Public Hearing

before

SENATE ENVIRONMENT COMMITTEE

"Discussion of the 'Environmental Cleanup and Responsibility Act' (ECRA). The Committee is seeking testimony concerning the current operation of the ECRA program and whether the ECRA program needs to be modified, improved, or made more efficient."

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

DATE: March 16, 1992
10:20 a.m.

MEMBERS OF COMMITTEE PRESENT:

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

ALSO PRESENT:

Raymond E. Cantor
Judith L. Horowitz
Office of Legislative Services
Aides, Senate Environment Committee

Hearing Recorded and Transcribed by
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New Jersey State Legislature
SENATE ENVIRONMENT COMMITTEE
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NOTICE OF PUBLIC HEARING

The Senate Environment Committee will be holding two public hearings on **Monday, March 16, 1992, at 10:00 a.m. and on Thursday, March 19, 1992, at 2:00 p.m. Both hearings will be held in Room 9, Legislative Office Building, Trenton, New Jersey.**

The Committee has invited interested parties to discuss the "Environmental Cleanup and Responsibility Act" (ECRA). The Committee will be seeking testimony concerning the current operation of the ECRA program and whether the ECRA program needs to be modified, improved, or made more efficient.

Any questions concerning this hearing can be addressed to Raymond E. Cantor or Judith L. Horowitz, Committee Aides, or inquires to Elva Thomas, secretary, at (609) 292-7676.

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SENATOR HENRY P. McNAMARA (Chairman): Good morning. Judy, would you please take the roll call?

MS. HOROWITZ (Committee Aide): Senator McNamara?

SENATOR McNAMARA: Here.

MS. HOROWITZ: Senator Corman?

SENATOR CORMAN: Here.

MS. HOROWITZ: Senator Sinagra?

SENATOR SINAGRA: Here.

MS. HOROWITZ: Senator Adler?

SENATOR ADLER: Here.

MS. HOROWITZ: Senator Rice?

SENATOR RICE: Here.

SENATOR McNAMARA: I'd like to welcome all of you who have been invited and all those in attendance. We will be using the time we have during this and the next meeting reviewing the ECRA program. We have deliberately kept these two meetings on an invitation only basis. We will be hearing from the regulated community, from environmental consultants, engineers, the banking community, and from environmental advocacy groups.

I have requested that the Commissioner provide his staff most familiar with the program to assist us in our review, and he has agreed to do so. While I do not anticipate asking the Department to testify, I will call on them to make some introductory remarks, and from time to time to clarify any issues which are still creating some confusion.

It is our intent to learn as much as possible through these forums regarding ECRA and its implementation. We have heard for many years from the regulated community about the deficiencies of the program. Even its staunchest supporters have agreed that improvements can be made. I will not recite the litany of horror stories that I have heard, nor will I seek to defend the premise of the law, with which I agree. It is with the same measure of objectivity that we have solicited the

testimony of people who have the most contact with the program. We are not interested, for the purposes of this effort, in hearing stories of years past. We wish to hear of current problems, problems that lend themselves to statutory or regulatory solutions. We are also interested in hearing from witnesses about those improvements they think would be most advisable.

I anticipate that after this process the Committee will review the options before us, and draft legislation for submission and review by the full Senate.

If Deputy Commissioner Lancer Miller would come up for a couple of minutes, please?

A S S T. C O M M. L A N C E R. M I L L E R: I'm getting joked, Senator. It's Assistant Commissioner. They're kidding me that I'm being promoted as I walk up here.

SENATOR McNAMARA: I felt that Deputy was more appropriate. (laughter)

ASSISTANT COMMISSIONER MILLER: Thank you, Senator. Considering the Deputy is in Florida, I guess, your title will certainly be appropriate.

I am Assistant Commissioner Lance Miller, for the Site Remediation Program, New Jersey Department of Environmental Protection and Energy. I have been with the Department for over 16 years, and I have been involved with the ECRA program, directly and indirectly, since June of 1986. It is certainly a pleasure for me to be here today, Mr. Chairman.

On behalf of the Governor and the Commissioner, it's a pleasure for the Department to be here. I would like to compliment the Committee and you, Mr. Chairman, for the process that you have outlined. We are certainly happy to engage in it.

We do feel that if we were doing ECRA today, we would do it differently than when it was enacted in 1983. That's because we're smarter today. We have nine years of experience upon which to base that knowledge. What we're looking for,

from the Department's perspective, is that we want to increase the public's confidence in the Department, and we want to serve the public by cleaning up sites that have contamination that are preventing appropriate use or reuse, as the case may be.

We feel that these hearings offer an opportunity to push away the unfortunate rhetoric that has clouded this program. ECRA seems to have become a shorthand phrase to symbolize overregulation to the detriment of industry. I believe that is unfortunate because ECRA has a specific focus as specified by the bill. Maybe an example of that is appropriate.

Oftentimes people say that vacant property cannot be redeveloped because of ECRA. Well, if the property was vacant before the effective date of ECRA at the end of 1983, it is not subject to ECRA. That situation is not-- That redevelopment is not occurring not because of ECRA, but because of contamination that may exist on the site. That's an issue that needs to be remembered.

There are a few things that we feel should be focused on in these hearings and probably kept in the forefront of everyone's mind; and that is, should the current policy of cleaning up sites at the time of transfer be continued? That is certainly the law as it exists today, and it is certainly within the purview of the Legislature to change that public policy. However, if we continue that policy, then there is another issue that needs to be addressed; that is, who pays for the cleanup of these contaminated sites that are subject to ECRA?

The Department would love to be in a position to be able to provide funds to assist people in cleanup endeavors. We take no pride in dealing with people, and when they come in and say, Mr. Miller, -- or Mr. Hart, or Mr. DeLaney, or whoever they are dealing with in the Department -- "I can't afford this cleanup. I'm making my payroll, but I can't afford-- I'm

paying my taxes, I'm repaying my mortgage, but I can't get more money to pay these cleanup costs now. The banks just won't give us any additional funds because we're at the edge of our credit limit." Unfortunate situations. We feel for those people. The way the law is currently structured though, at the time of transfer, the ECRA obligations kick in. We'd love to be in a position to help those people out financially.

From an operational standpoint, the Department has made strides to run the program more effectively and efficiently. Over the last year we have certainly continued, and stepped up those activities. We have regulations coming out that are in response to the Appellate Division decision to clarify when people are subject to ECRA. We have the cleanup standards that were mandated by the initial act, and they are in the "Register" as a proposal. The Commissioner has announced a voluntary cleanup program to allow people to come forward and clean up sites when they feel it is necessary and appropriate. And we will soon be issuing technical standards on how to clean up a contaminated site so that we standardize the process, so that people know what is expected of them before they start these processes, and in that way, take out some of the concerns and criticisms of the past that the Department is being arbitrary or unreasonable in what it is requiring to remediate a contaminated site.

In closing, I look forward to working with you, and the Department stands ready to provide any assistance to this Committee, and to you, Mr. Chairman, that is necessary to move this process forward. Thank you very much.

SENATOR McNAMARA: Thank you, Mr. Miller.

Our first witness today will be Edward Hogan.

E D W A R D A. H O G A N, ESQ.: Good morning, Senator.

SENATOR McNAMARA: Good morning.

MR. HOGAN: My name is Edward Hogan. I'm a principal with the law firm of Porzio, Bromberg, and Newman of Morristown, New Jersey and New York, New York. I Chair our

firm's Department of Environmental Law. I have been actively involved in working with regulated industry in the ECRA program. I have been involved in some 300 or so ECRA related matters. I testified at the first DEPE hearing on the regulations in 1984. I testified before the Assembly Oversight Committee in November of 1984, and since then I have been a frequent commentor on the ECRA problem. I have been a member of the ECRA Industrial Advisory Committee, which was an industrial advisory group that DEPE put together in 1984 to solicit the input of business, and I have been on that committee since then. I am a past Chair of the Environmental Law Section of the State Bar. I currently Chair the Environmental Issues Committee of the New Jersey Commerce and Industry Association. That Association has set up a separate ECRA Task Force, which is Chaired by Bruce Siminoff, who I understand will be testifying on Thursday. Through that task force a group, called the ECRA Reform Coalition, was organized, which a number of representatives of that coalition, a variety of business groups are here today testifying, and I understand will be testifying on Thursday.

However, today I am testifying on my own behalf and not as representative of any of those organizations. I have spoken with staff, who have, through your kind offices, invited me here today to share some observations that I have on the ECRA program.

I think that in starting to comment, it is important to keep in mind at the very beginning, what ECRA is. ECRA quite simply is a process by which an owner or operator of a business must go through before he is able to transfer a facility. Or in the case of a closure of a facility, upon the public announcement of that closure, that facility has to go through that same sort of process. Most importantly for a transfer, it's a precondition to the ability to consummate that transaction. That is a rather tremendous burden. I think that

many of the problems that will be discussed by myself and subsequent speakers relate to the fact that that burden, that process, can be quite a bit more lengthy than might have otherwise been anticipated, and the constricture of the statute, particularly the precondition, puts a tremendous burden on business.

In all fairness to our friends at the DEPE, the Legislature put a tremendous burden on our civil servants by requiring them to sign off on a property. As compared to other environmental programs where they have to respond to a particular environmental condition, the ECRA program put a burden on civil servants that they have to sign off on a facility and implicitly certify -- although it is not a certification or an estoppel to the agency's ability to look back at the property, at least implicitly -- this did put that burden on the agency, and that is a very significant burden. As a result it has become a very, very conservative process, because the civil servants have, appropriately, tried to make sure that every "i" is dotted, every "t" is crossed, every potential piece of investigation or sampling that might be done on a facility is done so as to preclude some accusation that they did not follow through on their obligations. Again, I think it is, indeed, inherent in any of us, if an affirmative burden is put on us, not merely to respond to a problem but to sign off on a problem, to make sure that it is very stringently focused upon.

It's also important to keep in mind that when ECRA was enacted in 1983 it was in the same month that dioxin was discovered in Newark. There was very little debate, as I understand, in the Legislature. Senator Lesniak -- then Assemblyman Lesniak -- had written an article just a couple of months before the legislation was enacted, and predicted in an article called, "ECRA is coming," which appeared in "The New Jersey Lawyer," that ECRA would impact about 80 or 100

facilities each year. We know that it has impacted close to 1000 facilities each year. The full magnitude of the statute wasn't recognized at the time. Neither, however, was really the magnitude of the program anticipated at the time. And I would suggest that there were also some policy issues that might appropriately be revisited at this point.

When I started in reviewing the ECRA program, I mentioned it was a precondition to the ability to do transactions; indeed, the legislation allowed that a negative declaration, or a cleanup plan would be developed prior to the sale, with the cleanup being accomplished afterwards. What wasn't contemplated was that the process of getting to that cleanup plan is a lot more complex than the Legislature envisioned. Indeed, from the time that one files the forms, it was anticipated that a cleanup plan would be developed before -- and some would read the statute to say 60 days before -- the closing of that transaction would occur.

Well, point in fact, development of cleanup plans take a great deal of time; sampling, resampling, and sampling again, in order to quantify the extent of contamination, and once the extent is known, develop and analyze the proper technology to determine what that cleanup might be. The Legislature contemplated, one would suggest, that that could happen from the time a contract was signed to the time that the transaction was going to close, whether it be a business transaction or a corporate stock, asset type transaction. Well, what we found is it takes many months to go through iterations of sampling and develop a cleanup plan; some of those months inherent simply in the turnaround time in the laboratory of four to six weeks; some inherent in the fact that it would be very inefficient to do all of your sampling -- a broadcast sampling at one time -- but rather do it in iterations that more logically look for an issue. What we found is that there are still some 12 facilities from 1984 that still do not have

approved cleanup plans. That's nine years in the ECRA process. Now that may be appropriate -- some portion of that. There may be inefficiencies over time. But many of those facilities have been through three, four, and five iterations of sampling, and still would take a number of years.

I would suggest that the Legislature did not contemplate the fact that that could hold up transactions for some rather lengthy period of time. DEPE, much to its credit, has invented some procedures without legislative sanction, without legislative imprimatur, to attempt to deal with that. But perhaps direction from the Legislature, now that we have nine years of experience, might not simply look at the administrative side, which the Department has been trying to do in trying to adjust the program, but look back at the very basic policies which underlie the statute to determine whether for those sites the legislative fixes are necessary. That, I presume, is the very reason you are having your hearing today.

ECRA has been costly, and it has been costly in many ways. It's been costly on large sites. It's been costly with inefficiencies on that end. It's also been costly for small sites to get through the process relatively simply, but still at the costs of $5000, or $10,000, or $15,000, or $20,000 to go through the process, even for some of the simplest sites.

It has also been costly in the perception that it has caused for the State of New Jersey. That perception, much as Mr. Miller has observed, which ECRA has become a synonym for any type of environmental program. It's not unusual to get a call, "I have an ECRA problem." "What's your ECRA problem?" "I can't get an air pollution permit." Well, it has nothing to do with ECRA, but ECRA has become the watchword. I would suggest that it's that perception which may be just as important in the business community, talking with business leaders in other states who avoid New Jersey because they don't view ECRA as a purchaser protection program, but they

view it as a burden on their facilities, while in theory it might, indeed, be a purchaser protection as well as an environmental protection program.

Senator Lesniak observed in yesterday's Star-Ledger that while ECRA may have been costly, someone has to pay for it, and it shouldn't be the taxpayers of the State. Well, indeed, ECRA works at virtually no cost to the taxpayers of the State. It's a fee supported program. However it has been costly. It's been costly to business, and it's been costly to business not only for these out-of-pocket costs, but costly because of the perceptions that ECRA has caused.

What have we bought for that cost, though? From an environmental protection point of view, ECRA is a procedural statute only. It adds a procedure that companies have to jump through or deal with, at least on the outside of facilities. It may add something to DEPE's substantive authority on the interior of facilities, but as to the exterior of the facilities, where 90-plus percent of the ECRA work is done, the DEPE could accomplish any of the same work through the Spill Act, and now through -- since the enactment of ECRA -- through the enactment of hazardous substances, the underground storage tank act -- the Underground Storage and Hazardous Substances Act; the tank program -- which has since come into the fore. It could accomplish the same work, and all it adds is a procedure. So what we have bought is a procedure for this great cost, but no additional substantive authority for the State.

