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Industrial Property Transactions and Hazardous Waste Cleanup in America: An Analysis of State Innovations

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COMMENTS

INDUSTRIAL PROPERTY TRANSACTIONS AND HAZARDOUS WASTE CLEANUP IN AMERICA: AN ANALYSIS OF STATE INNOVATIONS

Before technology
there was just the earth.
Pretty soon you'll find out
exactly what it's all worth.[1]

I. INTRODUCTION

America's emergence in the early 1900's as a burgeoning industrial giant, and its continuing growth during the mid-twentieth century created ominous by-products—hazardous wastes. "For decades, American industry has generated and discarded hazardous wastes, including flammables, explosives, nuclear and petroleum fuel by-products, germ-laden refuse from hospitals and laboratories, toxic metals such as mercury or lead, and dozens of synthetic chemical compounds including DDT, PCBs, and dioxins."[2] The realization that such hazardous wastes created a tremendous ecological impact which necessitated an immediate need for containment, disposal and cleanup, has been a rather recent phenomenon. Until 1969, no federal agency existed which had as its principal objective the protection of the environment.[3] Over the last twenty years the quest for a clean, healthy and stable environment has become a national priority. Environmental disasters at Times Beach, Love Canal and Three Mile Island serve as dramatic examples of the acute dangers to public health and the "potentially crippling financial

1. *From the Earth* (original recording by John Dehner, copyright Dec. 1988) (on file with the University of Dayton Law Review).

2. Note, *Developments in the Law-Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1462 & n.1 (1986). The Comprehensive Environmental Response, Compensation & Liability Act, (CERCLA) covers about 700-800 individual "hazardous substances" and tens of thousands of combinations of substances. 42 U.S.C. § 9601(14) (1988) (defining "hazardous substance").

3. The Environmental Protection Agency (EPA) was established in 1970. *See* Reorgan. Plan No. 3 of 1970, 40 C.F.R. §§ 1.1-799.5055 (1989).

liability posed by toxic waste."[4] Federal and state efforts to cope with the vast array of environmental challenges presented by hazardous wastes have been aggressive, yet haphazard, because legislative action often outpaced the need for a thorough review of alternatives and external factors.

At the federal level, Congress passed the Resource Conservation and Recovery Act of 1976 (RCRA),[5] a prospective law aimed at the transportation and disposal of hazardous wastes. In an effort to address past transgressions of polluters and recover some cleanup costs, Congress in 1980 passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[6] CERCLA and the Superfund Amendments and Reauthorization Act of 1986 (SARA) represent the principal cleanup vehicles of the federal program.[7]

A majority of the states have now adopted mini-Superfund acts, and many have sought to move beyond the federal statutory scheme and initiate creative cleanup programs of their own.[8] New Jersey has been an aggressive leader amongst the states, due to its tremendous exposure to hazardous wastes and its incumbent problems. New Jersey has been principally "inspired by its one hundred seven Superfund[9] and ten Top Priority sites identified by the United States EPA for cleanup."[10] New Jersey's primary cleanup statute is the Environmental Cleanup Responsibility Act of 1983 (ECRA).[11] This landmark legislation has "permanently altered the environmental law landscape."[12] The law was the first to couple real estate and business transactions to government imposed and regulated "environmental audits and cleanups."[13]

This article focuses on the New Jersey experience and on ECRA as a model law for other jurisdictions. In addition, the federal hazard-

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4. Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, 73 A.B.A. J. 67, 67 (Nov. 1987).

5. 42 U.S.C. §§ 6901-87 (1989).

6. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended by Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-75 (1988)).

7. *Id.*

8. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-454(b) (West Supp. 1990); ILL. ANN. STAT. ch. 30, paras. 901-07 (Smith-Hurd Supp. 1990); IOWA CODE ANN. § 455B.430 (1990); N.J. STAT. ANN. §§ 13:1K-6 to :1K-13 (West Supp. 1990); OHIO REV. CODE ANN. § 3734.22 (Anderson 1988).

9. "Of the total number of final and proposed [Superfund] sites, New Jersey still leads with 107 . . . ." *EPA Adds 101 Sites in 33 States to Superfund, Drops Four Proposed Sites With Scoring Errors*, 19 Env't Rep. (BNA) 2569 (April 7, 1989).

10. Wagner, *Liability for Hazardous Waste Cleanup: An Examination of New Jersey's Approach*, 13 HARV. ENVTL. L. REV. 245, 246-47 & nn.9-10 (1989).

11. N.J. STAT. ANN. §§ 13:1K-6 to :1K-13 (West Supp. 1990).

12. Farer, *ECRA Verdict: The Successes and Failures of the Premiere Transaction Triggered Environmental Law*, 5 PACE ENVTL. L. REV. 113, 113 (1987).

13. *Id.*

ous waste cleanup effort and state initiatives of the 1980s serve as principal themes throughout the article. Section II provides a historical perspective on the hazardous waste problem in America, sets forth the constitutional grounds for environmental laws, and addresses the current federal program. Section III focuses on state actions, fully reviewing ECRA, its pluses and minuses, its impact to date, and its likely future impact. This section also considers the hazardous waste statutes of Connecticut and Illinois where ECRA has served as a model, and briefly examines the approach taken by Ohio, which is representative of those states exercising the priority lien approach. Finally, this section considers whether the environmental landscape of the United States requires a comprehensive shift to an ECRA-like law.

II. BACKGROUND: THE PROBLEM AND THE FEDERAL RESPONSE

A. Addressing the Problem of Hazardous Waste in America

While it is impossible to determine the first significant instance of hazardous waste[14] pollution in America, commentators trace the country's current problem to the American industrial complex during World War II.[15] The massive buildup of war materials created an immediate and substantial drain on natural resources, forcing American manufacturers to move away from natural materials and towards synthetics.[16] Hazardous waste was an abundant and latent by-product of this technological revolution.[17] The casual or uneducated practices of industrial waste disposal over the last fifty years has created an environmental crisis of enormous proportions.[18]

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14. Four measurable characteristics are used to identify a waste material as hazardous—ignitability, corrosivity, reactivity and toxicity. Note, *supra* note 2, at 1462 n.1 (citing COUNCIL ON ENVIRONMENTAL QUALITY, THIRTEENTH ANNUAL REPORT (1982), *reprinted in* F. GRAD, ENVIRONMENTAL LAW § 4.04, at 639-40 (3d ed. 1985)).

15. *See* Epstein & Briggs, *If Rachel Carson Were Writing Today: Silent Spring in Retrospect*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,180-81 (June 1987).

16. *Id.* The impact of synthetic products on the environment has escalated dramatically. Over the last seventy-five years "U.S. production of synthetic organic chemicals (from PCB's to pesticides to plastics) has gone from almost nothing to 225 billion pounds per year—half a ton for every American." Gore, *The Ecology of Survival*, THE NEW REPUBLIC, Nov. 6, 1989, at 28.

