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate; subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expedience of any such sale or other disposition;

(b) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person or to deposit or arrange for the deposit of any securities issued by the Federal Government of the United States or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the NJDEP a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the NJDEP shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation from time to time for its services, as agreed upon in writing with the Grantor.

Section 13. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and his successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over to the successor Trustee the funds and properties constituting the Fund. If for any reason, the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor, the NJDEP and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Successor Grantor.

Sixty days prior to the Grantor ceasing to exist if dissolution is contemplated, the Grantor must notify and provide NJDEP with the names and addresses of any and all successors and assigns along with a notarized acknowledgement from same stating that the successors and assigns assume responsibilities concerning financial assurance.

Section 15. Instructions to the Trustee.

All orders, requests and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in Attachment B or such other designees as the Grantor may designate by amendment to Attachment B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests and instructions by the NJDEP to the Trustee shall be in writing, signed by the NJDEP Commissioner or his/her designee and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or NJDEP hereunder has occurred.

The Trustee shall have no duty to act in the absence of such orders, requests and instructions from the Grantor and/or NJDEP, except as provided for herein.

Section 16. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed jointly by the Grantor or the Grantor's principals, successors, and assigns if Grantor has dissolved, the Trustee and the NJDEP or by the Trustee and the NJDEP if the Grantor ceases to exist and no successors or assigns are named.

Section 17. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement, as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee and the NJDEP or of the Trustee and the NJDEP, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act of omission, made in good faith, in the administration of this Trust or in carrying out any directions by the Grantor or the NJDEP issued in accordance with the Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law.

This Agreement shall be administered, construed and enforced according to the laws of the State of New Jersey.

Section 20. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular.

The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof, the parties have caused this Agreement to be executed by their respective officer or management official, duly authorized, and their corporate seals to be hereunto affixed and attested, as of the date set forth below:

DATE: _____ BY: _____ [NAME OF GRANTOR]
TITLE: _____

DATE: _____ BY: _____ [NAME OF TRUSTEE]
TITLE: _____

[Grantor shall attach Attachments A and B.]

CERTIFICATION OF ACKNOWLEDGEMENT

(Grantor & Trustee)

ECRA Case #: _____

Industrial Establishment: _____

Owner: _____

Operator: _____

Amount of ECRA Cleanup Approval: _____

Amount of ECRA ACO: _____

Type of Financial Assurance Posted: _____

State of _____

County of _____

On the [date], before me personally came [owner or operator of the industrial establishment] and [Trustee], to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instruments is such corporate seal; that it is so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

FULLY FUNDED TRUST

A fully funded trust for a ERCA cleanup plan approval or an ECRA ACO shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Fully funded Trust Agreement

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT ECRA CODE # _____

This Fully Funded Trust, hereinafter "Agreement", entered into as of [date] by and between [name and address of the owner or operator of the industrial establishment], a New Jersey [insert "corporation", "partnership", "association", or "proprietorship"], hereinafter "Grantor" and [name and address of corporate trustee], [insert "incorporated in the State of" or "a national bank"], hereinafter "Trustee".

WHEREAS, the New Jersey Department of Environmental Protection, hereinafter "NJDEP", an agency of the State of New Jersey, has established the Environmental Cleanup Responsibility Act Regulations, N.J.A.C. 7:26B, pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., hereinafter "ECRA", applicable to the Grantor, requiring that certain procedures be followed by industrial establishments to ensure adequate preparation and implementation of acceptable cleanup procedures as a precondition of any closure, sale or transfer of any industrial establishment in accordance with ECRA.

* * *

[Next Paragraph For Use by Grantor With ECRA Administrative Consent Order Only]

WHEREAS, the Grantor has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Grantor has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, the Grantor is required within 14 days of written approval of the ECRA-cleanup plan by NJDEP to provide a surety bond or other financial security pursuant to N.J.A.C. 7:26B-6 in an amount equal to or greater than the cost of said approved cleanup plan;

WHEREAS, The Grantor, acting through its duly authorized officer or management official, has selected the Trustee under this Agreement, and the Trustee is willing to act as Trustee.

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

(a) The term "Grantor" means the owner or operator of the industrial establishment entering into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into the Agreement and any successor Trustee.