From a purchaser's protection point of view, things have changed very much since '83 or '84, and that is that the private market recognizes that the Spill Act means what it says; that is, that responsible parties have great burdens on real property. They recognize what CERCLA has said -- the Comprehensive Environmental Response Compensation and Liability Act -- that mere operators of property can be held responsible,

and indeed, whether a company is subject to ECRA or not, it still goes through a considerable due diligence effort now. That did not happen in '83 or '84. It was not a recognition in the business community.

Someone suggested ECRA actually raised the consciousness of business America, and I think it did. The question is now, do we still need from a purchaser protection point of view -- the paternalistic protection of the State of New Jersey -- a very rigid, regulatory program which may mislead some companies, and in other respects, misses other companies in providing an overview which may or may not be absolutely necessary?

Why does ECRA work? ECRA works because it extorts compliance at a time when a company is most vulnerable, when it wants to get a transaction done. Companies jump through the hoops. Companies cooperate with DEPE much more than they ever would before. And again, from the DEPE perspective, this is viewed as a great advantage. I would suggest that it's a great disadvantage at the same time because the regulated community may not take the time to debate and try to refine the appropriate scope of investigation or cleanup simply to accommodate the timing of a transaction; that is, when you are dealing with a transaction you have certain costs of doing a transaction -- timing costs -- and as a result you have to balance those with the procedural requests. And if there is a bizarre request, or an inappropriate request, or even an unnecessary request that may cost $10,000 or $20,000, you might do that because it weighs off the transaction. From DEPE's perspective, it's gotten something that may have happened very quickly. From a societal point of view, I would suggest that may be a waste of time.

So there is, indeed, a pressure that exists in these transactions, and I would suggest that pressure, while it's no cost to the State government, and in fact, allows State

government to do work more quickly, it does sap the business community, and it does extort a cost on the entire economy that we are dealing with and creates, indeed, a perception that New Jersey is going to force and take advantage of businesses when they are most vulnerable.

With that general overview in mind, though, I think it's important to distinguish one thing. DEPE has often been criticized for the timing of the ECRA program. And that timing-- Much as I have suggested the timing that is necessary to close a transaction, the nine years in the example I used, some of that timing problem has since disappeared. That was the backlog. DEPE was dramatically understaffed in the ECRA program early on, and in fact, the success of the early ECRA program is really-- The fact that it even survived is a testimony to the dedication of the civil servants who staffed the office, particularly in the first couple of years, because there was a tremendous pressure on those individuals.

Indeed, in the first 50 months of the ECRA program, the ECRA office never cleared more cases in a month than it took in. In other words, a backlog built up for 50 months, and much to the credit of the civil servants who have staffed the office since then, they have been able to whittle that backlog down, and they have, indeed, been fully staffed.

There still are timing problems. That is not the timing problem that I am talking about, and I think as you have suggested, some of the rhetoric much relates to the horror stories of '84, '85, '86, and '87, when that tremendous backlog occurred. What has happened, however, is the fact that there still is an inherent timing problem, the laboratories developing work, going through the iterations of sampling to get to a cleanup plan on a site for which there is some contamination. There is also the extreme conservatism on the part of the Department, which still takes three and four months -- and in some cases longer, although the Department has tried

to keep it under three months -- of reviewing plans and reports; reviewed, rereviewed, and reviewed yet again. There is not a trust of the business community. There is not a mere oversight, but a total second guessing of the laboratory data, of the sampling techniques, and of the conclusions that are drawn. And it is that extreme conservatism, in part, because the civil servants of DEPE have had this tremendous burden put on them, of signing off on a facility--

SENATOR McNAMARA: Excuse me for one minute. Wouldn't it partially be because they didn't have published standards?

MR. HOGAN: It's part because there are not published standards. It's part because the data that is reviewed, there is-- The ECRA office, for instance, will not rely simply on a laboratory signing that they followed their procedures, but requires that for each sample the full so-called tier-2 data package -- 20 to 30 pages, everything from the calibration of the laboratory instrument to the holding times of the data -- all the backup -- the chromatograms from the machine -- all have to be submitted. Those are reviewed by the DEPE staff. They have a separate office in DEPE that certifies laboratories and licenses them, but it doesn't accept that. It licenses engineers in this State, but it won't accept their sign-offs or their certifications that certain work has been done in compliance with certain procedures.

Now, early on there were no procedures.

SENATOR McNAMARA: But they kind of-- In licensing engineers, they are not licensing most engineers as environmental consultants.

MR. HOGAN: That's correct. They license engineers but they have also developed a field-- It was initially a sampling plan guide. It's now called a remedial investigation guide, which sets forth certain procedures and does now allow a certification that that's been complied with.

Other programs in DEPE, even prior to licensing, such as in the tank program where there was a qualified groundwater professional, there was a recognition that many different types of professionals, whether it be soil scientists or geologists or engineers, could sign off on certain programs. This has been licensing in the tank program. Perhaps it would be appropriate to have that sort of licensing, because I think there is still an increased need for privatization, with guidelines -- privatization with guidelines -- DEPE has built up the experience; the remedial investigation guide, for instance -- and I think you will hear more as other speakers, particularly the consultants and engineers who will give you some insights as to the need for privatization, but that is still part of the timing delay. The Department, even when it has a clean standard still has to -- even when it does have that -- agonizes over the data, and is still extremely concerned with dotting every "i" and crossing every "t," particularly on facilities that we're taking out of order, so to speak. These facilities are getting in the ECRA program not because they are dirty. It is because they are being transferred or sold, unlike any other program in the State.

But I think that there are-- An effort for privatization-- I think you'll hear some other suggestions from my technical colleagues who will testify.

I think it may be useful to look, however, assuming that you're not going to -- that ECRA has become firmly entrenched in the State of New Jersey and it's not going to go away -- I think it appropriate at least, to look at these other issues and to contemplate whether, indeed, it's really necessary. Does its costs justify the environmental protection that we are buying? Does it justify the perception it's caused for the State of New Jersey? And I just note that no other states have jumped on the bandwagon. Connecticut has a privatization program, certification between individuals.

Illinois and California, a disclosure program. But none with the same level of -- and I hate to use the word bureaucratic control -- but governmental control in the process.

Assuming, however, that that isn't going to change, I think there are some things that can be done with the program, and I think it's logical to look at those things from an applicability, process, and a substance point of view. From applicability, ECRA contemplated that certain facilities, called "industrial establishments," would go through ECRA when there were certain regulated transactions, and the Legislature defined those and recognized that not all facilities be subject to ECRA.

What were industrial establishments? Facilities that were in a certain standard industrial classification industry number -- that is what we call SIC Industry Number, a government classification book -- and it allowed DEPE to exempt certain businesses. DEPE has done that for 24,000 facilities that fell within the standard industrial classification major groups enumerated in the statute. DEPE has cut a quarter of those out, down to about 18,000 facilities. But it also contemplated that those facilities that use, store, treat, refine, or otherwise be involved with hazardous substances and hazardous waste, and it told DEPE to be consistent with their other programs. Indeed, they have been on hazardous waste. You have hazardous waste only if you have enough that you have to manifest. But for hazardous substances, the DEPE has taken the view that any quantity of hazardous substances stored, treated, or refined at a facility is sufficient to cause ECRA to be applicable.

So a two-part test, SIC Code and hazardous substances, but virtually any facility has hazardous substances-- Early in the first year or two, DEPE gave exemption letters to some facilities that used motor oil in a forklift truck. They have since cut back on that and said any quantity of hazardous

substance is sufficient for you to be subject to ECRA. If you have less than 11 gallons of paint, or certain quantities of inks, there is an alternative compliance process, but it is still subject to ECRA; it's just a different process. And the DEPE has taken the position that whether it be Xerox toner, or halon fire extinguishers, or stannous fluoride in a toothpaste tube, that that is sufficient quantity of a hazardous substance at a facility -- you're storing it -- and hence you're subject to ECRA. I would suggest that there are virtually no facilities that don't have some quantity of hazardous substances, if not maintenance chemicals.

Has that caused a real problem? No. It doesn't drag a lot of-- It doesn't cause a real major substantive problem, but it draws facilities to be industrial establishments on the happening of those events, which means they have to file the forms. If they are a major company they don't qualify for a small business. They are talking about $2000 or $2500 in filing fees. They are going to have to fill out forms, which still take eight or ten hours of internal staff time: the history of the property back to 1940; the inventory of chemicals on the facility; going through that storage cabinet and inventorying spray paint and the WD-40 and the Xerox toner; arranging for DEPE; mailing in the forms; going back-- At least 10 or 15 hours of internal staff time. Perhaps if they want to move it forward quickly and want to make sure that they go through as quickly as possible filling out the forms-- DEPE can process these in three or four weeks. But it is still an investment of internal staff time, which on any value assigned to it, whether it be $40 or $50 or $100 an hour, and the filing fees, it's costing a facility close to $10,000 -- a small facility, maybe less with the smaller fees. But a lot of facilities are industrial establishments, and the Legislature in 1983 was thinking this was a two-part test, and DEPE had read it as a one-part test -- standard industrial

classification number -- and has really gutted the second part of the test, hazardous substances, because they think they have a mandate that any quantity of hazardous substances must be hazardous substances for purposes of the act. They set up this limited quantity exception, but it's still subject to the statute and it's subject to a very complex combination of small quantities, plus always having been owned by the same entity, and it's a program that I have found only two or three clients out of several hundred have ever been able to qualify for. It just causes an extreme recognition.

DEPE will tell you, and appropriately so, that two-thirds to three-quarters of the facilities are handled by three or four staff members, these so-called low environmental concern cases. They are dealt with on the papers and the staff runs in and out of the facility. It probably is even a money-maker for DEPE. It's not costing hundreds of thousands of dollars, but it does cause a perception problem.

I would suggest that that might be one adjustment -- giving DEPE some latitude on a legislative authority, to cut back on this where they have been very, very conservative in cutting back.

SENATOR McNAMARA: If the transaction required a financial arrangement with a bank, wouldn't they require that same facility to at least get a clearance from DEPE, or a letter of nonapplicability?

MR. HOGAN: Let us say for instance, if the facility instead of wholesaling paint was wholesaling machine parts -- the same sort of facility. Or instead of wholesaling drugs, which are subject to ECRA -- pharmaceuticals -- it was wholesaling machine parts. One facility would be subject to ECRA, one wouldn't.

A financial institution might require compliance -- show that you've complied with ECRA -- a so-called nonapplicability letter, or letter of nonapplicability, but

most sophisticated banks would not accept that. That just means the statute isn't applicable. They would want a phase-one investigation of some sort, to their own standards with some, either internal or outside consultant going through and doing a walkover. The walkover they would require, and they might want some of that same information. But in this circumstance you're requiring -- you're forcing DEPE in the process, the bank might be able to get out there quickly, the bank, perhaps, wouldn't require the company to inventory their storage cabinets, because it's certifying it's true, accurate and complete. The bank might come in and look at the storage cabinet, know what WD-40, and spray cans, and other things are, look through the facility and come to the same conclusion that low environmental concern case manager is; not that it's clean, but there is no basis for going further. The point is, on the low end -- and I'm not suggesting that this is a major expense to the State, but it might be 700 or 800 facilities, each spending $5000 to $10,000, but the perception of a ridiculous nature-- And I've had so many clients who have gone through this process and have said, "I've spent 50 hours of my time. I've spent 5 or 10 hours of your time, Mr. Hogan, at some exorbitant rate of expense, and I've paid $2000 in filing fees, and I get a 10-minute walkover." I said, "Should you be happy or sad? You should be happy, you're through it." They said,--

SENATOR McNAMARA: You may be very upset if we clean things up.

MR. HOGAN: Right. But the point being, it just creates a very odd state of affairs. DEPE is only responding to the mandate that they have been given, and I think that minimum quantity can't be changed. They can't come up with any minimum quantity. And recognize, they're missing facilities. They're missing a lot of facilities that aren't subject to ECRA, because they never included their SIC Code. DEPE

recognizes they have exempted out 6000 facilities that could have been subject to ECRA, not because -- because most of them are clean.

So there is a balancing here. ECRA isn't an absolute program. DEPE has given away a quarter of the program, if you want to look at it that way, for facilities that based on their SIC Code, have never had a problem, but they have had--

SENATOR McNAMARA: Ed, you're not recommending that we should subject all commercial property transfers and closures to go through ECRA?

MR. HOGAN: Absolutely not. But I think to recognize that ECRA is not an absolutist program. I would suggest that none of them should be. I think that it -- a transactionally based program is simply pressuring business at a time it can probably least afford it, and the reason it succeeded as well as it did in the '80s was that it lived off the fat of the transaction. There was some money coming out at the time, and let's grab it. I think there's a recognition that it's not an absolute program. There are things that are going to be missed, and I think that DEPE said, "Yes, a gallon of trichloro death could contaminate an aquifer." But that gallon of trichloro death could be at one of the 6000 facilities exempt, or at the 50,000 facilities that the Legislature never included.

So I think that a minimum quantity, or small quantity exception, the DEPE has tried to work around it and what they believe their legislative mandate to be. I think the Legislature meant to have some minimum quantity or they wouldn't have defined industrial establishment as they had.

SENATOR McNAMARA: Ed, are you-- I would like to give the Committee an opportunity to question you if they have any questions.

MR. HOGAN: Surely.

SENATOR McNAMARA: Are you pretty close to your ending your remarks?

MR. HOGAN: I'm pretty close.

SENATOR McNAMARA: Okay.

MR. HOGAN: Let me just hit a couple of other ones, because by all means, I think there are going to be a number of other speakers who are going to cover a lot of the same issues.

Transactions, which are, when those facilities are subject to ECRA, very broadly defined. Again, the Legislature said, "All transfers including but not limited to six specific examples." DEPE has tried to live with that very broad exception. They have written out intrafamily transfers, perhaps transfers to incompetents, but many other transfers they felt very constrained by. Most of their positions have been sustained recently by the Appellate Division, but there are lots of transfers that I would suggest were never contemplated in '83, and maybe now in the wisdom of 1992, nine years later, we can look back and say, "Do we really mean all transfers, or do we mean something else?" I think it's time to take a look at that very long list. DEPE has established 40 or 60 different types of transactions, and it might be a time to look whether all those really ought to be included.