17. Epstein & Briggs, *supra* note 15, at 10,181.

18. *Id.*

> From the disposal of under one million tons of hazardous wastes in 1940 to over 300 million tons annually in the 1980s . . . industries have littered the entire land mass of the United States with some 50,000 toxic waste landfills, 20,000 of which are recognized as potentially hazardous; 170,000 industrial impoundments; 7,000 injection inspection wells; not to mention some 2.5 million underground gasoline tanks, many of which are leaking.

Id. "The Environmental Protection Agency has estimated that ninety percent of the 57 million tons of hazardous industrial chemical wastes produced annually in the United States are disposed of improperly." S. REP. No. 848, 96th Cong., 2d Sess. 3-4 (1980); *see also* Note, *The Comprehensive Environmental Response, Compensation & Liability Act of 1980: Is Joint and Several Lia-*

Severe groundwater contamination, potential exposure of large population centers to toxic gasses, and the continued haphazard approach to disposal of industrial wastes has led to an entire range of previously unconsidered legal issues. The who, what, when, where and how questions of causation are necessarily complicated by time delays, multiple party involvement and other factors. There are four central issues necessarily raised in addressing the hazardous waste cleanup question: (1) How to link the harm caused to a particular hazardous waste; (2) How to determine responsibility for cleanup and/or financial liability; (3) How to determine the financial capacity of identified parties for cleanup purposes and victim compensation; (4) Who are the victims and what is the appropriate compensation.[19] The responses to these questions have varied.[20]

B. The Federal Response

The rights of an individual to private property are protected under the fifth and fourteenth amendments of the United States Constitution and have long been a part of the American system.[21] Our historical experience, however, demonstrates the need for restriction of these private property rights when societal concerns dictate. Such has been the case with environmental pollution problems.

The federal government's authority to enforce environmental laws is derived from article I, section 8 of the United States Constitution.[22] "The extent of police power authority does not depend on the application of formalistic categories of property law, but ultimately on the precise nature of both the governmental interest and the private property expectations at odds in a particular case. Increased awareness of the acute condition of modern resource allocation and environmental pollution problems provided the most recent trigger for police power expansion . . . ."[23] While this authority is not absolute,[24] the federal govern-

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bility the Answer to Superfund?, 18 NEW ENG. L. REV. 109, 114 & nn.27-28 (1982).

19. *See* Note, *supra* note 2, at 1463-64.

20. *See infra* notes 26-31, 76-182 and accompanying text.

21. The fifth amendment states in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The fourteenth amendment states in pertinent part that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

22. U.S. CONST. art. I, § 8, cl. 18. Clause eighteen states that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*

23. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 666 (1986).

24. All appropriate means plainly adapted to a legitimate end, which are not prohibited by the Constitution may be employed to carry Congress' authority into effect. McCulloch v. Mary-

ment's authority to enact laws and promulgate regulations for environmental protection has been virtually unchallenged. "It is now well-settled that the police power is the most fundamental source of governmental authority to prevent needless environmental harm and related risks to human health and welfare."[25]

In 1976, Congress enacted RCRA,[26] which established a "cradle-to-grave"[27] regulatory scheme authorizing the EPA to continuously monitor hazardous wastes from their creation to disposal.[28] While RCRA provides substantial oversight and compliance mechanisms, its one great failing is its prospective nature, since it failed to address the problem of existing hazardous waste sites.[29] Five years later, in 1981, Congress passed CERCLA,[30] now the key statutory scheme in the federal hazardous waste cleanup effort.[31] "CERCLA cured many of RCRA's deficiencies by establishing a means of managing both governmental and private responses to abandoned and inactive disposal sites."[32] The most prominent element of the CERCLA law is the Hazardous Substance Response Trust Fund, commonly referred to as the Superfund.[33] The Superfund is designed to finance remedial or abatement actions at those sites deemed to be the greatest immediate threat to public health and safety.[34] Other key provisions of CERCLA include cooperative EPA and state discovery and cleanup initiatives[35] and the compilation of a National Priority List (NPL)[36] identifying those sites requiring immediate attention.[37]

Liability under CERCLA is severe. The law imposes strict, joint

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land, 17 U.S. 316, 421 (1819).

25. Lazarus, *supra* note 23, at 665.

26. 42 U.S.C. §§ 6901-87 (1988).

27. Note, *supra* note 2, at 1470-71.

28. 42 U.S.C. §§ 6901-87.

29. Note, *supra* note 2, at 1471.

30. 42 U.S.C. §§ 9601-57 (1988).

31. Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253, 254 (1986).

32. *Id.* at 255. CERCLA targets four groups to pay for environmental cleanups: past and present owners, past and present operators, transporters of hazardous substances to the site, and generators of hazardous substances. 42 U.S.C. § 9607(a).

33. 26 U.S.C. § 9507 (1988). The Superfund was initially authorized at $1.6 billion across five years, with special taxes on chemicals and petroleum covering 87.5% of the cost and 12.5% being derived from general revenue appropriations. *See* 26 U.S.C. §§ 4611-12, 4661-62 (1982).

34. 42 U.S.C. § 9604. The initial funding went almost exclusively to site identification and assessment. As of November 1987, the EPA had identified over 26,000 sites; government estimates suggest there is a potential for over 350,000 sites if a comprehensive inventory were to be attempted. *See* Marcotte, *supra* note 4, at 67.

35. 42 U.S.C. § 9605(a)(1)-(a)(2) (1982).

36. *Id.* § 9605(a)(8)(B).

37. *See id.* By 1992, the NPL is expected to include approximately 3,000 sites. Marcotte, *supra* note 4, at 67.

and several liability on any present or past owners of the property.[38] Strict liability has regularly been applied to hazardous waste problems, both at common law and by statute. Strict liability for ultrahazardous activity originated in the landmark case of *Rylands v. Fletcher*.[39] This doctrine is set forth in the Restatement (Second) of Torts and is widely recognized by legislatures and courts.[40] Some commentators have been critical of applying strict liability to activities involving hazardous substances,[41] nevertheless, federal and state environmental laws now feature strict liability for owners of contaminated property as a central component in affecting hazardous waste cleanup.[42]

In the federal context, "strict liability as developed in CERCLA and RCRA provides a strong incentive for clean up—especially when property is changing hands—and a strong deterrent against future contamination."[43] Under the federal scheme, a single company who, among several hundred other companies, was involved at a waste site can be held liable for the entire cost of a site clean-up.[44] In *New York v. Shore Realty Corp.*,[45] "the defendant-owners of a hazardous waste site argued that they were not liable under section 107(a)(1) since they neither owned the site at the time of disposal nor caused the presence

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38. 42 U.S.C. § 9607(a). For judicial treatment of the statute as to strict liability, *see* United States v. Conservation Chem. Co., 589 F. Supp. 59, 62-63 (W.D. Mo. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808-09 (S.D. Ohio 1983).