Section 2. Identification of Industrial Establishment and Cost Estimates.

This Agreement pertains to the industrial establishments and cost estimates identified on Attachment A. [On Attachment A, for each industrial establishment list the name, cleanup plan cost estimates, current ownership, Standard Industrial Classification number, location of the industrial establishment, tax lot and block number, municipality and county for which financial assurance is demonstrated by this Agreement.]

Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a fully funded trust fund, hereinafter the "Fund", for the benefit of NJDEP. The Grantor and the Trustee intend that no third party shall have access to the Fund except as herein provided. The Fund is established initially as consisting of the total sum of [dollar amount] which is acceptable to the Trustee and NJDEP. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the NJDEP.

Section 4. Payment for ECRA Cleanup.

The Trustee shall make payment from the Fund as the NJDEP Commissioner, or his designee, shall direct, in writing, to provide for the payment of the ECRA cleanup costs of the industrial establishment [as appropriate add "pursuant to the Administrative Consent Order dated [date]" or "covered by the ECRA cleanup approved by NJDEP on [date]"] and this Agreement. The Trustee shall reimburse the Grantor or other persons, as specified by the NJDEP, from the Fund for ECRA cleanup expenditures in such amounts as the NJDEP shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts the NJDEP specifies in writing. Upon refund such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management.

At such time as the corpus of the Fund is funded, the Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee shall discharge his duties with respect to the Fund solely in the interest of the NJDEP as the beneficiary and with the care, skill, prudence and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities or any of their affiliates, as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment of distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq. including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expedience of any such sale or other disposition;

(b) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person or to deposit or arrange for the deposit of any securities issued by the Federal Government of the United States or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the NJDEP a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the NJDEP shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation from time to time for its services, as agreed upon in writing with the Grantor.

Section 13. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over to the successor Trustee the funds and properties constituting the Fund. If for any reason, the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor, the NJDEP and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as

a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Successor Grantor.

Sixty days prior to the Grantor ceasing to exist if dissolution is contemplated, the Grantor must notify and provide NJDEP with the names and addresses of any and all successors and assigns along with a notarized acknowledgment from same stating that the successors and assigns assume responsibilities concerning financial assurance.

Section 15. Instructions to the Trustee.

All orders, requests and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in Attachment B or such other designees as the Grantor may designate by amendment to Attachment B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests and instructions by the NJDEP to the Trustee shall be in writing, signed by the NJDEP Commissioner or his/her designee and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or NJDEP hereunder has occurred.

The Trustee shall have no duty to act in the absence of such orders, requests and instructions from the Grantor and/or NJDEP, except as provided for herein.

Section 16. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed jointly by the Grantor or the Grantor's principals, successors, and assigns if Grantor has dissolved, the Trustee and the NJDEP or by the Trustee and the NJDEP if the Grantor ceases to exist and no successors or assigns are named.

Section 17. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement, as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee and the NJDEP or of the Trustee and the NJDEP, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act of omission, made in good faith, in the administration of this Trust or in carrying out any directions by the Grantor or the NJDEP issued in accordance with the Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law.

This Agreement shall be administered, construed and enforced according to the laws of the State of New Jersey.

Section 20. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular.

The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof, the parties have caused this Agreement to be executed by their respective officer or management official, duly authorized, and their corporate seals to be hereunto affixed and attested, as of the date set forth below:

[NAME OF GRANTOR]

DATE: _____ BY: _____
TITLE: _____

[NAME OF TRUSTEE]

DATE: _____ BY: _____
TITLE: _____

[Grantor shall attach Attachments A and B.]

CERTIFICATION OF ACKNOWLEDGEMENT
(Grantor) & (Trustee)

ECRA Case #: _____

Industrial Establishment: _____

Owner: _____

Operator: _____

Amount of ECRA Cleanup Approval: _____

Amount of ECRA ACO: _____

Type of Financial Assurance Posted: _____

State of _____

County of _____

On the [date], before me personally came [owner or operator of the industrial establishment], and [Trustee], to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of

said corporation; that the seal affixed to such instruments is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

Amended by R.1993 d.3, effective January 4, 1993.
See: 24 N.J.R. 720(a), 25 N.J.R. 100(a).
Various editorial corrections throughout.