On the process side, a few things to keep in mind: I think DEPE, because of their conservatism that's been placed by the Legislature, the data requirements have been rather phenomenal. I think they have invented some processes -- administrative consent orders -- that allow transactions to occur quickly, so that you're not waiting six or eight years. But DEPE again has been very conservative. Because they had no statutory mandate to do this, as a result it requires very high financial assurance, which really cuts out most of the small and medium-sized businesses. They have a minimum of 100,000. Their average is 800,000. They are holding half or three-quarters of a billion dollars in financial assurances. At times they have been too low; most times they have been too high in their amount of financial assurances that they have

had. I think some direction from the Legislature to give the DEPE some authority-- They have tried to invent things, but they don't want to give away the store, and their job is protecting the environment, not necessarily protecting business, and they have read their mandate very broadly. I think they need some direction.

There is no effective administrative hearing process. Again, timing, which I keep going back to. There is not the time in most transactions to go through the formal appeal process: to OAL, then to the Commissioner, then to the Appellate Division, to challenge the DEPE position, because time is money in a transaction. We need an alternative dispute resolution program here in ECRA, particularly because of the exigencies of the time. Due process is not quick enough. In the ECRA process we need some alternative dispute resolution program. Resort to the courts just doesn't work. The hearing process doesn't work. That's the reason we haven't seen lots of challenges. Business will accede to DEPE's demands on the time versus money, or the cost of going through the normal process.

Finally, on some of the substantive issues, as Lance Miller suggested, the cleanup standards are inherently antiurban. It causes a problem for redevelopment. It transcends ECRA, but again the DEPE, at least in their most recent cleanup standards uses something like a one in a million risk as a generalized risk basis. That's the same kind of risk you are going to have by driving 300 miles this afternoon. The same sort of increased risk in a lifetime, driving that distance. But DEPE, again, extreme conservatism; a great concern in signing off. Those are the risks that they are assigning in residential areas. It's tough to tell people that they may be that one in a million, but I still think that both in ECRA and elsewhere, cleanup standards can be inherently

antiurban unless there is great flexibility on the part of the Department. I suggest that they can only get that flexibility in direction from the Legislature.

I will just close by suggesting that even, whatever you end up doing, I am concerned -- and it may sound a bit disingenuous -- but I think that much of the problem with ECRA is the perception that it's really caused. I've sat with CEOs from foreign countries who have been on the buying side of ECRA, indeed, have been the beneficiaries of the clean site that DEPE would tell you. And their perception -- and I've sat with the CEO of a major foreign oil company, who sat and said in his broken English, "ECRA, New Jersey, never another transaction." That really is the perception. In fact, in theory he was benefited, because he was getting a clean piece of property. But that's the perception it has caused. It's caused people to think that air pollution permits are ECRA, other problems of overregulation are ECRA.

SENATOR McNAMARA: I recognize that the perception of that four letter word, ECRA, carries a tremendous negative. But the program itself, aside from the fact of its initial stages in which you had mentioned, the goal is in the right direction.

MR. HOGAN: Absolutely.

SENATOR McNAMARA: What we have to do, or what we can do to work with the Department to make modifications; that's what it's all about. Now if someone can come up with some other clever short word, that we don't want to turn into another unpleasant four letter word, maybe that is part of the solution. Although I think that if we can air and develop something with the Department, we may, in fact, turn it around, as to the perception is not what it is today.

MR. HOGAN: I heartily agree with that. It's important, however, to recognize that it's not just

administrative fixes, but I think a legislative fix is in order. I think that legislative fix can be transmitted out to the public, out to the business community, and it can be a positive.

SENATOR McNAMARA: That's the reason for the start of today's hearings.

MR. HOGAN: And I think the business community will be much better off for it.

SENATOR McNAMARA: Are there any questions?

SENATOR CORMAN: Yes.

SENATOR McNAMARA: Randy?

SENATOR CORMAN: Mr. Hogan, you seem to have indicated that you see no need for any kind of a transaction based cleanup statute. Is that correct?

MR. HOGAN: That's correct. I think that there is no need for it. I think that from an environmental protection point of view, DEPE can do everything else under the Spill Act, the tank statute, and other programs that it can-- And private parties, from a purchaser protection point of view are adequately protected. We're not dealing in the dark ages.

SENATOR CORMAN: If you were to look at all the properties that had been cleaned up with respect to ECRA and those that are currently undergoing an ECRA cleanup, would you say that would DEPE have found out about all those properties and would they have been able to effect those cleanups as quickly, under the Spill Act or under other existing statutes?

MR. HOGAN: They could have. They could have under the Spill Act, but what ECRA does is it privatizes-- To a certain degree, it's already privatized. It's pushed that burden back on industry. But it's forced people through the door. It's pushed them through the door. Indeed, I wouldn't be telling you the truth if I didn't think that it had caused more cleanups to be done. But I think they are being done -- a lot of inefficient cleanups, a lot of soil dug up and moved to Ohio that maybe was never needed to be dug up.

I think more has occurred, no question about it. It's been at a great cost. It's been at a great cost. A number of cleanups have been--

SENATOR McNAMARA: I think that also is a factor of a lack of standards.

MR. HOGAN: Partially--

SENATOR McNAMARA: I mean a lot of soil that went to Ohio, including some of my own, wouldn't have to go today.

MR. HOGAN: I think a part of that is a lack of standards. Part of it is though, and it is interesting to see the development of two programs independently, the tank program and the ECRA program. The tank program, which had a much more lenient perspective-- When DEPE didn't have to sign off, and I remember speaking to Assistant Commissioner Trela, five or six years ago, the tank program-- If you were pulling out a tank for the tank program, you would take the soil and rub it on a bag and see if it left a grease stain, you would put it in a jar and shake it up. In many cases -- and we've had actual DEP inspectors say, "If I can't smell it, it's not there." Where in the ECRA program, you'd have to clean up to a hundred parts per million.

DEPE left to its own devices, whether it be under the early forms of the tank program, the field offices, from the general mandate that it had under the Spill Act said, "We're not worried about-- This is how we're looking at it." In the ECRA program they are requiring tremendous data. I think that's really the difference. If left to their own devices to enforce the law-- And there was a great problem. In fact, the ECRA office didn't extend diplomatic recognition to its sister offices; in fact, distrusted and made to retest where the Bureau of Field Operations or one of the field offices had done a cleanup. Maybe standards would help along those lines, but I guess I'm suggesting that even with standards, even the

sampling requirements, which in many cases exceed the cleanup costs -- and you're going to hear a lot of that -- that extreme conservatism--

SENATOR McNAMARA: We may hear a lot of it if we get finished and have a few other questions to ask. (laughter) We may miss it all, too. Are there any other questions from any of the Senators?

SENATOR ADLER: Not at this time.

SENATOR McNAMARA: You bought a pass. You wore them all out.

MR. HOGAN: I thank you very much for your patience.

SENATOR McNAMARA: Thank you. David Farer?

D A V I D B. F A R E R, ESQ.: Good morning, Mr. Chairman and Senators. Let the record reflect that Mr. Hogan's sensitivity about soil going to Ohio results from the fact that I think he was born there.

My name is David Farer. I'm Chairman of the Environmental Law Department at Farer, Siegal, Fersko, in Westfield, New Jersey. I Chaired the ECRA Committee of the Corporate and Business Law Section for some years -- '85 until the end of last year -- and I was responsible in that regard for the articles that have been printed from time to time in the "New Jersey Law Journal" on the applicability of ECRA. The firm has handled hundreds of ECRA submissions from the commencement of the program in early '84 to the present. I teach the New Jersey Institute of Continuing Legal Education courses on ECRA, and I Chair the American Law Institute American Bar Association national course on the impact of environmental law on business and real estate around the country. In that regard I have monitored and talked on not only ECRA, but the effect it's had on other laws, other states that have considered it.

I thank you for affording me this opportunity to speak to you. I am speaking today not in my professional

affiliations with any bar association, but for myself, the firm, and the firm's clients.

Now we're here today to discuss ECRA, not the environment as a whole. But still we have to start with a couple of axioms: One, that cleanup of the environment is not only legitimate, but a necessary goal; and two, equally important, that society's method of accomplishing that end must be fair and must be equitable.

I am very proud that here in New Jersey we are in the forefront of environmental law. We had the Spill Act in 1986, four years before the Federal Superfund law. And we had ECRA in 1983, the first of the transaction triggered laws, as Mr. Hogan has eloquently described to you. If there is one point I can leave with you today, it is that New Jersey should now take the lead, and in other words, continue to be the innovator, by creating a system that imposes cleanup operations fairly and equitably.

I'm talking reform. I'm talking reform at the legislative level and the regulatory level, because the Federal Superfund law is not working equitably on the Federal level. New Jersey ECRA is not working equitably on the State level. We have an obligation to make it work here.

The problem is this: We have 200 years of industrialization from which the population as a whole has benefited. Who pays for curing the historical toxic residue? I'm not talking about the wrongdoer today who is dumping the contaminants out the back door, I'm talking about what we have all benefited from and where people have followed the standards of the times.

Now I think ECRA is an ingenious law. I believe it is a good idea to tie events in the business and real estate world to government audited cleanups. And I think ECRA can be made to work right, but it's been plagued from the outset, as you know, not only by legislative, but by regulatory problems that

have never been adequately overcome. There have been early legislative efforts. I was the Special Counsel to the Assembly Regulatory Oversight Committee, back in 1987, when Assemblyman Albohn was attempting to push through an ECRA reform bill. It failed, I believe, to the detriment of both business and the environment. And I know, from seeing what other states have done, that the failure of ECRA in terms of its inequities have stemmed a groundswell of support for ECRA-type legislation in other states, because three or four years ago, if I were sitting here, I would have said to you, "I really think there is a good chance that ECRA is going to catch on." That has really fallen apart in the last two or three years.

But let me focus: There is a unanimity of frustration out there that cannot be scoffed at, partly due to the unartful drafting of the law, partly due to an enforcement driven regulatory perspective that leads my clients -- our businesses -- to see our traditional concept of justice turned upside down. The clients, the businesses, believe that they are guilty until proven innocent. Now, when business after business -- and for me, client after client -- small and large, domestic and foreign, clean and contaminated, says the same thing to me: "I'll never go through that again. I'll never buy or rent, nor operate property or business in the State of New Jersey again." You can have one of two responses: One, as unfortunately I have heard uttered in a court by a State representative, "I know I'm right because I have the environment on my side. This property has got to be cleaned up, and that's that." Or, "Something is awry, and we've got to fix it." We have to fix it before there are no companies left in the State, before there are no revenues coming from those companies, and before the regulators don't have any salaries to be regulators any more. So that's why I say that ECRA reform is necessary.

Where? The liability scheme, first of all, because to a great degree the State's hands -- the regulators' hands -- are tied. It says -- ECRA -- "Strict joint and several liability of owners and operators" No exceptions, no defenses. If you happen to be holding the bag, it's your problem. Now compare that to the Federal Superfund law that you mentioned earlier, Mr. Chairman. The Federal Superfund law is also very strict. There were no real defenses when the law first came out in 1980, but there was such an outcry that in 1984, when Congress went back to the Federal Superfund law, they at least put in an innocent purchaser defense. Now it's a tough defense, and I don't know how far it really gets a lot of people, but we have nothing similar in New Jersey.

What's a current example I can give you of that -- not an old horror story -- but current situation? I'll use a composite, because I have several different clients in the same situation. I'll call them the Cooks, a mom and pop operation -- no purposeful spilling. They have performed a useful function. They had a business for years. The community had their services -- benefited from those services, and our clients followed the standards of the time. Now comes ECRA, they want to sell. Their tank leaked. Who cleans up the tank? They cleaned it up. How did they fund it? Well, what do we care? It's a strict liability law; it's not a question that we can ask. But if you want to know, they funded it not only from what they anticipated to get as a purchase price, but they had to dip into their CDs for retirement, they had to dip into all of their retirement savings, and the answer is, "Sorry, that's the law." And from the State's point of view, that's what the answer has to be, unless you reform the liability scheme.

The same thing, Senators, occurs--

SENATOR McNAMARA: But they could pursue those people who did create--

MR. FARER: The answer, Mr. Chairman--

SENATOR McNAMARA: I am not--

MR. FARER: --the remarks that they could pursue the predecessors who may have been responsible; they are gone. Or, let's say they could pursue it; they can't afford it. And if they turn to their insurance company, the insurance companies are getting tougher and tougher. They know it's mom and pop, and that mom and pop can't afford to pursue the insurance company, and the insurance company is going to sit back. So they're stuck.

Yes, you could say that there is a liability scheme where they can sue, but for them it's not real. It's make-believe. It's pie in the sky.

SENATOR McNAMARA: Could they meet the standard of the Federal law?

MR. FARER: Could they meet the standard of the Federal law? No. Because under the Superfund law they can only be an innocent purchaser if they bought it now, having made an investigation into predecessors' ownership and operations, and not have found any contamination.

SENATOR McNAMARA: All right, but how would you structure that type of a defense into the law?

MR. FARER: What would I propose?

SENATOR McNAMARA: If you gave-- I mean, I can even see where the Federal defense, you know, might be something to be legitimately considered by the Committee, but you're saying that that's inadequate.

MR. FARER: I think it's inadequate. I think this Committee has to look at something much bigger and much more important. What I'll propose today is that the Senators consider some sort of Innocent Property Owners Protection Act -- since we love acronyms, let's call it POPA for today -- and let's say we'll legislate POPA either as an amendment to ECRA, or as free standing legislation to provide some sort of

financial means to not only investigation, but cleanup for these mom and pops, for these innocent owners, even for tenants who wind up having to pay for prior tenants and prior owners' cleanup problems -- because very often tenants get the same problem. You have someone who has operated for the last five years; they go through ECRA. The State makes them investigate everything starting from the year one, which includes underground storage tanks that they may have never used. So you have these inequitable situations.