39. 3 L.R.-E. & I. App. 330 (H.L. 1868). *Rylands* held that a landowner is strictly liable for any resulting consequences of unduly dangerous activities or structures maintained on his land. *Id.* at 340.

40. RESTATEMENT (SECOND) OF TORTS, §§ 519-20 (1977). Section 520 creates a test using six factors to define "abnormally dangerous activities":

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. See W. PROSSER, J. WADE, V. SCHWARTZ, CASES AND MATERIALS ON TORTS 679 n.8 (8th ed. 1988).

41. *See, e.g.*, Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 40-42 (1987).

42. *See, e.g.*, 42 U.S.C. §§ 9601-57 (1988); N.J. STAT. ANN. §§ 13:1K-6 to :1K-13 (West Supp. 1990).

43. Frost, *Strict Liability as an Incentive for Cleanup of Contaminated Property*, 25 HOUS. L. REV. 951, 952 (1988).

44. *Real Estate Transactions More Complicated as Lawyers, Consultants Tangle with Waste*, 20 Env't Rep. (BNA) 198 (June 2, 1989). The courts generally interpret the statute as imposing liability jointly and severally on all "responsible" parties, including successor owners. Wagner, *supra* note 10, at 252 & n.33.

45. 759 F.2d 1032 (2d Cir. 1985).

or release of hazardous waste at the site."[46] The court rejected Shore's argument noting that the statute clearly contemplated different treatment for different classes of potentially liable persons.[47]

Liability has also been imposed on a landowner leasing property to a polluter,[48] a mortgagor holding a security interest upon foreclosure,[49] and, in a personal capacity, on corporate officers of a polluting business.[50]

Defenses to CERCLA's strict liability are very limited. Section 107(b) of CERCLA provides only three defenses: "(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant."[51]

CERCLA was renewed in 1986 under SARA for an additional five years.[52] In addition to other goals, Congress sought to create an exception to strict liability for innocent purchasers—those purchasers of property who, after good faith efforts to determine potential pollution problems, remain unaware of previous pollution activities occurring at that property.[53] Practical application of the innocent purchaser "exception" is very unlikely, however, due to the vague wording of the statute.[54] Drafted to provide flexible application to the wide variety of purchaser schemes, the statute stymies the industrial real estate community by providing no concise rules of application. The legislative history, as drafted by the Congressional Conference Committee on SARA, used equally vague terms in defining when the exception should be available, suggesting availability where the landowner exercises "the requisite due care upon learning of such release or threat of release."[55] Legislation introduced in the 101st Congress to remove certain financial institutions from the owner-operator definition suggests that the in-

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46. Frost, *supra* note 43, at 953; *Shore*, 759 F.2d at 1043.

47. *Shore*, 759 F.2d at 1044 (Congress distinguishes in § 9607(a) between current owners and operators and prior owners and operators).

48. United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1984).

49. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).

50. United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984).

51. 42 U.S.C. § 9607(b) (1988); *see* Frost, *supra* note 43, at 954-55 & n.28.

52. 42 U.S.C. §§ 9601-75 (1988).

53. *See* 42 U.S.C. § 9601(35)(B)). "Specifically, Congress provided a definition of 'contractual relationship' that establishes a defense for innocent purchasers who 'have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.' " Wagner, *supra* note 10, at 253 (quoting 42 U.S.C. § 9601(35)(B)).

54. *See* Wagner, *supra* note 10, at 254-55; 42 U.S.C. § 9601(35)(B).

55. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 183, 187, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3280.

nocent "owner" exception remains ineffectual.[56]

While the CERCLA/SARA law is necessary, well-intentioned, and tough on paper,[57] its effectiveness at cleaning up hazardous wastes remains in doubt. The courts have made it clear that they will enforce the liability scenario provided in the statute,[58] and the EPA has been granted a vast amount of authority and discretion to implement the Superfund program.[59] Yet, despite Congressional directives and the best intentions of both Congress and the Agency, the EPA's implementation of the federal hazardous waste statute has not lived up to public expectations.[60] "Cleanup of hazardous waste sites has proceeded slowly."[61] The magnitude of the CERCLA/RCRA/SARA programs on top of pre-existing environmental statutes such as the Clean Air Act[62] and Clean Water Act[63] has seemingly overwhelmed the EPA.[64] Burdened by mismanagement, ever-changing personnel and inadequate resources, the EPA effort has been a significant disappointment.[65] While the EPA defends their rate of cleanup "starts," a recent study by the Office of Technology Assessment stated that only 40% of the $4.4 billion dedicated to clean-up efforts and spent by the EPA be-

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56. *See Legislation in House Would Limit Liability of CERCLA Lenders, Trustees,* 20 Env't Rep. (BNA) 17 (May 5, 1989). On April 25, 1989, Representative John LaFalce (D-N.Y.) introduced H.R. 2085, a bill to "provide that a financial institution that foreclosed on real estate to protect its security interest would not be an 'owner or operator' of property for purposes of CERCLA liability." *Id.* Rep. LaFalce introduced H.R. 4494 on April 4, 1990, as a substitute for H.R. 2085. The new legislation broadens the lending institutions covered to include public lenders such as charitable institutions, mortgage lenders, the Small Business Administration, and corporate fiduciaries holding legal title for the administration of a trust or estate. *LaFalce Revises Lender Liability Bill to Protect Broader Spectrum of Lenders*, 20 Env't Rep (BNA) 1966 (April 13, 1990). Congressional staff indicated that it was doubtful any action would occur during the 101st Congress, but it was likely that such legislation would be incorporated into CERCLA amendments during the 102d Congress. *Id.*

57. The House Judiciary Committee set forth the following purposes of SARA:

> [A]t the heart of the Superfund—and of the reauthorization process—are many complex legal and judicial issues that reflect the tensions inherent in the Act itself: first, the need for effective and speedy clean-up of hazardous waste sites in order to protect human life and the environment; second, the need to protect the interests and rights of those affected by these sites in obtaining effective and speedy clean-ups; and third, the need to protect the interests and rights of those who may be held liable for such cleanups.

H.R. REP. NO. 253, 99th Cong., 2d Sess. 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038. *See* Marcotte, *supra* note 4, at 67-68.

58. Marcotte, *supra* note 4, at 68; *see, e.g., Shore*, 759 F.2d at 1032.

59. Marcotte, *supra* note 4, at 67-68.

60. *See generally* Babich, *Coming to Grips With Toxic Waste: The Need for Cooperative Federalism in the Superfund Program*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,009 (Jan. 1989).

61. Note, *supra* note 2, at 1474 & n.47.

62. 42 U.S.C. §§ 7401-42 (1988).

63. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1376 (1982).

64. Babich, *supra* note 60, at 10,009-10.

65. *See* Note, *supra* note 2, at 1474 nn.49-51; *see also* Babich, *supra* note 60 at 10,009-10.

tween 1986 and 1989 was spent to clean up toxic waste dumps.[66] The study further noted that only about three dozen of the nearly 1,200 primary cleanup sites have been declared completely clean.[67]

"Despite the difficulties that have plagued their implementation at the federal level, RCRA and CERCLA have spawned extensive state government efforts to regulate hazardous waste management and to clean up dangerous disposal sites."[68] The states have a dual role in this cleanup effort. They act in a partnership capacity with the federal government under the CERCLA program.[69] The states also act in an individual capacity, crafting statutory and administrative solutions to address the environmental concerns particular to their individual jurisdictions.[70] In enacting mini-Superfund laws and other related statutes, the states can effectively plug any holes in the CERCLA web.[71] One of the major features of CERCLA is that it only applies to prior errors and omissions made at industrial sites in years past, generally long after the polluting party has left the site. It is not until there has been a "wrong" committed that CERCLA comes into play[72]—it was designed to clean up sites that had been abandoned.[73] However, individual states have supplemented and expanded upon the federal program.[74] New Jersey has led the way in exploring both retrospective and prospective solutions, and in fashioning innovative and effective hazardous waste laws.[75]

III. Analysis of State Initiatives

A. New Jersey's Priority Lien

New Jersey's initial effort at statutory control of hazardous waste was embodied in the Spill Compensation and Control Act (Spill Act) of 1976.[76] "The Spill Act prohibits the discharge of petroleum products and other hazardous substances, imposes a tax on certain transfers of these materials, establishes a special fund to be applied in accordance with the act, and provides for the expeditious cleanup and removal of

66. U.S. Congress, Office of Technology Assessment, Coming Clean: Superfund Problems Can Be Solved 28 (1989).

67. *Id.*

68. Note, *supra* note 2, at 1475.

69. *See* 42 U.S.C. § 9604(c)(3) (1988).

70. *See* statutes cited *supra* note 8.

71. *See* Babich, *supra* note 60, at 10,010.

72. *See* Note, *supra* note 2, at 1472 & n.36.

73. Note, *supra* note 31, at 255.

74. *See* statutes cited *supra* note 8 and accompanying text.

75. *See* Farer, *supra* note 12, at 113-14; Frost, *supra* note 43, at 956-57; Wagner, *supra* note 10, at 267-80.

76. N.J. Stat. Ann. §§ 58:10-23.11 to -23.24 (West 1982 & Supp. 1990).

spills."[77] "Importantly, the statute provides strict liability for all cleanup and removal costs and for all direct and indirect damages."[78]

The most recognized aspect of the Spill Act is the superlien provision.[79] This provision transforms any expenditure from the spill compensation fund into a debt of the business or individual that discharged the waste.[80] This debt is secured by the statutory superlien, which attaches to all personal and real property, and all revenues of the hazardous waste producer.[81] The statute provides that the lien for the hazardous waste cleanup will receive first priority before all other claims or interests in the property of the hazardous waste producer.[82] The priority lien provision is particularly critical because it applies to all owners of contaminated property.[83] "The lien serves two purposes. First, it eliminates the bankruptcy loophole which allows responsible parties to escape liability for cleanup. Second, it encourages creditors of those operating hazardous waste sites to take precautions to ensure that their debtors are not paying back loans at the environment's and public's expense."[84]

The priority lien provision of the Spill Act was much more comprehensive as originally enacted than in its present form. A number of amendments have been added to ease the hardship on third parties such as secured creditors of the hazardous waste producers.[85] A 1985 amendment created a distinction between "clean" and "dirty" assets of the waste producer.[86] " 'Dirty Assets' are those assets directly associ-

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77. Goldshore & Wolf, *Hazardous Waste Checklist*, NEW JERSEY LAW. Nov. 1986, at 20-21. (citing N.J. STAT. ANN. §§ 58:10-23.11c, -23.11h, -23.11i, -23.11f (West 1982 & Supp. 1990)).

78. *Id.* at 21; *see* N.J. STAT. ANN. § 58:10-23.11(g) (West 1982 & Supp. 1990).

79. N.J. STAT. ANN. § 58:10-23.11f(f) (West 1982 & Supp. 1990). The superlien or "priority lien" was added to the Spill Act by amendment in 1979. *Id.*

80. *Id.*

81. *Id.*

82. *Id.; see infra* notes 89-96 and accompanying text. A 1985 amendment provided limited exceptions to the Spill Act's priority lien provisions. *Id.*

83. N.J. STAT. ANN. § 58:10-23.11f(a) (West 1982 & Supp. 1990).

84. Wagner, *supra* note 10, at 278.

85. *See* Act of May 10, 1983, ch. 182, 1983 N.J. Laws 899 (codified as amended at N.J. STAT. ANN. § 58:10-23.11f(f) (West Supp. 1990)).

86. Act of Apr. 9, 1985, ch. 115, 1985 N.J. Laws 210 (codified as amended at N.J. STAT. ANN. § 58:10-23.11f(f) (West Supp. 1990)). The amended statute states:

> The notice of lien filed pursuant to this subsection which affects the property of a discharger subject to the cleanup and removal of a discharge ["dirty assets"] shall create a lien with priority over all other claims or liens which are or have been filed against the property . . . . The notice of lien filed pursuant to this subsection which affects any property of a discharger other than the property subject to the cleanup and removal, ["clean assets"] shall have priority from the day of the filing of the notice of the lien over all other claims and liens filed against the property . . . .

Id., see also Wagner, *supra* note 10, at 278 n.150.

ated with the property subject to a cleanup operation. 'Clean Assets' are the remaining assets that the responsible party owns."[87] As to clean assets, the superlien has priority only over subsequently filed interests.[88] Dirty assets or property, however, are subject to cleanup and removal and the lien displaces prior claims and interests.[89] This amendment has been criticized because of the negative impact it has on funds available for cleanup, and its potential for leaving "the state with nothing more than a lien on contaminated property."[90] "Moreover, limiting the priority portion of the lien to 'dirty' property eliminates some of the incentive for lenders and other creditors to investigate a site which might contain hazardous substances before agreeing to finance it."[91] "Finally, by restricting the application of the lien to 'dirty property,' an owner may still avoid liability by moving assets from the 'dirty' property to other properties."[92]

Other states,[93] and the federal government[94] have instituted some variation of the priority lien, each with varying rates of success.[95] While the state lien provisions are similar in their goal of assisting the state financing of hazardous waste site cleanup, there are great differences with regard to priority rules, residential property rules, and the clean/unclean property distinction.[96] Given the varying degrees of hazardous waste problems from state to state, the priority lien has been an attractive statutory vehicle. However, as the impact of hazardous waste on society is better understood, more drastic solutions are being considered which transcend prior governmental actions. The principal model of this invigorated state effort is New Jersey's Environmental Cleanup Responsibility Act.