Now the inevitable next question is, "Where the heck are we supposed to come up with the money for this wonderful idea?"

SENATOR McNAMARA: That's exactly what I was thinking.

MR. FARER: Let me point out to the Senators that the State Spill Fund, under the Spill Compensation and Control Act is currently sitting on $82 million of funds that could, and in my view, should be made available to the public in these hard luck cases under some liability scheme that I know that this innovative State and this innovative Committee could come up with.

SENATOR McNAMARA: We could assess attorneys that handle ECRA problems. (laughter)

MR. FARER: That's another opportunity.

SENATOR McNAMARA: Could I just ask the Assistant Commissioner, because I noticed, his head seemed to unravel when you discussed the $82 million that was available.

ASSISTANT COMMISSIONER MILLER: (speaking from audience) Mr. Chairman, the Spill Fund is minus $50 million, when you compare the amount of money that is in the Fund compared to claims that are pending against the Fund, and authorizations that are pending against the Fund. In effect, we have to do a lot of work to bring the Spill Fund up to not being broke. It is not available for the purpose outlined.

SENATOR McNAMARA: Well, it makes me realize that when I objected to the administration taking so much money out of the Hazardous Waste Site Cleanup Fund, and lapsing the money and using it for general treasuries, it would have been better off to stay and been in use for an environmental purpose.

MR. FARER: Mr. Chairman, obviously where there is a will there will be a way. I think that with things like the Spill Fund-- And by the way, if the State would, and were funded enough to aggressively pursue the many intransigent parties who aren't cleaning up, and get those triple damages that they are entitled to, and obviously, as Mr. Miller will point out, now private parties may be able to get at under the Spill Fund amendments -- these are all methods of funding.

Also, as my colleague, Mr. Hogan, pointed out, we have got a tremendous amount of money sitting in financial assurances to pay for cleanups. I don't come here today with a foolproof method for funding innocent party cleanups. I'm simply saying that when you weigh the benefits society has obtained from these parties and from people following the standards of their time, versus putting those small businesses -- putting those mom and pops -- out of business, there is something wrong. I think the equity has to fall on their side, and I would make any effort I could to assist this Committee.

SENATOR McNAMARA: David, that's one of the intentions of the Chair and the Committee members, to look exactly at those particular issues.

MR. FARER: I appreciate that, Mr. Chairman.

Next, delays: The cost of time, a primary and consistent problem. DEPE has never been able to solve the backlog problem as a whole. They have made great strides in certain areas, as Mr. Hogan pointed out: nonapplicable letters in a few days, low environmental concerns. But on the medium and high environmental concern cases, it doesn't work. Simply

being able to close under an Administrative Consent Order today really doesn't give the buyer the kind of buyer protection program it wants.

Let me give you a concrete example of that also: A client of ours, today, is in a situation where it is a buyer. The seller is going through ECRA, has not failed to do anything. The buyer is in trouble now. Our client is a real estate development company. Times aren't so great for real estate development companies right now. They need to refinance to infuse new capital into the company. What does the lender say? Fine. But I want to see this latest answer from DEPE on what your seller is doing on the sampling results before I infuse this capital in. We are not going to close until you get the sampling results reviewed.

So we call up DEPE, and DEPE says, "I'm sorry. This matter is a low priority." Now, low priority to whom? Is it a low priority to our client? No, he is going to go out of business. To the company employees, citizens of the State of New Jersey? No, because they won't have a job. To the State of New Jersey, which won't collect revenues? No. I think it is a big deal. Those who depend on the revenues think it is a big deal. These are problems that have to be overcome. When you have to wait two or three months for sampling results to come back-- When I say "sampling results to come back," I mean for DEPE to finish its review. This is something that goes way beyond just the ECRA office, because the ECRA folks have to turn it over to technical coordinators. As Mr. Hogan pointed out, they go through a rethinking of the entire process.

Cleanup plans: three or four months or more to approve. Final results of cleanup: three or four months and up to approve. This is not exactly in a booming economy. Now, as you have heard, there are new proposed standards for cleanup -- just a proposal -- but what DEPE is doing, is taking that proposal, using it as guidance, and reviewing everything. In

an active case you've got going on, they may reopen all sorts of areas you've got closed and take a look at them again. "Yes, you have cleaned up to that standard, and we thought we only had groundwater problems left. But now we have to rethink the soil cleanup level." This leads to such inconsistency that it drives clients and businesses up a wall.

One client commented to me -- it was David -- "I've got three submissions going on. It's like there are three ECRA programs. Will the real ECRA please stand up?" It is a moving target, and that is a problem.

Now, a lot of the problem is perception, and it is perception which is, I must say, combined with attitude, which is this enforcement bias of DEPE, because that is what the clients see. Now, we work with many devoted and fair-minded individuals, and those who are sitting behind me today stand out -- Lance Miller, Karl Delaney, and Ken Hart. You could not want more dedicated civil servants. They're terrific, but God forbid that they should ever leave the Department. But all too often, the business and the client run up against a moving target, because they hear one thing from senior management at lectures or at discussions or while sitting in a Commissioner's office, but when they get down into the trenches, either because it just can't be done or because it is not filtering down, they get something different. You should have to prevail on the merits. Too often when you come up against DEPE, especially on contract negotiations, like a consent order or a cleanup order or a deed restriction, it is a "take it or leave it" attitude that gets perceived by the client as another bit of evidence that the State really doesn't want the business; they just want cleanup at any cost.

Now, let me get to some proposals, and then that will conclude my remarks and I will answer any questions. I have already indicated what I think is the most important point, which is some sort of equitable restructuring of the liability scheme. I cannot overstress it.

Number two, time deadlines. I think we have to have time deadlines for DEPE responses. Do they need more funding? Let's hear, because a few years back when DEPE decided they were going to charge fees for the program, there was a good reason for it, because they came to us and said, "If we can have fees for the program, it will be self-funded and we can give you the service you need." And we said, "Fine, charge us. Charge us for the privilege of going through ECRA so that you have enough staffing." I must say, last year, when there was an Executive Order for a hiring freeze in the State, that covered the ECRA program as well, and business got very hot under the collar. Here the ECRA program was losing people to attrition, taking better, more highly paying jobs with consulting companies, and DEPE couldn't bring in new people.

Now, yes, it was eventually straightened out, but there was one Industrial Advisory Committee meeting -- the organization Mr. Hogan was talking about, which we both serve on, where DEPE interacts with those of us in the business and regulated community -- and we said, "Why? This just does not make sense." The answer was, "The Governor's Office." Now, it was fixed, but it is just another nail in the coffin. Do they need more funding? Let's find out. Do they need more people? Let's find out.

Next, financial assurance reform. Right now, the way the law reads -- and it doesn't work -- someone who has to clean up must both devote the necessary funds to cleanup and post a financial assurance, which is usually a letter of credit -- as, Mr. Chairman, I am sure you have experienced yourself, given the problem you discussed earlier. What do you need to get a letter of credit from a bank? You need collateral. Well, the bank ain't going to look at that piece of contaminated property that you've got to clean up, so you have to come up with other collateral; some resources you have

available. Well, those are the same resources you are going t use for cleanup. For the small- and medium-sized businesses it does not work.

I propose allowing trusts to be established. In the anticipated cleanup costs, allow drawdowns on those trusts as the cleanups are completed. Let DEPE monitor to make sure that people are paying the consultants their bills and the consultants are doing the right work. You don't need both the financial assurance and the cleanup moneys.

SENATOR McNAMARA: For letters of credit, isn't there sometimes a fee also from the bank?

MR. FARER: Yes. As to a letter of credit, the situation you go through-- You are going to get charged a point or two by the bank, so on a $100,000 letter of credit, you are going to pay $1000 or $2000 to the bank. You are also going to get charged a renewal fee each year that letter of credit stays in effect. You are going to pay the bank some money every year for maintaining the standby trust fund that this money would go into if DEPE were ever to draw down on it.

And let me point out to the Senators that, while DEPE has called several letters of credit and funded standby trust funds, they have not, to my knowledge, ever actually started cleaning up themselves under an ECRA default. So what is that money really doing there? Plus collateral.

SENATOR McNAMARA: What if we establish a trust? Then, how would you feel about the assessing of a one- or two-point charge that would go into a fund to do other cleanups of the small mom and pops that are unfairly victimized by historical fill?

MR. FARER: I think that is exactly the sort of inventive and innovative thinking that can go into ECRA reform and make this law work.

SENATOR McNAMARA: Again, that is an area at which the Committee is looking.

MR. FARER: And don't forget, the collateral is awfully tough to come up with, too.

SENATOR RICE: Excuse me?

MR. FARER: Yes, Senator Rice?

SENATOR RICE: We need to get these definitions straight, because every time I hear definitions in government which exclude what I call "mom and pops" and small businesses, and any time we talk about funds in trusts, you can bet for sure that 80 percent or 90 percent of those funds in trusts are targeted toward areas that are nice and clean, like Westfield and environmental areas.

So now, when we are saying "moms and pops," how are you defining that? Are you talking about the cleaners on South Orange Avenue, because I have more cleaners and small businesses than you would ever have in Westfield? It seems to me that if we are going to do a trust, there has to be an equitable formula to make sure that equity does not mean that if I get $5000, Westfield gets $5000. What it means is whatever it takes to resolve the problem. Nor does it mean that we will be the last in line to be drawing down, because there is Newark.

If you want to talk about perception, let's talk about real perception. Let's put the four-letter word, "ECRA"--

SENATOR McNAMARA: Hopefully it will not mean--

SENATOR RICE: --with Newark, okay? Then you get real perception because people from outside of Newark, who don't know what the hell is going on, including DEPE and those guys, always make sure those words come together, so folks can look elsewhere in New Jersey in terms of doing their business, and things like that.

So I am just going on the record to say, I am listening. I have heard a lot that I totally disagree with, but heretofore there is not going to be an exclusionary process. Unfortunately, we don't have the attorneys and the

big firms and the environmental people in Newark coming down to testify on issues they should be here testifying on. So usually when I am looking at environmental issues, particularly special interests from South Jersey, from Middlesex County, on the other side of Bergen, you are not going to have a lot of urban folks coming down, unless the local engineer comes down, because they are kicking our butt with development.

So I just want to be clear that when these statements come up, don't be so suburban minded. I know as an attorney you are probably not, because you probably get business from all over. But the point is, let's keep it in perspective, so that people like me who don't know a whole lot can get the right definitions of this terminology.

SENATOR McNAMARA: Senator, excuse me. One of the intentions of this Committee is to look at, specifically, the urban problem -- okay? -- not looking at it in a void and ignoring commercial property in a suburban area either; but, in fact, to address, how can we go about effectively moving on urban properties?

There was an article in The Trenton Times, I believe Sunday or Monday -- today -- where they had followed the suggestion of DEPE to inventory their property to find out, in fact, some of the land that they have sitting vacant, that they assumed had to be cleaned up, didn't have to be cleaned up to begin with. So, there are a lot of things that can be done with the cooperation of the Department, and also, I think, from the direction to which this Committee is--

You know, your concerns hopefully will be addressed by the time we end the hearing.

SENATOR RICE: Fine, because I agree with you. I personally experience those problems as a local Councilperson. I have dealt with the former Commissioner, as was said earlier, about the cleanup. I mean, if you go into an area where there is nothing but housing, you can basically expect what you are

going to find in terms of cleanup, but yet some of those yo-yos that used to be there wouldn't sign off on anything, so we lost development during good times. I can't afford that. It started to make me bitter with the Department, as well as some of these environmentalists who only see oceans.

MR. FARER: Mr. Chairman, and Senator Rice, I must say, most of the problems we encounter with what I am referring to, Senator, as the mom and pop operations, are in urban areas, and they are the downtown areas that have been there for a long time.

SENATOR RICE: Good. We have some vacant space for law firms, too. (laughter)

SENATOR McNAMARA: That's the last commercial until we move on.

MR. FARER: This gets to a point, though. Senator Rice's comments get me to the objective of also-- I think this is, again, a legislative duty, not a regulatory duty, and that is the least benign SIC designations. You heard Mr. Hogan talk about this vast array of SIC Codes that are subject to ECRA. How do I describe to-- One of my hard luck stories I described as a reupholsterer in the middle of a downtown area. On one side is a dry cleaner; on the other side is a lawn mower repair shop. How do I describe to my client why they are exempt? My client has to go through ECRA, and because it has an underground storage tank, just like everybody else does, to heat the darned place over the last 50 years, and it leaked-- My client is the one who has to spend their life savings on cleaning that up. It just doesn't make sense. I think with DEPE's assistance, we can easily target a number of SIC designations that just shouldn't be under ECRA.

SENATOR McNAMARA: All right. Senators? Jack?

SENATOR SINAGRA: Only because Senator Rice brought it up also-- There is this movement that there should be two

standards: one for urban areas and one for rural areas. What are your feelings on that? How would that ever be implemented and practical?

MR. FARER: Right. The Senator is referring to the current DEPE approach, which is, if something is going to be used for residential purposes, the standards have to be stricter because-- Let's just picture, you know, the child crawling on the ground and picking up the dirt and putting it in his mouth and getting sick, as opposed to capping an industrial site that is only going to be used for industrial purposes, so you don't have to have as strict a cleanup level. Am I correctly paraphrasing?

I think there is some room for this sort of differentiation. It has to be involved with other trade-offs with the State, such as how far you are going to have to clean up. What sort of restrictions are we going to have to put in the chain of title? All difficult issues, which I think we could defer to DEPE's expertise. But, you know, again, any time you create a double standard, you are going to have people coming back and telling you it is unfair. "Why should I have to clean up to a stricter level? Why don't I just clean up -- use it a little more for an industrical purpose, and then later on turn it over, or maybe use it for a non-subject ECRA purpose, and then turn it over for residential development?"

I think it is a mine field, but it is one that is being crossed very carefully right now by the agency.

SENATOR McNAMARA: What is your reaction to a deed restriction, so that if it--

MR. FARER: Yes, deed restrictions-- See, this is another area where I think if there is real business negotiation that goes on between the State and the business community, it could be dealt with. This gets to one of my primary recommendations.