B. The New Jersey Environmental Cleanup Responsibility Act

The Environmental Clean-up Responsibility Act (ECRA)[97] is the most pervasive of the hazardous waste enactments. The statute assures

87. Wagner, *supra* note 10, at 278 n.150.
88. N.J. STAT. ANN. § 58:10-23.11f(f).
89. *Id.*
90. Wagner, *supra* note 10, at 279.
91. *Id.*
92. *Id.*
93. *See, e.g.*, CONN. GEN STAT. ANN. § 22a-452a (West 1985 and Supp. 1990); MASS. GEN. LAWS ANN., ch. 21E, § 13 (West Supp. 1990); OHIO REV. CODE ANN. § 3734.22 (Anderson 1989).
94. SARA, 42 U.S.C. § 9607(l)(1) (1988).
95. *See generally* Bleicher & Stonelake, *Caveat Emptor: The Impact of Superfund and Related Laws on Real Estate Transactions*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,017 (Jan. 1984).
96. *Id.* at 10,020-21.
97. N.J. STAT. ANN. §§ 13:1K-6 to :1K-14 (West Supp. 1990).

> the clean-up of an 'industrial establishment' upon the occurrence of an ECRA-triggering event. Thus, it is necessary to determine, first, if the facility is subject to the jurisdiction of the statute, and second, if the proposed transaction requires ECRA compliance.[98]

ECRA defines "industrial establishment" as a place of business having a specific Standard Industrial Classification (SIC) code.[99] The listed SIC codes include most manufacturing, transportation and wholesale distribution operations, although some specific subgroups within those codes have been exempted by administrative rules promulgated by the New Jersey Department of Environmental Protection (NJDEP).[100] "While the legislative goal was apparently to target those operations most likely to use, generate or dispose of hazardous substances or wastes, the failure of ECRA to further delineate subject businesses"[101] has resulted in a broad and haphazard application of the statute.

The fundamental premise of ECRA is to attach "a mandatory precondition of cleanup to all industrial real estate before transfer."[102] The drafter's reliance on the SIC codes for definitional purposes has served to define "industrial real estate" in the broadest of terms.[103] The vague terms of the SIC groupings has served to prompt cautious buyers and sellers, uncertain of their classification status under the SIC, to comply with ECRA for fear of making an error at this crucial stage in the transaction.[104] Consequently, ECRA applies to a vast spectrum of transactions[105] and has inadvertently served the policy goal of expanded environmental enforcement on a much broader scale than was

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98. Goldshore & Wolf, *supra* note 77, at 20.

99. N.J. STAT. ANN. § 13:1K-8(f) (West Supp. 1989). The SIC Manual is published by the Office of Management and Budget and offered through the National Technical Information Service. Farer, *supra* note 12, at 119 n.34. David Farer, esq., one of the leading analysts of the ECRA law, notes the problem with ECRA's use of the SIC codes:

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

Id. at 119.

100. Dean, *How State Hazardous Waste Statutes Influence Real Estate Transactions*, 18 Env't Rep. (BNA) 933, 934 (1987). For a listing of establishments exempted by rule, see N.J. ADMIN. CODE tit. 7, § 1-3.20(e) (1987).

101. Farer, *supra* note 12, at 120.

102. Wagner, *supra* note 10, at 270.

103. *See supra* notes 99-102 and accompanying text.

104. " 'Its reach is so broad. The first thing done with any transaction so much as touching New Jersey is to find out if ECRA applies. . . .' Sellers should begin this process as soon as a transaction is even contemplated." *Understanding ECRA Regulations, Processes Crucial to Limiting Liability*, 19 Env't Rep. (BNA) 1671 (1988) (quoting William Warren, esq.).

105. Dean, *supra* note 100, at 934.

imagined by the drafters of the legislation. "In addition to the sale of real property, events such as the termination of a lease, transfer of a controlling interest in the corporation owning the industrial establishment, initiation of bankruptcy proceedings, and transfer of title through foreclosure proceedings have triggered the requirements of ECRA."[106]

"The law is self-policing."[107] Applicants have five days within which to notify the agency after a triggering event and must maintain a regular compliance schedule following notification.[108] The penalties are severe for failure to comply in a timely manner and for the falsification of information. ECRA imposes fines of up to $25,000 per offense and each day of noncompliance constitutes an additional offense.[109] Failure to meet the statutory requirements of ECRA may serve to nullify the real estate transaction entirely, whereby the seller becomes strictly liable for all costs of cleanup, and the buyer may seek to recover damages.[110] At the initial stage, the owner(s) or operator(s) of the industrial establishment must inform NJDEP of the transaction and must either "1) submit a negative declaration of hazardous waste on the site"[111] or "2) submit a cleanup plan, together with adequate financial security guaranteeing performance of the plan, to NJDEP for approval and implement the plan after approval."[112] One of the most criticized aspects of ECRA is the broad grant of authority it provides NJDEP in the regulation of industrial property transactions. ECRA provides no statutory time requirements for NJDEP to act on applications[113] and provides no standards for cleanup.[114] NJDEP has failed to

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106. *Id.*; *see also* N.J. STAT. ANN. § 13:1K-8(b) (West Supp. 1990).

107. Farer, *Transaction-Triggered ECRA: The New Wave in Cleanup Law*, Nat'l L. J., Feb. 27, 1989, at 24, col 1.

108. N.J. STAT. ANN. § 13:1K-9(a)(1) (West Supp. 1990).

109. N.J. STAT. ANN. § 13:1K-13(c) (West Supp. 1990).

110. N.J. STAT. ANN. § 13:1K-13 (West Supp. 1990).

111. Dean, *supra* note 100, at 934; N.J. STAT. ANN. § 13:1K-9(B)(2). A "negative declaration" means:

> (a) written declaration, submitted by an industrial establishment and approved by the department, that there has been no discharge of hazardous substances or wastes on the site, or that any such discharge has been cleaned up in accordance with procedures approved by the department, and there remain no hazardous substances or wastes at the site of the industrial establishment.

N.J. STAT. ANN. § 13:1K-8(g) (West Supp. 1990).

112. Dean, *supra* note 100, at 934; *see* N.J. STAT. ANN. § 13:1K-9(b)(3) (West Supp. 1990).

113. N.J. STAT. ANN. § 13:1K-9(b) (West Supp. 1989). "The state review process can take more than a year, and applicants for state approval will have to pay fees ranging up to $7,500 for state services . . . ." *Real Estate Transactions More Complicated as Lawyers, Consultants Tangle with Waste*, 20 Env't Rep. (BNA) 198 (June 2, 1989) (quoting David B. Farer, esq.).

114. N.J. STAT. ANN. § 13:1K-10(a) (West Supp. 1989). The statute does provide that minimum standards shall be set by rules and regulations as adopted by the department. *Id.*

establish any experience-based cleanup standards.[115] Further, as of 1987, an average of six months delay was the norm for NJDEP's assignment of a case manager to pending transactions.[116] To alleviate this long waiting period, NJDEP has instituted an informal consent order procedure whereby the transaction is allowed to be completed subject to the ECRA audit and any necessary cleanup, so long as the seller agrees to post a financial security bond set by the NJDEP.[117]

In the six years since its enactment, the ECRA model has been a lightning rod in the stormy debate over appropriate means of financing the cleanup of hazardous wastes.[118] At the very least, ECRA has significantly shifted the heavy cost of cleanup from the state to the private sector; and it has spawned an increasing number of similar legislative initiatives in other states.[119] Of greater significance, however, is its effect on heightening the environmental awareness of industry and in providing a regimented timetable for environmental cleanups.[120] Since its inception in 1983, ECRA has accounted directly and indirectly for over 400 site cleanups at a cost to "responsible" parties of over $50 million.[121] In addition, over 400 additional transactions have been completed under consent orders with cleanup guarantees in excess of $500 million, pending detailed site evaluations.[122] Given such results, the legitimate concerns about the law's weaknesses and drawbacks have met with diminished attention.[123]

"The chronic problem of ambiguity in the interpretation and application of ECRA is inextricably bound up with the fact that ECRA is regulated by an environmental agency, but triggered by specific events taking place in the world of real estate, business and commerce."[124]

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115. Dean, *supra* note 100, at 934.

116. *Id.*

117. N.J. ADMIN. CODE tit. 7, §§ 26B-7.1 to -7.6 (1987). In 1986, RCA Corporation signed an administrative consent order and posted $35.6 million in financial assurances for any necessary environmental cleanup at 28 sites in New Jersey, clearing the way for the corporation to merge with General Electric Co. *RCA Corp.-New Jersey Clean-up Agreement Clears Way for RCA-General Electric Merger*, 17 Env't Rep. (BNA) 403 (July 7, 1986).

118. Regarding the financial aspects of ECRA, one New Jersey practitioner, Edward A. Hogan has said "[t]he model of the New Jersey statute is not that at all . . . New Jersey [ECRA] is a very rough sketch, perhaps an artist's conception, but by no means a finely detailed masterpiece." *EPA Regional Administrator in New York Says Environmental Policy in State of Gridlock*, 17 Env't Rep. (BNA) 1190, 1191 (Nov. 14, 1986).

119. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-454(b) (West Supp. 1990); ILL. STAT. ANN. ch. 30, paras. 901-07 (Smith-Hurd Supp. 1990); IND. CODE ANN. § 13-7-22.5 (Burns Supp. 1989).

120. *See* Farer, *supra* note 12, at 142-43.

121. For a detailed accounting of ECRA cleanups, see *id.*

122. *Id.*

123. *See generally* Wagner, *supra* note 10, at 303-08.

124. Farer, *supra* note 12, at 129. Given the broad impact of the ECRA law on all property

The lack of expertise among environmental enforcement officers on intricate real estate and business issues, coupled with an understaffed NJDEP charged with administering a highly technical law, served to create something of a property gridlock in New Jersey during the early years of ECRA.[125] While the processing time has been much improved, six months to a year remains the standard delay.[126]

When ECRA was first enacted, a major concern was the potential negative impact the law might have on economic development and real estate growth in New Jersey.[127] This fear seems to have abated over time,[128] as studies by state and national commerce departments suggest no discernible impact on development or growth.[129] In practical terms, the principal challenge has been to educate the real estate and business community on the constantly evolving intricacies of ECRA.[130] Parties to commercial property transactions are cautious to draft agreements which clearly set forth the responsibilities for any present and future environmental actions or liabilities.[131]

Another major question raised by ECRA is how to treat land previously approved that is later found contaminated. The first rescission of a previously approved transaction occurred in 1989[132] and involved a five-acre tract in Middlesex, N.J.[133] The prior owner (seller) had submitted a negative affidavit (an affidavit by the seller attesting to the cleanliness of the site, and stating that the property did not require the completion of any remedial or abatement actions) and the property had been visually inspected prior to sale.[134] However, the purchaser later discovered significant contamination from an underground storage tank

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transactions " 'the lead time for development of regulations prior to effective date should be provided if an ECRA-style law is to be passed in another state.' " *Understanding ECRA Regulations, Processes Crucial to Limiting Liability*, 19 Env't Rep. (BNA) 1671 (Dec. 16, 1988) (quoting Lee Miller, Deputy Director, NJDEP). This would allow all parties, regulators and the regulated community time to prepare for the requirements imposed by the statute.

125. *See generally* Farer, *supra* note 12, at 122-23.

126. *See generally* Wagner, *supra* note 10, at 281-83.

127. *Id.* at 281-82.

128. *Id.* at 284-85.

129. *Id.* at 285-86, 292-93.

130. *Id.* at 287, 291.

131. "ECRA transactions result in a divergence of interests between buyer and seller. [The seller] . . . 'wants work completed as quickly and inexpensively as possible. The buyer wants all problems located and remediated to the extent technically feasible.' " *Understanding ECRA Regulations, Processes Crucial to Limited Liability*, 19 Env't Rep. (BNA) 1671 (Dec. 16, 1988) (quoting William Warren, esq.).

132. *See Approval of Sale of Polluted Property Rescinded by State Under 1983 Cleanup Law*, 19 Env't Rep. (BNA) 2380 (Mar. 10, 1989).

133. *Id.*

134. *Id.*

left on the property.[135] The manner in which this rescission of approval and its pending litigation are handled will undoubtedly serve to further fuel the running debate on ECRA.[136]

One final point of contention is the strict liability feature of ECRA as applied to landowners. Under the present law, innocent purchasers who acquired property prior to the enactment of ECRA are still deemed liable if the land is found, upon efforts to sell the property, to be contaminated with hazardous waste.[137] Common law remedies may be available against the prior owner if the prior owner is available and solvent.[138] Without such recourse, however, the innocent landowner is left to face the cleanup costs alone. While there is a general recognition that some innocent landowners may be harmed by this sweeping approach, the owner-operator liability imposed under ECRA is no more stringent than the federal approach.[139] As demonstrated by the 1983 decision in *State Department of Environmental Protection v. Ventron Corp.*,[140] the courts have acted with certainty in affirming the strict, joint and several liability approach set forth in New Jersey's environmental law.[141]

Despite these concerns, even critics acknowledge ECRA's overall success in affecting environmental cleanups in the state. In concert with the priority lien and the federal CERCLA/SARA laws, ECRA has served to establish "environmental audits as a crucial element of a buyer's due diligence inquiries."[142] ECRA also effectively altered the enforcement mechanism from selective governmental regulation to self-regulation by private industry.[143] Finally, ECRA provides all parties to an industrial property transaction with a pre-transfer assessment of environmental liabilities and a more reasoned approach to distribution of liability for cleanup. It is on the basis of these strengths that ECRA has inspired other states to consider similar environmental laws.