We are dealing with people at DEPE out of the Attorney General's Office -- the environmental section -- who are very good environmental specialists. They are just not businesspeople. That is not their training, and they shouldn't be. But we get into negotiation problems where we have a client who is coming in and knows that he or she has negotiated 300 deals in good faith, and knows that there is such a thing as give and take, and then comes up against a brick wall, which is: "This is our deed restriction language, sir. If you don't want to have to clean up and send another 100,000 yards of soil to Mr. Hogan's home state, then you are going to have to use our deed restriction, and this is our language."

I say, look, there has to be give and take. There has to be reasonable language, and I think that would be reasonable, to have give and take. I am in favor of the concept of some sort of restrictions of use of property placed in the chain of title, as an exchange for not cleaning up to the standards of Westfield, New Jersey, or something like that.

SENATOR RICE: Mr. Chairman, I need to get some clarity here, and I know we need to move on. I don't want a new Senator to read and think that the debate, which is isolated to some degree, is all that was said. That debate is really geared toward "double standards," talking about business versus residential, which is totally different. By the way, I spent nine years in the National League of Cities on the Steering Committee setting national policy. And I'm telling you that the debate from all the cities, including those in New Jersey, is that rural America, urban America, suburban America, when it comes to where we are going to build housing units, based on what was there, the history of that land, dictates that some of the things we are being taken through, we should not be taken through in the first place.

If you want to require tests, require them. But there are ways of doing tests that can be signed off on that are

easier and less expensive and remove the delay, which is different than the way we do with industrial areas. So there are some common things about real estate development in terms of residential units in rural America, suburban America, and urban America. In urban America, we will tell you, there has never been anything there but housing, maybe going back to coal-burning types of heating units to maybe wood stoves up to oil and gas. Well, in rural America it is the same thing. You have a lot of open space and you almost know it has never really been contaminated. I think that is what the Senator was talking about. But yet they want us to test all this stuff.

So, the double standard-- Don't let them fake you out. It is not one of relaxing for the industry side. It is giving some elasticity, something that makes sense regulatorially, to deal with keeping these housing units being constructed, which we can't build because of DEPE's--

SENATOR McNAMARA: Thank you, Senator. Are there any further questions? (no response)

MR. FARER: Let me just make a final point on this business issue. I think that mandatory positions should be established, both within the agency and within the Attorney General's Office, for people who interact with the program and have a business background. I don't think we should drain the quality that is there now from the environmental standpoint, but I think we should give them the support they need to make the business calls in a learned and experienced manner. And both sides-- It is a legislative initiative that needs to be accomplished. There is regulatory cooperation which must be achieved. The responsibility in ECRA should be on both sides, the regulated community and the regulators.

SENATOR McNAMARA: Thank you, David.

Steven Picco? I apologize for the time delays.

S T E V E N J. P I C C O, ESQ.: Oh, not at all. You are controlling your enthusiasum for another lawyer very well. (laughter)

My name is Steven Picco. I am with the Trenton law firm of Picco, Mack, Herbert, Kennedy, Jaffe, and Yoskin. I also Chair the firm's Environmental Practice Unit. In addition, I represent 11 different statewide trade associations. I hope I come to the Committee with a little bit broader perspective in terms of the business groups I represent.

For the purposes of today's presentation, the matters of substantive changes to the ECRA statute as they relate to technical and bureaucratic issues, my statements generally reflect the views of the New Jersey Chemical Industry Council. To the extent that my comments are on urban policy issues, they generally reflect the views of Trenton Mayor Douglas Palmer.

I am going to do this as quickly as possible. I have broken this out into four or five major areas. I have a couple of comments to make in each area, and then a couple of specific suggestions for the record. I expect to meet with staff at some point after the hearing to put in specific language proposals. I don't think it would be helpful or timely to do that in front of the Committee right now.

SENATOR McNAMARA: Or appropriate, at this point in time.

MR. PICCO: Yeah, okay.

First of all, ECRA is a buyer protection statute. I think it is important for everybody to understand that. It is not a cleanup statute; it is not an insurance statute. It is a buyer protection statute. It was intended to protect the purchasers of commercial and industrial properties in the State of New Jersey. It has evolved into the primary cleanup statute that the State has. Now, whether that evolution is something that was appropriate given the legislative intent or not, is almost not the issue anymore. The fact of the matter is, we have a major environmental cleanup program that is achieving significant successes in the cleanup area. Therefore, it is a good statutory policy. It is working on a practical level in terms of cleanups.

In terms of how the program is working, it is working today a lot better than it did when the program first went into effect, as you heard from the comments of the previous speakers. There are, however, significant problems; some stemming from the structure of the statute itself, and others stemming from how the implementing bureaucracy has been organized to implement that legislation. I am going to try to bounce through those.

They involve a couple of areas. First, time and money. Almost any problem that any businessperson has, or any person who is complying with a regulation or a statute, is, how much is it going to cost me to comply, and how quickly can I get through the process? There are no good things to say about the ECRA process when viewed in those two lights. There are better things to say now than when the program began, but ECRA, in my view, is still too time-consuming and too expensive for almost anybody who enters the program.

The process itself can be very complicated, with a lot of internal redundancy. Now, what I mean by that is, you have a lot of the same data being reviewed by different people for exactly the same thing, or essentially the same thing. This occurs most often in the submittal of the technical reports that are required by the current process. First you send in what is known as a general information statement, which is basically a description of the parties to the transaction and the transaction itself. The second is a site evaluation submittal and a sampling plan proposal, which is a very detailed look at the site and a proposal of how you are going to sample the areas of concern -- of environmental concern -- at the site.

The Department -- as I believe Ed and David both mentioned -- requires a high degree of technical sophistication in its reports from applicants. Specifically, it requires laboratories to churn out a lot of what we call QAQC data.

It's "quality assurance, quality control" data. It is not unusual for a one-page document, in terms of the results presented, to be accompanied by several hundred pages of QAQC support work that certifies, on a technical basis, that the results on page 1 really were the results that we saw when we undertook this lab analysis.

The Department has staff that goes page by page through those reports to double check the lab results. Although I understand the reason that the Department is undertaking that particular staff activity, it is time-consuming and it is money-consuming, and it really does not achieve the kinds of things that the time and money that are being invested in -- that you would think it would.

There is a fairly simple answer to that, and it is one that we have seen in a couple of other areas. It is privatization -- the "p" word again. There is simply no reason, if the regulated community understands the standards to which it must perform; that is, the Department has put out cleanup standards and says, "If you meet these cleanup standards, you are through the process," and if they put out a document that tells you how you prove to the Department, on a technical basis, that these standards have been met, which is what they have done with their compliance guides. There is no reason why the Department should not accept a certification from a licensed PE that the work has been done according to the Department's standards, and does, in fact, meet the Department's cleanup standards.

If the Department receives that certification, it processes and approves the documentation. If there is a problem, the PE's license is on the line. It turns the program into an enforcement program, rather than a review program. It is a lot easier to enforce something than it is to review and approve and question the technical building blocks of any particular cleanup.

So, if the Department could do anything at all in the ECRA process that would have a tremendous impact, in terms of ease of implementation versus the results, both in terms of time and money, it would be to privatize the technical reviews by allowing independent certifications of compliance from licensed professional engineers.

Another problem the Department has -- and, frankly, I am not sure what they do about it -- is the revolving door among technical staff. It is not unusual to have two, three, even four case managers over the life of a project. It is not unusual, but it is infinitely more damaging to have two, three, four, five, six technical people assigned to that project. When the technical people change in the ECRA process, progress stops, because every technical person, in my experience, looks at a site a different way. And there is no institutional memory in that technical staff. If I have a new geologist coming onto a project, I can expect to have every single decision by the previous geologist reviewed and questioned by the new geologist. It takes time; it takes money. It can lead to radically different results, in terms of what you are going to do at an individual site.

I don't know how you change the revolving door problem, but I think that there should be some direction to the Department, that a decision by the Department by its technical staff cannot be undone by succeeding technical staff, in the absence of some tremendous mistake earlier in the process.

Money is another issue. I have mentioned the QAQC requirements. That can quintuple laboratory costs -- laboratory costs in an ECRA process. I have never had an ECRA case that was not a low environmental concern case, that had laboratory costs under five figures. In most cases, they get to six figures relatively quickly. The bulk of that laboratory money-- A little hyperbole there. A good portion of the laboratory money is in meeting these QAQC requirements of the

Department. I consider those to be unnecessarily conservative, and therefore unnecessarily expensive to the regulated community.

The financial assurance requirements, as both David and Ed Hogan have mentioned, are unnecessarily harsh. The Department has limited discretion in the area, and I would urge the Committee to take a look at alternatives for financial assurance, particularly for small business and urban redevelopment projects.

I have two specific suggestions in that regard: The first would be to allow -- or to maintain that the Spill Act act as a guarantor of low interest loans taken out by small business or urban redevelopment projects. The second would be that all fines generated as a result of ECRA infractions be put into a separate account, and that account be used either as a low interest loan source or as a low interest loan guarantee for urban redevelopment projects and for small business projects.

Right now, although I think the Department is constrained to either admit or deny it, the process is that fines collected by the Department run back through the Treasury and are then rebated to the Department for use in their operating budget, the result of which is that the Department is now 80 percent off-line as far as the Legislature is concerned. That is, 80 percent of the Department's revenue comes from fees and fines, and is, therefore, outside the normal budget oversight process, and, therefore, exempt from the kinds of legislative reviews that normal, fully funded programs enjoy.

So, to the extent that we can take these fines, take them out of the general cycle, put them into some kind of fund that will serve a legitimate State purpose, both in aiding small business and in making it easier for these urban redevelopment projects to get started and to get financing.

SENATOR McNAMARA: Someone handed me an article and it refers to the fact that about 25 percent of the labs checked failed some portion of the tests which DEPE ran. So, somehow or other--

MR. PICCO: No, that's right.

SENATOR McNAMARA: --there is that. I hear what you're saying, and it is something that has to be addressed.

MR. PICCO: Well, when a PE certifies something, that is personal knowledge and personal reviews. In its basic sense, my proposal is, instead of having a DEPE person, as part of 9000 other things that DEPE person is doing, go page by page through these documents, if an applicant wants to pay a PE to do that in order to save the time that that review would involve, I don't see any reason why that can't be an option for compliance with the ECRA statute. A PE, in most cases, is as qualified as the DEPE person doing the review and, in some cases, is more qualified, from a technical standpoint. They are going to do exactly the same thing as the DEPE person will do. They are going to look at every page. They are going to check the spikes. They are going to check the holding times, and they are going to make a judgment as to whether or not the standards were complied with. If they were not complied with, they don't get a certification. I think the issue of noncompliance would be picked up in a private review as quickly as it would be picked up in a public review, and at less cost.

Another area where there is a lot of contention between the regulated community and the Department involves areas of substantial technical agreement regarding the appropriate levels of cleanup to be had at the site, or the appropriate strategies to be used in effectuating that cleanup. At present, there is no mechanism within the ECRA process to resolve the technical disputes. Basically, if someone has significant whining rights during a negotiation

process, they will whine as much as they can, but ultimately, if the Department is not impressed, the Department's position prevails.

I believe that some sort of alternate dispute resolution for major technical disagreements should be implemented as part of the process; some sort of binding arbitration where the Department takes a look at a particular problem. Let's use a specific example: My client says, "I need three wells somewhere." The Department wants 18 wells somewhere else. The difference in price is over $20,000. That specific technical issue is submitted to a panel. We do it the same way we do it in private practice. I give the Department three names. They either agree with the three names, or give me three names -- the regular American Arbitration Association process. One arbitrator takes a look at it. The cost of doing it is paid for by the applicant, and the decision of the arbitrator binds both parties.

I believe that would short circuit a lot of the kinds of time delays we experience in arguing about technical issues. I frankly think it would have a chilling effect on the Department's tendency to oversample and overanalyze particular sites. I have a gas station which, fortunately, is not an ECRA project, but that gas station, one site, has more monitoring wells on it than the Gems Landfill. Obviously, the owner is not a happy puppy in that regard. Those are the kinds of things that I think alternative dispute resolution processes would avoid; again, saving time, and saving money.

Triggers: Triggers is the term I use to describe the event that has the statute attached to a particular site. It is usually a sale or a transfer of stock. The problem with triggers is that the Department has very little backing in corporate law; very little understanding of how the business world works, and is triggering -- has written rules that result in triggers for transactions which neither party contemplates as a true sale.

Now, this gets relatively esoteric. I can tell you that my firm, on behalf of the Chemical Industry Council, has sued the Department, and has won in court on this issue twice, and twice we have gone to the regulations and lost in the regulations. I guess I can talk out of the back of my head, we are very unhappy with the latest revisions that resulted from the last lawsuit, and if they are not changed to reflect the agreements which we thought we reached during the judicial negotiation process, the suit will continue.

The problem is, the legislation is very unclear in this area. The Department has policy concerns that drive them in one direction. Business has economic concerns that drive them in another. We have been unable to establish a bright line trigger test; that is, a test that any reasonable person can look at and say, "This transaction will trigger, or won't trigger the statute."

I look forward to working with staff over the next weeks or months to try to develop that kind of a trigger bright line test, because the single, most obscure area in this statute is when the statute begins, as far as a particular transaction is concerned, and we need a bright line trigger test to make this statute more efficient.

Urban policy: ECRA, for better or worse -- and I don't believe intentionally -- operates as a virulently antiurban statute. I don't believe it was intended by the sponsor; I don't believe it is intended by the regulators who are charged with implementing the statute. But the fact of the matter is, ECRA is the single most significant impediment to urban redevelopment in the State of New Jersey. It simply has to be changed.

There is a perception problem which I will talk about in just a second, but the reality is, the Department is not set up to address urban issues in any kind of a systematic way. I recommend for ECRA that the Department set up an urban section

within the ECRA office that gets all the urban development projects statewide into one area, with the same staff that can become sensitized to urban development issues; that can become familiar with the kinds of contamination that you may or may not find in urban areas; and that will, therefore, be sensitive to the kinds of issues that will crop up time and again in urban development and redevelopment projects. It wouldn't cost the State anything. It would be a simple reassignment of staff resources.