C. *The Connecticut Transfer Act*

The first spin-off of New Jersey's ECRA model occurred in Connecticut in 1985, with the passage of "An Act Concerning the Disposal

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135. *Id.*

136. *Id.*

137. *See generally* Schmidt, *New Jersey's Experience Implementing the Environmental Cleanup Responsibility Act*, 38 RUTGERS L. REV. 729, 730-33 (1986).

138. *See* State Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 503-05, 468 A.2d 150, 166-67 (1983).

139. *Compare* N.J. STAT. ANN. § 13:1K-13 *with* 42 U.S.C. § 9607(a).

140. 94 N.J. at 503-05, 468 A.2d at 166-67.

141. *See id.*

142. Farer, *supra* note 12, at 143-44.

143. *Id.* at 144.

of Recycled Hazardous Waste Residue," commonly known as the Transfer Act.[144] Prior to transferring an establishment, the owner or operator is required to submit a negative declaration[145] to the transferee and, within fifteen days after the transfer, must submit a copy of such declaration to the Commission of Environmental Protection.[146] If unable to truthfully submit this negative declaration, the transferor may certify to both the transferee and the state that it will take whatever actions the Commission deems appropriate to mitigate the on-site wastes.[147]

The Connecticut law thus differs from New Jersey's ECRA in two key respects: (1) Connecticut allows a negative declaration by the transferor even if hazardous wastes remain on-site;[148] and (2) unlike ECRA, the Transfer Act does not permit the Commissioner to void the transaction.[149] However, the failure of the transferor to meet his or her mitigation duties will render the transferor strictly liable to the transferee for all damages, both direct and indirect, and all cleanup costs.[150] In addition, any person who fails to comply or knowingly renders false information is liable for civil penalties of up to $100,000.[151] The Transfer Act avoids ECRA's reliance on the SIC Codes for defining industrial establishment and applies the law against all establishments generating more than one hundred (100) kilograms per month of hazardous wastes, or those establishments which recycle, reclaim, reuse, store, handle, treat, transport or dispose of hazardous wastes generated by another.[152]

In many ways, the Transfer Act has avoided the troublesome delays inherent in New Jersey's law. "There are no preconditions to transfer, no pre-transfer and cleanup plan requirements, no state over-

144. CONN. GEN. STAT. ANN. § 22a-134 (West Supp. 1990). Originally recognized as Public Act No. 85-568, effective Oct. 1, 1985, the Transfer Act was previously codified at § 22a-454(b) (West 1985).

145. Connecticut defines "Negative declaration" as a written declaration stating:

> (1) that there has been no discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste on site, or that any such discharge, spillage, uncontrolled loss, seepage or filtration has been cleaned up in accordance with procedures approved by the commissioner or determined by him to pose no threat to human health or safety or the environment which would warrant containment and removal or other mitigation measures and (2) that any hazardous waste that remains on site, is being managed in accordance with this chapter and chapter 446k and regulations adopted thereunder.

CONN. GEN. STAT. ANN. § 22a-134(5).

146. § 22a-134a(b).

147. § 22a-134a(c).

148. Dean, *supra* note 100, at 934.

149. *Id.*

150. *See* § 22a-134b.

151. § 22a-134d.

152. § 22a-134(3).

sight, and consequently no state-instigated delays."[153] The state does, however, retain the post-closing discretion for establishing cleanup standards for the transferor who is unable to present a negative declaration.[154] This is a significant check the state can exercise to ensure against transactions occurring without the cleanup of the hazardous wastes.

The Connecticut Transfer Act has proven to be expeditious and well-suited to that state's needs for hazardous waste cleanup. The Transfer Act employs the "transfer" of industrial establishments as the trigger to state oversight of private cleanup efforts. While significantly less stringent than the New Jersey law, Connecticut's law may be a better model for states considering transaction-triggered environmental laws. No other state has had the devastating hazardous waste problems which New Jersey has been forced to deal with over the last thirty years.[155] The NJDEP inherited a massive statutory program with the passage of ECRA which immediately overwhelmed a highly competent Department. By most accounts, it has taken almost six years for New Jersey to work through the administrative jungle which grew up around ECRA and to begin to effectively administer the program.[156] The Transfer Act is significantly less intrusive and as a result appears much more manageable.[157] For those states considering a transaction-triggered cleanup approach, the Connecticut Transfer Act may be considered a midway approach to a full ECRA model, and a good skeleton on which to develop legislation.

D. The Illinois Responsible Property Transfer Act

The Responsible Property Transfer Act of 1988 (RPTA),[158] represents compromise legislation that initially mirrored the New Jersey ECRA law and evolved in the legislature into a transaction-triggered

153. Farer, *supra* note 12, at 137.

154. § 22a-134a(c),(e).

155. *See supra* note 9.

156. *See* Farer, *supra* note 12, at 122-23.

157. *See* Dean, *supra* note 100, at 934.

158. ILL. ANN. STAT. ch. 30, paras. 901-907 (Smith-Hurd Supp. 1990). The RPTA was enacted into law on August 30, 1988 with an effective date for implementation of its disclosure requirements set for January 1, 1990. Section Two sets forth the purpose of the Act:

> The purpose of this Act is to ensure that parties involved in certain real estate transactions are made aware of the existing environmental liabilities associated with ownership of such properties, as well as the past use and environmental status of such properties. It is also the purpose of this Act to ensure that the interest of the People of the State is protected by providing a mechanism whereby parties to a real estate transaction are advised of the environmental condition of such property and thus are encouraged to act in a responsible manner so as to fulfill the purpose and intent of existing environmental laws.

Id. para. 902, § 2.

law similar to the Connecticut Transfer Act. The RPTA covers real property that "either contains facilities subject to the reporting requirements of the federal Emergency Planning and Community Right to Know Act of 1986,[159] or that has underground storage tanks that require registration with the state."[160]

The Illinois statute is largely a notice statute. The RPTA requires transferors to complete a comprehensive environmental disclosure form[161] and deliver the form to the transferee and/or lender within thirty days of a written contract for the transfer of real property.[162] Delivery of the disclosure form may occur no later than thirty days prior to the transfer of real property subject to the Act.[163] If the transferor fails to timely deliver the disclosure form, or if such form contains information of previously unknown environmental defects, the transferee has the option to void any obligation to accept a transfer or finance a transfer which has yet to be closed or finalized.[164]

The importance of this notice requirement cannot be overstated because of the strict environmental liability which is imposed on owners of real property by the Illinois Environmental Protection Act (IEPA).[165] Under the IEPA, owners of real property are liable for all costs of removal or remedial actions incurred by the state as a result of a release or substantial threat of a release of a hazardous substance.[166] With the passage of the RPTA, the importance of this section of the IEPA took on a lesser role because the RPTA disclosure form must be recorded with the state.[167] Once notice is given to the state of environmental releases, the IEPA requires owners (upon notice by the state) to either 1) perform the response actions themselves[168] or 2) face liability for up to three times the cost of cleanup performed by the state unless good cause is shown for failing to clean up.[169]

With these kinds of liability provisions in effect, the notice provisions accorded by the RPTA carry special significance. The disclosure

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159. 42 U.S.C. § 11022 (1988). The range of manufacturers and industrial interests covered by the federal right-to-know law is extensive. Those companies subject to its provisions are defined by a lengthy list of potentially hazardous substances, which if employed in the manufacturing processes or stored in any measurable amount must be reported on a regular basis. *See id.* § 11022(a)(1).