I also recommend that the Legislature give a strong signal to the Department that urban redevelopment projects and urban development projects are a State priority, and should be given expeditious treatment in the review process within the Department of Environmental Protection and Energy.

I believe the fine fund that I mentioned earlier, that fund that would receive fine payments for ECRA violations, could also serve as a guarantor -- should also serve as a guarantor for these kinds of urban development and redevelopment projects. In addition, the Spill Act is also available as a source of loan guarantees for these kinds of projects. I think we have been a little too timid in our use of that fund as a mechanism for some creative financing guarantees in urban areas.

SENATOR McNAMARA: Steve, before you move on, do you believe urban areas should be allowed to leave more contamination on site?

MR. PICCO: I think that one is a red herring, and I am going to talk about it. Sorry, Senator, I was going to put that on right away.

The issue is not whether it is more contaminated or not. I have heard several environmental groups try to cast this brown fields/green fields argument in terms of people shouldn't be forced to live in more contaminated areas.

Frankly, those comments are coming from people whose idea of urban congestion is a parking jam at the Short Hills Mall. (laughter)

You've pressed the button on this one, Senator. I am going to go on a little bit of a roll on this one. The regulations talk about "actual or intended use of a property." Holding urban areas to residential cleanup standards in the absence of an actual residential use makes no sense from a policy standpoint; makes no sense from a public health standpoint; makes no sense from an environmental standpoint. The standard now is actual and intended use. The implementation of that standard assumes residential use. That is why it is a virulently antiurban development statute.

I believe there is nothing wrong, whether it is in Westfield or Short Hills or Newark, with having a different standard for an industrial piece of property than for a residential piece of property. That is all I'm saying. You can get a statistician in here who will turn your brain into Jello in about 11 seconds; who will tell you what all these models mean, "One in a billion chance, one in a million chance," but the fact of the matter is, no one anywhere has been able to show that a brown field standard based on actual intended use has any -- not an increased risk or anything, has any health impacts.

I urge the Committee to put some sort of brown fields policy in the ECRA statute. I hope that having done it at this Committee, it will spread to other areas within the Department.

The final point I want to make is about the perception problem we have all heard about. ECRA is a perception problem. Part of the problem is, people who have the perception don't really have the knowledge, which is usually a problem with perception problems. The Department has not done a very good job explaining what it is it does in the ECRA process in nonregulatory terms. ECRA should be a job-enticing

statute. I should be-- As the Commerce Commissioner, I should be able to go to a company that is looking in North Carolina and looking in New Jersey at a piece of property, and say: "If you come into New Jersey, we've got a process that is not going to cost you a dime; that is going to result in you having a certified piece of clean property that you can take to the bank, or to your insurance company, as the case may be. No other state can give you that guarantee."

That would be a plus. The fact of the matter is, we have allowed ourselves to be bashed. I am using North Carolina as a specific example. They use ECRA all the time. They beat the hell out of us with it. They use it totally incorrectly. They know they are using it totally incorrectly, and we have not come to the fore and just beaten them back. If there is a state that has problems with people buying some really amazing property, it is North Carolina.

We've got to do a much better job as salesmen for our State on this issue than we have done in the past. I think going through this ECRA reform process will give us an opportunity to do that kind of stuff.

Finally, there is a goal I would like you to keep in mind when you do that. This is really, for me, a three-point reform plan. I hope the Committee will keep this in mind as it goes through. If you can make ECRA faster, if you can make it cheaper, if you can make it fairer, then you have succeeded in your exercise. I look forward to working with you to help you to do that.

Thank you.

SENATOR McNAMARA: I think one of the reasons they lose technical staff to private industry and consulting firms is that they can earn more money.

MR. PICCO: That is correct.

SENATOR McNAMARA: If it is paid via the fee-- It would be hard to make the fees less, if we are going to have to pay the staff more.

MR. PICCO: A fair point taken. My point, I guess, in return is, I don't think they need the levels of technical staff they have now, because those technical functions can be performed faster and more cheaply in the private sector, with no loss in terms of the integrity of the process. I would rather see the Department's technical staff reviewing, on a random basis, the performance of the certifications than I would-- That might take a third of the people they have now, at a third of the cost, and the cost savings can certainly go into higher salaries. But I don't think the State's interests, even the Department's interests, and certainly not the applicants' interests, are being well served with the kind of detailed -- relatively meaningless detailed review that goes on right now.

SENATOR McNAMARA: Any questions from any of the Senators? Randy?

SENATOR CORMAN: Along the lines of privatization, any time that you contract something out, or turn it over to some private entity to administer, you have to have a certain degree of contract administration, if you will, or some way to make sure they are doing what they are supposed to be doing. Now, if, for instance, we, I guess, had private engineers review the data with respect to a cleanup, I would gather we would have to have some sort of way to make sure they were signing off correctly.

MR. PICCO: Right.

SENATOR CORMAN: After all, they would have-- If the applicant were paying them to sign off on this, obviously they would have an interest in doing what the applicant wants them to do. What would you suggest to see to it--

MR. PICCO: I am not saying eliminate the technical staff. What I am saying is, the technical staff should be used to double check the performance of the private certifiers for compliance on a -- not on a case by case basis, but on a spot

basis. It is fairly easy to see that if you have some professional engineer out there who is using his license to get bucks, that is going to come up very quickly. Frankly, I don't think PEs are going to put their licenses on the line for something as relatively insignificant as a lab certification. That would be a big price to pay. It would have to be a pretty big project, I think, for someone to take that kind of a risk.

I believe the technical staff should be used as an enforcement tool, not as a compliance tool.

SENATOR CORMAN: Okay.

SENATOR McNAMARA: Thank you.

SENATOR RICE: Mr. Chairman, through you--

SENATOR McNAMARA: Make it a real quick one, Ronny, because we have two more witnesses to hear from.

SENATOR RICE: I need information. If I don't request it through you, I won't get it. You're letting these people speak.

SENATOR McNAMARA: Okay, go ahead. Go ahead.

SENATOR RICE: You said you would like to see things faster, cheaper, and fairer. If all of the speakers are going to say that, can you send us some kind of ideas? You must have some ideas how to make it faster, cheaper, fairer. In other words, in the proposals you may have been reviewing, could you send that to us through the Chair? In other words, if people are going to come up and give suggestions, they should make--

MR. PICCO: We have been in contact with staff, and they have solicited those kinds of comments. We are putting them together.

SENATOR RICE: Through the Chair to us?

SENATOR McNAMARA: Yes, yes. Thank you, Mr. Picco.

MR. PICCO: Thank you, Senator.

SENATOR McNAMARA: Al Griffith?

A L F R E D H. G R I F F I T H: Good morning, Mr. Chairman, and members of the Committee. My name is Al Griffith, and I'm the Executive Vice-President of the New

Jersey Bankers Association. I have with me Mike Spicer, Counsel for our Association. We'd like very much, first of all, to appreciate and express our thanks to you for your willingness to allow us to participate in this process. We hope that we're able to offer some information and help for you in your task.

Our Association represents the commercial banks in the State, and we are pretty much involved in both the residential as well as the commercial real estate lending field. There are other trade associations -- the Savings League, the Savings Bank Association -- who represent lenders as well, who we do not claim today that we're speaking for.

We'd like to say right at the outset that our concern in the lending community is our ability to provide credit in our State. We are, for a number of reasons, limited to some degree at this particular time because of the nature of the economy and the increased pressure that we've experienced from our regulators, particularly our Federal regulators who are asking us to jump through a number of hoops, and so forth, that we've never had to feel we needed to jump through, in recent months. However, aside from that side of the coin, we have had an ongoing concern about our ability and desire of our ability to lend in areas and on property that might be considered to be environmentally troubled. As a result of that, we've been working with and communicating with DEPE for probably a little bit more than a year-and-a-half on the subject matter. We've had some good discussions on that and we've also been working with our affiliates at the Federal level, the American Bankers' Association, knowing that in this area of environmental lender liability reform, including ECRA, that there's not only a necessary State solution, but similarly, also a need for action and consideration at the Federal level.

We'd like to say, just at the outset, that the focus here appears to be clearly the ECRA Act, and clearly there is

an impact on ECRA, as far as lenders are concerned. I think many of the points that were made this morning by Counsel regarding the process, the delays in the process, etc. all obviously reflect upon the ability and the timing of a lender in arranging and providing for a loan. I know that at times there's frustration with lenders because of the delays that are consumed because of this process.

We have, perhaps, a more significant issue that we'd like raise with you this morning that we are hopeful that we'll be able to pursue legislatively that not only relates to ECRA but more specifically to, and perhaps is confused with; that being the Spill Fund Act. We have a concern both in our secured lending capacity, as well in our capacity as fiduciaries -- many of our banks have Trust Departments -- of the environmental liability that we experience in granting a loan or in assuming in our fiduciary capacity, an estate of which might have as part of it, property that might ultimately become subject to a cleanup, one that could become very expensive and can create a serious challenge to the bank if the the bank considered is considered to be the deep pocket for meeting the costs which cannot be obtained otherwise.

We see a need to make a statute clear, particularly in regard to this subject, in light of some of the developments that we're seeing within our State. It appears pretty clear and obvious in terms of the movement on the State Development and Redevelopment Plan that should that Plan become a reality and the bias for development under that plan be in areas where there is an existing infrastructure, namely the urban areas of our State, an issue over which we, you know, are not concerned in that regard, it does call upon the lender to step to the bat and come forward and provide lending in those areas, which are areas, perhaps, which might find because of the industrial locations that have been there over the years the most environmentally sensitive areas; as a result, the areas that

provide the greatest degree of risks for banks in terms of their lending capacity. So, in fulfilling that purpose, if that's the purpose that our State eventually finds its way in going, namely the fulfillment of the Redevelopment Plan in urban areas and where there's an existing infrastructure, it's very clear that the lender is going to need far more protection than presently exists in the statutes.

With that as a background of the Association and where we've been working and where we've been coming from, I thought, maybe, next I might refer to our Counsel, Mike Spicer.

M I C H A E L F. S P I C E R, ESQ.: Thank you, Al.

I'd like to pick up where-- I'd like to follow up on a remark that Lance Miller made, where he said ECRA is not a statute that provides the payment for the raising of funds to effect cleanups; it's a process to identify. Then, we're up against the question: Who pays for the cleanup? Now it seems to me that one of the desirable answers to that is that we should create a process whereby private funds can go into the system to take care of cleaning up cleanups. The reliance on the taxpayers, the reliance on the current funds, I think everybody knows, isn't going to do the job the way it should be done. The trick is how do we create an atmosphere where the private sector, primarily banks, are willing to risk their funds into the system? And when a lending institution comes up against issues of whether or not to extend credit-- Actually it comes up in two separate type scenarios, one with respect to new loans, the other with respect to work out a problem loans, which can be foreclosures, bankruptcies -- and the question of whether or not a bank which already has a lien is going to put more money into the project to try to save its position.

In both of those circumstances, the main impediment -- not the only impediment, there's lots of things going on obviously with any credit -- but the uncertainty in the total of the environmental regulations has been a very serious

impediment. That uncertainty comes partly from questions under the CERCLA, the Federal law, and to what extent under that law an institution in its role as lender or secured party can proceed and try to work out a project, or to go further with it and put more money in it? It also comes from State law; the questions of uncertainty under ECRA and the Spill Act. All those together cause the climate that is interfering with the ability of lenders to make loans to business and to residences.

With respect to ECRA, in particular, some of the things have been mentioned today about the need for further clarity with respect to the statute, the standards of cleanup. It's one thing, for example, for a lender to make a decision: "I'm going to put $1 million into this project. I know it may not be able to be paid back, but that's a credit decision. We can look at the value of collateral." That's the type of decision that a lending institution makes every day.

When you add to that equation some unknown amount, it could be $10 million on a $1 million loan if, by what you do, by getting into the project, creates liability over and above just what the money is loaned-- Whether that's under ECRA, the State Spill Act, the Federal Spill Act, whatever, that's a serious problem, and it's very difficult for the lenders to make reasonable judgments in that area as to what the risk is with such an unknown factor hanging out there as to: 1) who's responsible for a cleanup if there is one; and 2) what the limits of that cleanup may be for whoever is responsible?

Those questions are the two that are very difficult to answer. The insurance companies haven't been able to answer them very well which has led to the situation where there's no-- Up to now at least there hasn't been any environmental insurance that either the banks as lenders or the businesses as borrowers could purchase. There's nothing for the actuaries to really work with, given all the questions. Hopefully, that's

turning around. There are some companies now which have come forward, and we're speaking with on behalf of the Bankers Association to try to explore that further.

But the primary point that we would like to leave with you is that in this whole-- Well, there are two of them. In this whole process, and from our perspective it's got to be an entire process of how all the environmental laws link up with each other-- It's not just, can we fix ECRA, can we do something else. It's how they work together, because ECRA takes us to the point where there has to be a cleanup, and somebody has to pay. We have to see it as a unit, and something has to be done with respect to clarifying from the lender's perspective what the lender's risk is if the lender finances a cleanup or finances a borrower that has a problem relating to the environment.

We're happy to answer any questions.

SENATOR McNAMARA: I was out for a couple of minutes and I don't know if you covered it at all, but what is the extent of the environmental audits and cleanups that you require to be performed on non ECRA commercial properties?

MR. SPICER: That varies from bank to bank, from loan to loan. It depends on the bank's policies; it depends on where the property is; it depends on the amount of the loan. One of the reasons I suspect that it's hard to get kind of a consensus or to come up with a figure is because of the uncertainty that exists in the law about what has to be done, and the fact that you can have certain types of envirnomental audits and you can say a "phase one," but it's different things to different people, and no one's sure that if you get it, it's going to be sufficient if there are problems later on.

SENATOR McNAMARA: How do you ensure that the environmental audits performed are done by the consultants adequately? In other words, do you have a select number of

consultants that you would use and only accept, rather than, somebody goes out and hires Joe Smith, who comes in with an audit that you're suspect of?

MR. SPICER: We have not done a survey of this, Senator, among our members. I can anecdotally give you some information on that, I think. In most cases the lending institution will permit the borrower to employ the environmental consultant subject to the approval by that lending institution. There may well be lending institutions that have a list of environmental consultants and technical people that they draw from. I'm not sure. That's something we could try to find out for you.

SENATOR McNAMARA: I really would appreciate it if you would. Because, again, when we talk about relying on the private -- and relying on PEs to sign off, there's varying degrees of expertise that's out there, and I'm just wondering if the banks, in fact, since they're buying themselves into a liability, wouldn't have already looked at that in some form or matter?

MR. SPICER: Well, each bank has. It's just a question of us getting the data together, and we have a meeting this week--

MR. GRIFFITH: There's a meeting on Friday with our Commercial Lending Committee which makes up a pretty substantial size of the assets of our bank in terms of memberships, so we could probably get a thumbnail sketch from them, and then survey our entire membership if you'd like to see whether they're pretty well homogeneous.

SENATOR McNAMARA: All right. We would appreciate it if you would. Please send the information out to staff.

Jack? Randy? No questions? Okay.

MR. GRIFFITH: Thank you very much.

MR. SPICER: Thank you.

SENATOR McNAMARA: Thank you.

Jeffrey Horn. Oh, here we are. Good.

J E F F R E Y A. H O R N: My name is Jeffrey A. Horn. I am the Executive Director of NAIOP, the Association for Commercial Real Estate. Just as a program note, we were formally known as the National Association of Industrial Office Parks. I am accompanied today David T. Houston, Jr. Mr. Houston is the Chairman of NAIOP's ECRA Reform Committee and is the President of David T. Houston Company and Collier's International, a statewide industrial and commercial real estate brokerage concern. NAIOP represents over 6500 members nationwide and 250 members in New Jersy. Our members actively engage in the development, ownership, and management of industrial and commercial properties throughout the State.

Thank you, Chairman McNamara and members of the Senate Environment Committee, for initiating these hearings. We commend your approach in conducting these fact-finding sessions to determine if the Environmental Cleanup Responsibility Act warrants change, and the types of necessary changes.

We do not appear before you today requesting that we turn back the clock and eliminate the ECRA program. Nor do we appear stating that regulatory fine-tuning can provide a program that works for the benefit of New Jersey's citizens. ECRA needs important legislative revisions to make the program more predictable and efficient, and provide the finality required if we are to attract investment to New Jersey and its urban centers and older suburbs. We are pleased that the Department of Environmental Protection and Energy administratively seeks to change the program in an attempt to move toward some of these goals. However, we've suggested a number of ECRA changes to various administrations during the past eight years, and our suggestions were typically met with the response that the ECRA statute itself does not provide for our requested changes. The Legislature must send a strong and clear message to the Department by revising the statute to provide for changes that you believe are necessary.

Uncoordinated and conflicting policy directives and actions within our State government fail to provide guidance to private interests that continue to do business or seek to do business in New Jersey. A classic study in this process is ECRA. For as long as I can remember, our State government leaders echoed the theme of bringing development and redevelopment back to our cities and older suburbs. Actions taken by previous Legislatures and administrations are significantly reducing the amount of nonurban developable lands, in furtherance of this goal. The nearly completed State Development and Redevelopment Plan restates this objective in a resounding voice. Yet, the ECRA program operates in direct contrast to these objectives as it directs industrial growth to pristine locations.

Let me ask you to imagine yourself in the role of an investor or lender faced with making a locational investment decision for an industrial facility to house a new tenant. Let's assume that the decision involves two New Jersey sites. In our simple scenario, your decision is whether to acquire a site in one of New Jersey's urban centers or outlying suburb. While your tenant is not a Fortune 500 company, it is a promising venture, possessing good prospects for future growth -- a broker located a well-suited facility in an urban area meeting present needs while providing flexibility for future growth. The location provides easy access to skilled labor. It is accessible by a variety of transportation modes and provides easy access to the goods' movement network needed to move product quickly to markets throughout the world. An alternative site, located in a New Jersey suburb, is also available. Use of the outlying site requires additional construction and alteration for conversion from its previous light industrial use.

You, the investors, begin weighing the merits and risks associated with both sites. You will be subject to ECRA

at some point in the future, since your tenant will be a light manufacturer. You consider criteria as follows:

With regard to the urban site, it is essential that you know each of the uses on the site from at least 1940 onward. Even though you may be purchasing or leasing a facility that received ECRA clearance since 1983, when you trigger ECRA, DEPE will require you to extensively test the site again to determine if any contaminants exceed the Department's published or unpublished limits. Even if this site received previous ECRA clearance and a cleanup was not required, if any contaminants exceed DEPE published or unpublished limits, you must perform a cleanup, even if your operations did not involve the contaminants in question. If it is possible to trace where in the change of title the contamination occurred, you may be able to seek compensation from a previous owner. Remember however, that in order to collect damages from prior owners, you must first perform all the necessary testing and collect all the evidence necessary to initiate litigation to collect damages. Of course, you must also trace all previous owners and tenants and determine if they still exist.

By the way, if you trigger ECRA again while you occupy the site, you must go through the entire process again. If you do, Department policy and directives, in addition to the methodologies employed by individual DEPE case managers may require you to perform new tests and expend more resources to obtain the same clearances. This is a requirement every time ECRA is triggered.

You then estimate the cost necessary to negotiate the ECRA process on the urban site. The costs involved are difficult to determine because the methodologies and extent of testing are subject to on-the-spot change by DEPE personnel. All of the original testing data including reams of quality assurance and quality control data, and the results must be

submitted to the Department; all previous material from testing on the site must be submitted, as well. Any future submittals will also require resubmittal of all previously generated data.

You then perform the same assessment relevant to the suburban site. While the same criteria apply, the limited industrial history of the site limits your assumed liability. Senators, in your imaginary role as investors or lenders, which site would you pick?

NAIOP's members play a very real role in these investment decisions every day. Our members tell us that ECRA is the leading deterrent limiting redevelopment of viable urban locations. Any legislation you consider must address the inequities caused by the ECRA program in New Jersey's cities and older suburbs.

Our members tell us in clear terms that ECRA's lack of predictability, a lack of finality, and a lack of efficiency plays a significant role in the decision-making processes of companies considering New Jersey locations. Legislative changes are required to affirmatively state to the industrial community outside New Jersey that we are a desirable location that seeks their businesses.

We believe that a number of efficiencies can be achieved within a working ECRA program, thus allowing resources to focus on high-risk problems deserving State attention while allowing the private sector to clean low-risk sites. For example, our conversations with NAIOP members lead us to the conclusion that in low and moderate environmental risk cases, we spend as much, if not more -- and with all due respect to the Counsel that appeared previous -- on attorneys and consultants, to get through the process than we spend on actual testing and cleanups. These processing costs are the direct result of DEPE directives and requirements issued by individual caseworkers directing the ECRA process. We submit that since 1983, a significant body of knowledge and expertise has been

developed within the professional community. On the basis of this body of experience and knowledge, a standard set of examination criteria can be applied in these typical cases. Let's give the professional community the ability to exercise their professional judgments in the preparation and approval of cleanup plans for low and moderate environmental risk cases. Further, allow them to certify that the cleanups are completed in accordance with plans. In short, allow us to spend our moneys on cleanups, rather than plan development and processing.

Another efficiency involves coordinated DEPE efforts relevant to other programs and permits that impact on ECRA cleanups. Establish one-stop shopping and approvals for ECRA cleanups. Mandate one set of standards and rules to govern situations covered under ECRA. Mandate coordination of the procedures, requirements, and standards of ECRA, the underground storage tank rules and the Spill Act.

When ECRA triggers and a cleanup is required, cleanup plans are often subject to other DEPE programs. In ECRA cases where contaminated groundwater is discovered, extensive testing by the applicant and reviews by the Department are performed under the auspices of the ECRA program. However, to implement the cleanup, the applicant must obtain a permit from a different group in DEPE. The applicant must submit to a completely duplicative review, delaying the initiation of remediation. Cleanups can be started quicker and at less cost if all the relevant permits can be issued under the ECRA program.

In other cases, applicants for cleanup-based permits must negotiate the lengthy and difficult approval processes associated with such programs as stream encroachments and freshwater wetlands. Mandate a one-stop approval when a cleanup plan is required.

Legislation revamping the ECRA program must establish a degree of finality with respect to ECRA approvals and

cleanups. The "Big Lie" of the ECRA program is that it is a buyer protection program. In fact, the program is quite the opposite. Owners and tenants have absolutely no assurance that the DEPE won't change its mind at any point and require additional testing or cleanup at the next ECRA trigger. This is a particularly important point for industrial facility owners and tenants and a critical point with regard to urban problems. Continuously changing practice and procedure on the part of DEPE provides little assurance during multiple ECRA examinations of the same sites.

Sites are tested and retested for the same contaminants. ECRA approvals must be given a high degree of finality as to the activities up to that point in time. Barring any imminent threat to public health, safety, or welfare as may be established by science in the future, an ECRA approval for a site in 1992 should limit further examinations on that site to an examination of the activities that take place from this point forward. The currently proposed DEPE cleanup standards are a case in point in establishing the need for finality. In the proposed rules, the Department states that sites subject to cleanup must meet these standards. Thus, all sites that cleared ECRA in the past that do not meet these standards will be subject to cleanup for past contamination, even if they were not caused by present operations. I'm sure that you can appreciate the complications this will cause in landlord and tenant relations.

Others have spoken before you about the need to protect innocent parties. We are talking about those parties that did not cause the contamination that may be found upon their properties. Nowhere is this need more true than our urban areas. We strongly urge you to consider the establishment of an urban cleanup fund to provide cleanup assistance in these special cases.

We leave you with the premise with which we started today's testimony. ECRA needs a major overhaul. Fine-tuning of New Jersey's ECRA program will not be enough. However, New Jersey's ECRA program should not be eliminated. We ask you to develop a renewed and revamped ECRA program that will provide investors in New Jersey's economy and the citizens of our State with predictability, efficiency, and finality.

NAIOP offers the collective experience of our many members to the Committee and your staff in any future deliberations or efforts to develop legislation involving the ECRA program.

We welcome your questions. We thank you for your patience. This has been a long hearing today. Dave Houston and I are prepared to answer your questions.

SENATOR McNAMARA: Most people concede that the ECRA program, you know, over the past years, had numerous problems, but that it works far better today. You don't seem to particularly agree with that assessment -- not from your testimony.

D A V I D T. H O U S T O N, JR.: Senator, I think there have been clearly some improvements. I think there's a lot more that can be done.

SENATOR McNAMARA: Well, that's why we're here. But I mean, just taking from the tone of the testimony--

MR. HOUSTON: Well, we've lost 250,000 jobs in the last two years. As I go around this country talking to clients, I try to encourage them to come to New Jersey. I try to encourage them to build a facility. Unfortunately, what has happened is the perception is what-- The perception, okay, is what we have to deal with. Perception is far more powerful than reality. And all of these companies collectively, you go around the country, and they tell us New Jersey stories. And I've seen other states, including Pennsylvania in particular, when they go in and visit our companies to move them out of

here, they have got, literally, newspaper article after newspaper article, that they show a company in Chicago about why you shouldn't come to New Jersey.

We get judged only by, not the things we do right, unfortunately, in life. We get judged by the little things, or the things we do wrong. This, unfortunately, is the perception of our State around the United States because of this. It is a major deterrent to locating companies here. They can't understand-- They understand their need to not pollute. They are all quite willing to clean up what they did. But what really bothers them is this open-ended liability; that if they go to a section of the Ironbound in Newark, or the South Ward, or what have you, and they are told that this contamination can stay in place because it is ambient-- Let's say it's lead. The City of Newark has an average background level of lead of, I think, 1270 or 1280 parts per million. Their fear is-- They sit there and say, "Are we guaranteed that you won't come back five years from now and revisit this issue?" When they are told, "No, the Department might change its mind when you come back-- They have never done this before to my knowledge, but under this program, this is a potential--"

SENATOR McNAMARA: But if the Department is developing standards today which, in fact, may be different levels of standards between commercial and residential, wouldn't that, in fact, address a good portion of that problem?

MR. HOUSTON: Not unless there is an estoppel that says, "Once you have cleaned up to this standard today, that's it." If, in fact, that is the case, Senator, then what is to prevent the next administration from going back and setting another set of standards? Let's say you are sitting on that site--

SENATOR McNAMARA: How about an innocent purchaser and cleanup fund? You have to be an innocent purchaser if they told you that this standard is acceptable.

MR. HOUSTON: But we don't have that.

SENATOR McNAMARA: I'm throwing that on the table as a possible solution.

MR. HOUSTON: If you had some combination of that, but what we are saying is, a lot of these standards-- If we are dealing with a serious health risk, and we're saying that there isn't a serious health risk, you can leave it there in place today, and then to come back and say, "Well, we are going to change our mind five years later--" Now, if you're saying if we do that, okay, there is going to be State money, or some moneys available to clean it up--

The problem is, what if that cleanup interrupts the operation of that facility? What if, as a result of that cleanup, you can't continue to manufacture or operate that facility? Then what do you say?

SENATOR McNAMARA: Business interruption insurance.

MR. HOUSTON: Companies don't want to hear that, Senator. They'll go someplace else. There are 50 states in the United States, and 49 of them do not have this problem.

SENATOR McNAMARA: Well, they don't have this problem at this point in time. I am not saying we don't have a problem, but, you know, the solving of the problem is why we are here and what we are about.

MR. HORN: Absolutely, Senator.

SENATOR McNAMARA: You know, just taking the tone of the presentation, quite frankly, it seems like there is no solution unless there is no ECRA--

MR. HOUSTON: No, no.

MR. HORN: I disagree entirely with that, Senator--

SENATOR McNAMARA: --and I can't believe--

MR. HORN: --if I may. As a matter of fact, we are willing to sit down with staff. We have a number of suggestions that we wish to offer. Quite the contrary. We are not saying, "Get rid of the program." We're saying, "Let's

make the program what it should be." Let's make the program a true buyer protection program, so that when someone wants to make an investment decision in New Jersey, they can be assured that the site is not going to be revisited, but that they are, indeed, buying a site that has been declared clean, so they don't have an environmental risk in the future. Or, if they are going to be a manufacturer in Newark or Camden or any one of our urban centers, they are going to be moving into a prior manufacturing facility where they know they will not have to clean up to the same standard as a residential location in that same city. Those are the types of things we are talking about.