160. Farer, *supra* note 107, at 24, col. 4.

161. *See* ILL. ANN. STAT. ch. 30, para. 905, § 5 (Smith-Hurd Supp. 1990).

162. *Id.* para. 904, § 4(a).

163. *Id.*

164. *Id.* para. 904, § 4(c).

165. *See* ILL. ANN. STAT. ch. 111½, paras. 1001-1061 (Smith-Hurd 1988 & Supp. 1990).

166. *Id.*, para. 1022.2(f).

167. ILL. ANN. STAT. ch. 30, para. 906, § 6.

168. ILL. ANN. STAT. ch. 111½, para. 1004(q).

169. para. 1022.2(k).

form provided for by the statute and the timetables for the transfer actions provide a workable framework for evaluation of hazardous waste considerations without delaying the real estate transaction. In effect, the RPTA provides parties to the transaction with the knowledge necessary to negotiate the liability for making the property "clean." It enforces the state's desire to have cleanup costs paid by private parties as opposed to the state.[170] The RPTA, as of this writing, had only recently become effective but appears to be a well-reasoned and well-drafted document which will serve to substantially aid Illinois's quest for a cleaner environment.

E. Other State Initiatives

Even before its effective date, the Illinois RPTA served as a model approach for new hazardous waste legislation in Indiana. The Indiana Responsible Property Transfer Law (RPTL) was introduced and passed into law in January 1989 with an effective date of January 1, 1990.[171] The RPTL closely parallels the Illinois law, and is likewise designed to provide notice to all parties to an industrial property transaction of the need for remedial or abatement actions on the property.[172]

Both the Illinois and Indiana "responsible property transfer" laws represent enhanced approaches to the notice statutes in effect in a number of states.[173] The goal of these notice statutes seems less directed at affecting environmental cleanup and more directed at protecting a purchaser's interest "in not being saddled with liability for latent hazardous substances at the property."[174] Instead of imposing cleanup obligations on the parties, these states require sellers to notify purchasers of the presence of hazardous wastes or hazardous substances at the property.[175] It is only when these transfer statutes couple cleanup actions with the notice provisions such as accomplished by the Connecticut

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170. ILL. ANN. STAT. ch. 30, para. 902, § 2.

171. *See* IND. CODE ANN. § 13-7-22.5 (Burns Supp. 1989). For a comprehensive review of the Indiana RPTL, and a discussion of its subtle distinctions from the Illinois RPTA, see Newby, Rorick, Betz & Tyler, *Indiana Environmental Law: An Examination of 1989 Legislation*, 23 IND. L. REV. 329, 336-50 (1990).

172. *Id.*

173. *See* IOWA CODE ANN. § 455B.430 (West 1990); MASS. GEN. LAWS ANN. Ch. 21C, § 7 (West 1981 & Supp. 1990); MINN. STAT. ANN. § 115B.16 (West 1987 & Supp. 1990); MO. ANN. STAT § 260.465 (Vernon 1990); PA. CONS. STAT. ANN. § 6018.405 (Purdon Supp. 1989); W.VA. CODE § 20-5E-20 (West 1989). The notice provision statutes of Iowa and Missouri are identical and exemplary. These provisions require that, upon listing the site in the registry of abandoned or uncontrolled disposal sites, the person responsible for cleanup costs must submit a report to the director detailing the responsible person's assets and liabilities. *See* IOWA CODE ANN. § 455B.430 (West 1990); MO. CODE ANN. § 260.465 (Vernon 1990).

174. Dean, *supra* note 100, at 935.

175. *Id.*

Transfer Act, or trigger other environmental statutes such as required by the Illinois and Indiana statutes, that responsive action is taken to abate the presence of the hazardous wastes.

The other common method of focusing the attention of parties to a real estate transaction on the presence of hazardous wastes is the "priority lien."[176] An increasing number of states, including Ohio, have employed the lien provision.[177] Ohio law provides for a limited lien to aid in the financing of hazardous waste cleanup. The statute empowers the Ohio EPA to take the necessary steps to abate or prevent hazardous waste pollution in order to protect public health and safety.[178] All costs relating to these necessary measures are itemized and become a lien upon recordation against the property on which the facility is located.[179] The lien arises only upon recording, and applies only to property on which the hazardous waste site is located.[180]

In this variety of statutory approaches, states are working to ensure that purchasers of "industrial" property have knowledge of any potential hazardous waste problems. The trend is clearly towards providing both notice *and* cleanup requirements, and the vehicle of choice in a growing number of states is some form of transaction-triggered statute, exemplified by ECRA, the Connecticut Transfer Act and the Illinois RPTA.[181]

The environmental statutes passed into law in the last ten years have dramatically altered long-held notions of real estate and property law. Even in states where transaction-triggered cleanup laws have yet to be enacted, "environmental concerns reside at the forefront of industrial property transfer negotiations. Issues once glossed over—if considered at all—today take on the specter of deal breakers,"[182] as all parties to a transaction seek a balance between necessary cleanup and liability precautions and timely business considerations.

IV. CONCLUSION

America's industrial growth during the mid-to-late twentieth century produced a hazardous waste problem of immense proportion. This environmental threat has become a national priority. Federal initiatives such as RCRA, CERCLA and SARA were created to deal with this

176. *See supra* text accompanying notes 76-97.
177. OHIO REV. CODE ANN. § 3734.22 (Anderson 1989).
178. *Id.*
179. *Id.*
180. *Id.*
181. While no other states have enacted ECRA-type laws at present, many legislatures are expected to do so in the next few years. *See* Farer, *supra* note 107, at 25, col. 1.
182. *Id.* at 25, col. 3.

critical problem, but much of the responsibility necessarily fell to the states. The imposition of a strict liability standard against property owners, while criticized by many as harsh, has been evenly applied in both state and federal jurisdictions. The courts have endorsed this approach with few exceptions. New Jersey has been a leader at the state level in creative statutory schemes designed to clean up the environment. Priority liens, ECRA-type laws triggering cleanup on the transfer of industrial property, and notice statutes, represent the current landscape of environmental/property law. As America continues to confront its hidden hazards, the search for statutory remedies will continue. The successful passage into law of streamlined transaction-triggered cleanup laws is certain to play a major role in the states' battles to overcome further environmental devastation due to hazardous waste pollution.

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