SENATOR McNAMARA: Those are some of the things we are talking about today.

MR. HOUSTON: Yes. We talked about privatization for LEC cases and MEC cases. We think that will result in a more efficient and less expensive process. Don't forget, the great force in all this is the buyer. If ECRA went away tomorrow -- 1992 is not 1984, is not 1974 -- you've still got the buyer out there who now has woken up. There are very few stupid people left in the United States today who will come into New Jersey, or most other states, and who will just buy without doing at least a phase one, and perhaps a phase two testing. Privatization of a lot of this is one way to make it fairer; one way to make it less efficient.

The other thing we talked about--

SENATOR McNAMARA: One way to make it less efficient?

MR. HOUSTON: More efficient, excuse me. We talked about an urban cleanup fund for innocent parties as the only economic way to revitalize some of these older areas in Camden and Trenton and Newark and Paterson. Also, low interest loans for cleanups. A small business which has no assets other than that real estate and needs to post some financial assurance, or needs to clean the property up-- Who is going to lend them the money on contaminated property? There is no reason why-- It

shouldn't cost the taxpayers a nickel. We could have some form of a revolving low interest fund for small business, with that money going to cleanups.

I think we can also look at the paperwork that is generated. Is it necessary on every successive ECRA application? Ed Hogan told me of one in Pennsauken that I think has been through the process seven times now. For each of the previous-- To go back and regenerate all that data, which is already sitting there from six times before-- It costs money to do that. Is it really necessary to do that?

The other thing is, is it really necessary to have a negative declaration that is good for 60 or 120 days absent a spill, or something like that? A year later ECRA is triggered again and there hasn't been a spill. Why shouldn't that be a very simple process? I think it is the efficiency in the concept--

SENATOR McNAMARA: Mr. Miller?

ASSISTANT COMMISSIONER MILLER: (speaking from audience) Excuse me, I'm sorry?

SENATOR McNAMARA: On this question-- I don't know where I heard it, but I understand the Department is going through a process now of trying to computerize, or put up on computer past histories of different properties, or is that not true?

ASSISTANT COMMISSIONER MILLER: Well, all the ECRA cases are on computer. Ever since 1983, every case has been in a computerized data base. I was just talking to staff. I will pull some examples for you, Mr. Chairman, of cases that have gone through the process more than once, and indicate what their processing times were for the first case versus subsequent cases.

Our policy is that we will only look at what has happened since the cleanup was approved and completed for a new

transaction. Oftentimes, those cases are going to be considered low environmental concern cases and go through the process very quickly.

SENATOR McNAMARA: All right. So, in fact, you go back to the date of the--

I'm sorry. I guess I should have invited you up to the mike, since we are taping this.

ASSISTANT COMMISSIONER MILLER: That's quite all right, Senator. Usually I talk loud enough so that you can hear me anyway.

SENATOR McNAMARA: Would you reiterate what you just said, for the record?

ASSISTANT COMMISSIONER MILLER: We will provide information looking at some past cases that have gone through ECRA multiple times. It is our policy that once we have a negative declaration approved or a cleanup plan approved and implemented, we will only look at that new industrial establishment from that point forward. Oftentimes those cases then become low environmental concern cases, if they haven't had any subsequent discharges. That lets them, of course, go through the process much faster.

MR. HOUSTON: But you do require all the information to be resubmitted, correct?

ASSISTANT COMMISSIONER MILLER: Yes. We are also considering changes regulatorily that will allow us just to back-reference previous submissions and eliminate that administrative burden.

SENATOR McNAMARA: Thank you.

SENATOR RICE: Mr. Chairman, through you, is it Mr. Miller's plan-- Are you setting up a similar scenario that the title companies use when they are doing searches? Is that what you are implying? At one time, if you had to do a search on a piece of property in real estate, you had to keep going way back, way back. Then they said, "Well, look, you know, if a

search was done within "X" number of years, then we have no need to go back. We will just go back to those years and move forward." Is that what you are indicating?

ASSISTANT COMMISSIONER MILLER: That is correct, Senator.

SENATOR RICE: Well, then, should not the information that was given -- the old information -- be valid in computers and files around here? What I'm hearing is that-- You're saying that we are going to go forward, but we took what you gave us and threw it in the garbage can, so give it back to us. They're saying why should they have to pay for something they have already submitted.

ASSISTANT COMMISSIONER MILLER: That is what we're looking to change; to eliminate that need to submit. What usually happens now is, if somebody is coming in and making a new submission, they will come in and copy the old file of the case that went before it. Then they will just resubmit that information. Obviously, since that is happening, that is just an administrative burden that does not need to exist. We are looking to set up our regulations, which are on a sunset until the end of this year anyway-- We are making our revisions, which are required periodically, to those rules to, again, improve our efficiency wherever possible.

SENATOR McNAMARA: Any other questions? (no response)

MR. HOUSTON: May I make one last comment?

SENATOR McNAMARA: Sure.

MR. HOUSTON: I also think that with eight years -- and I believe this is being done, or should be done-- Clearly, after eight years they ought to know -- the Department should know -- of these large SIC Codes that are covered, which ones have caused a problem, and which ones haven't, and just eliminate the ones that haven't. After all, the fact that something isn't covered by ECRA does not mean the buyer and the lender are not going to go and do a private ECRA to begin

with. But let's get this program focused in then on those industrial establishments that have been shown to be a problem, or where there is reason to be a problem. More conversely, let's get rid of -- in this program -- those that have been clearly shown not to be a problem, especially now that we have the Underground Storage Tank Act, and hundreds of -- no, probably thousands, I guess, facilities were triggered solely because of that. Well, that is already covered. We don't need to duplicate the effort because of that.

SENATOR McNAMARA: I think you will find through the testimony today, and even from some of the comments that the Assistant Commissioner made in his opening remarks, that hopefully that is the direction we are tracking in. Whether it has to be done legislatively or regulatorily, we'll see.

MR. HOUSTON: Our experience is we have always agreed with the Deputy -- or Assistant Commissioner of the day, but then his answer to me is always, "But the legislation doesn't permit us to do that."

SENATOR McNAMARA: Okay. That is why we are having the hearings. Thank you.

MR. HORN: Thank you.

(HEARING CONCLUDED)

APPENDIX

New Jersey Chapter

NAIOP, The Association for Commercial Real Estate

Testimony relevant to the

Environmental Cleanup Responsibility Act

before the

Senate Environment Committee

March 16, 1992

My name is Jeffrey A. Horn. I am the executive director of NAIOP, The Association for Commercial Real Estate (formerly known as the National Association of Industrial and Office Parks). I am accompanied by David T. Houston, Jr. Mr. Houston is the chairman of NAIOP's ECRA reform committee and is the president of David T. Houston Co., Collier's International, a statewide industrial and commercial real estate brokerage concern. NAIOP represents over 6500 members nationwide and 250 members in New Jersey. Our members actively engage in the development, ownership and management of industrial and commercial properties throughout the state.

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met with responses that the ECRA statute does not provide for our requested changes. The Legislature must send a strong and clear message to the bureaucracy by revising the statute to provide for necessary changes.

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Let me ask you to imagine yourself in the role of an investor or lender faced with making a locational investment decision for an industrial facility to house a new tenant. Let's assume that the decision involves two New Jersey sites. In our simple scenario, your decision is whether to acquire a site in one of New Jersey's urban centers or in an outlying suburb. While your tenant is not a Fortune 500 company, it is a promising venture possessing good prospect for future growth. A broker located a well-suited facility in an urban area meeting present needs while providing flexibility for future growth. The location provides easy access to skilled labor. It is accessible by a variety of transportation modes and provides easy access to the goods' movement network needed to move product quickly to markets throughout the world. An alternative site, located in a New Jersey suburb, is also available. Use of the outlying site requires additional construction and alteration for conversion from its previous light industrial use.

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NAIOP's members play a very real role in these investment decisions every day. Our members tell us that ECRA is the leading deterrent limiting redevelopment of viable urban locations. Any legislation you consider must address the inequities caused by the ECRA program in New Jersey's cities and older suburbs.

Our members tell us in clear terms that ECRA's lack of predictability, a lack of finality and lack of efficiency plays a significant role in the decision-making processes of companies considering New Jersey locations. Legislative changes are required to affirmatively state to the industrial community outside New Jersey that we are a desirable location that seeks their business.

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We believe that a number of efficiencies can be achieved within a working ECRA program, thus allowing public resources to focus on high-risk problems deserving State attention, while allowing the private sector to clean low-risk sites. For example, our conversations with NAIOP members lead us to the conclusion that in low and moderate environmental risk cases, we spend as much, if not more, on attorneys, consultants to get through the process than we spend on actual testing and cleanups. These processing costs are the direct result of DEPE directives and requirements issued by individual case workers directing the ECRA process. We submit that since 1983, a significant body of knowledge and expertise has been developed within the professional community. On the basis of this body of experience and knowledge, a standard set of examination criteria can be applied in these typical cases. Let's give the professional community the ability to exercise their professional judgments in the preparation and approval of cleanup plans for low and moderate environmental risk cases. Further, allow them to certify that the cleanups are completed in accordance with plans. In short, allow us to spend our moneys on cleanups, rather than plan development and processing.

Another efficiency involves coordinated DEPE efforts relevant to other programs and permits that impact upon ECRA cleanups. Establish one-stop shopping and approvals for ECRA cleanups. Mandate one set of standards and rules to govern situations covered under ECRA. Mandate coordination of the procedures, requirements and standards of ECRA, the underground storage tank rules and the spill act.

When ECRA triggers and a cleanup is required, cleanup plans are often subject to other DEPE programs. In ECRA cases where contaminated groundwater is discovered, extensive testing by the applicant and reviews by the Department are performed under the auspices of the ECRA program. However, to implement the cleanup, the applicant must obtain a permit from a different group in DEPE. The applicant must submit to a completely duplicative review, delaying the initiation of remediation. Cleanups can be started quicker and at less cost if the all relevant permits can be issued under the ECRA program.

In other cases, applicants for cleanup-based permits must negotiate the lengthy and difficult approval processes associated with such programs as stream encroachments and freshwater wetlands. Mandate a one-stop approval when a clean-up plan is involved.

Legislation revamping the ECRA program must establish a degree of finality with respect to ECRA approvals and cleanups. The "Big Lie" of the ECRA program is that it is a buyer protection program. In fact, the

program is quite the opposite. Owners and tenants have absolutely no assurance that the DEPE won't change its mind at any point and require additional testing or cleanup at the next ECRA trigger. This is a particularly important point for industrial facility owners and tenants. Continuously changing practice and procedure on the part of DEPE provides little assurance during multiple ECRA examinations of the same sites. Sites are tested and retested for the same contaminants. ECRA approvals must be given a high degree of finality as to activities up to that point in time. Barring any imminent threat to public health, safety or welfare as may be established by science in the future, an ECRA approval for a site in 1992 should limit future examinations on that site to an examination of the activities taking place on the site from that time forward. The currently proposed DEPE cleanup standards are a case in point in establishing the need for finality. In the proposed rules, the Department states that sites subject to cleanup must meet these standards. Thus all sites that cleared ECRA in the past that do not meet these standards will be subject to cleanup for past contamination, even if they were not caused by present operations. I'm sure you can appreciate the complications this will cause in landlord and tenant relations.

Others have spoken before you about the need to protect innocent parties. We are talking about those parties that did not cause the contamination that may be found upon their properties. Nowhere is this need more true than our urban areas. We strongly urge you to consider the establishment of an urban cleanup fund to provide cleanup assistance in these special cases.

We leave you with the premise with which we started today's testimony. ECRA needs a major overhaul. Fine-tuning of New Jersey's ECRA program will not be enough. However, New Jersey's ECRA program should not be eliminated. We ask you to develop a renewed and revamped ECRA program that will provide investors in New Jersey's economy and the citizens of our state with predictability, efficiency and finality.

NAIOP offers the collective experience of our many members to the committee and your staff in any future deliberations or efforts to develop legislation involving the ECRA program.

We welcome your questions. Thank you for your patience.

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Statement of
Jim Sinclair P.E., First Vice President
New Jersey Business and Industry Association
before
The Senate Environment Committee
March 16, 1992

The 13,500 members of the New Jersey Business and Industry Association (NJBIA) wish to thank Chairman McNamara and the members of the Senate Environment Committee for holding public hearings on the implementation of the Environmental Cleanup Responsibility Act (ECRA). For over nine years, the Senate Environment Committee has never once examined the program to determine how it was working. Our members are pleased that the new committee leadership will take on this issue.

ECRA has been an economic disaster for the State's industrial sector. It has been an anti-urban policy that has resulted in unintended negative economic impacts, which have far outweighed its limited environmental benefits."

NJBIA recognizes that DEPE has made important strides in improving the management and administration of the ECRA law, and we believe that they have been unjustly criticized for many of the past problems in the program. The fundamental problem with the ECRA concept is that it imposed an inflexible bureaucracy in the middle of real estate transactions--- a place were it does not belong. No other state has followed our example. Others have seen that ECRA doesn't work.

NJBIA believes that once the court-mandated cleanup standards are adopted, New Jersey will have an opportunity to radically restructure the ECRA program and reduce its size and intrusion into the real estate market. We believe that New Jersey can rely upon private party site evaluation, cleanups, and certifications. We should privatize the process to the maximum extent possible. This would eliminate unnecessary delays, burdensome paperwork and excessive fees for most properties and reserve NJDEPE's limited resources for timely input into problems where they are truly needed.

The NJBIA would like the members of the SEC to address the following questions during the public hearing process:

-- What would be the environmental and economic costs and benefits to the State if we sunset ECRA?

-- Won't "due diligence" in real estate transfers accomplish the buyer protection goals of the ECRA program?

-- Won't enforcement powers in the Spill Fund and the Underground Storage Tank laws give the State most of the legal enforcement powers it needs to require cleanups?

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