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ECRA to ISRA: Is It More than Just a Name Change

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ECRA TO ISRA: IS IT MORE THAN JUST A NAME CHANGE?

I. INTRODUCTION

In 1983, New Jersey became the first state to enact legislation confronting its environmental problems.¹ New Jersey's Environmental Cleanup Responsibility Act (ECRA)² sought to address the state's environmental concerns by placing preconditions on certain business transactions and events which involve real property.³ ECRA, however, was not well received by business and industry.⁴ ECRA was the most encompassing and restrictive state statute regulating real property transfers.⁵ ECRA was difficult to administer and imposed immense costs and delays, effectively driving some business and industry out of New Jersey.⁶ ECRA not only caused

¹ See generally Kathryn E.B. Robb, Environmental Considerations in Project Financing, COMM. LAW AND PRACTICE HANDBOOK COURSE SERIES 1993 (PLI Order No. A4-4433, Oct. 7-8, 1993). State environmental statutes have also been enacted in Connecticut, Indiana, and Illinois. Id. at *13. Florida, Maryland, Massachusetts, New York, and Pennsylvania have proposed statutes fashioned after ECRA. Id. at *94.


³ Robb, supra note 1, at *94.

⁴ Id. According to the Vice President of the New Jersey Business and Industry Association, Jim Sinclair, "ECRA is the icon of what's wrong with the environmental regulatory system in New Jersey." Linda Molnar, Changes in an Environmental Law Draw Mixed Reviews From Business, N.Y. TIMES, Oct. 24, 1993, 13N], at 1. Likewise, the bill's original sponsor, State Senator Raymond J. Lesniak, has admitted that ECRA was an obstacle to economic development in New Jersey. Id. Commentator Molnar noted that ECRA "[has] been called a virus, a disease and the albatross around the neck of New Jersey's economy." Id. See also David B. Farer, ECRA Verdict: The Successes and Failures of the Premiere Transaction-Triggered Environmental Law, 5 PACE ENVTL. L. REV. 113 (1987) [hereinafter Farer, ECRA] (commenting on ECRA's "flawed draftsmanship and questionable constitutionality as well as inadequacies, inefficiencies and delays in administration.").

⁵ Robb, supra note 1, at *95.

⁶ Id.
the loss of jobs in New Jersey,⁷ but also created a perception that the state was hostile to business.⁸

In response to these criticisms, on June 16, 1993, the New Jersey Legislature replaced ECRA with the Industrial Site Recovery Act (ISRA).⁹ By reducing compliance costs and delays, and by simplifying application of the law, New Jersey hoped to encourage business and industry back to the state.¹⁰ Unfortunately, ISRA is already receiving the same criticisms as its predecessor.¹¹

Part II of this Comment discusses ECRA and its deficiencies. Part III explains ISRA’s provisions, focusing particularly on the ways in which ISRA changes ECRA. Finally, Part IV evaluates whether ISRA effectively reforms ECRA, arguing that ISRA is a positive step in ECRA reform.

II. THE GOALS AND WEAKNESSES OF ECRA

A. HOW ECRA WORKS

ECRA was the first statute to link real estate and business transactions to environmental audits and cleanups.¹² The New Jersey Legislature enacted ECRA in response to the growing concern over the number of abandoned waste sites in the state. Although the New Jersey Department of Environmental Protection and Energy (NJDEPE) was in the process of identifying contaminated sites, lit-

⁷ COMMITTEE MEETING BEFORE SENATE ENVIRONMENT COMMITTEE AND ASSEMBLY ENERGY AND HAZARDOUS WASTE COMMITTEE, S. 1070 AND A. 1727, at 3 (1992) [hereinafter COMMITTEE MEETING] (statement of Assemblyman Pascrell). "One of the reasons we have a lack of jobs is because ECRA, and the present laws that now exist, stand in the way - substantially in the way - of people selling their property, and of those properties being turned over into further industrialization." Id. According to Jim Sinclair, Vice President of the New Jersey Business and Industry Association, 150,000 to 200,000 manufacturing jobs were lost as a result of ECRA. Mark Perkiss et al., ECRA BEGETS ISRA: BUSINESS ADOPTS A WAIT-AND-SEE ATTITUDE TOWARD REFORMS, 39 N.J. BUS. 16, no. 9 (Sept. 1, 1993).


⁹ N.J. STAT. ANN. §§ 13:1K-6 to K-14. See also Robb, supra note 1, at *94-95 (noting Industrial Site Recovery Act (ISRA) enacted in response to concerns over ECRA). See also COMMITTEE MEETING, supra note 7, at 6 (statement of Assemblyman Pascrell) (“Above all, we need to reduce the costs and complexity of cleanup operations, so that redevelopment of our industrial areas becomes economically viable and possible, but within the next two centuries.”).

¹⁰ Robb, supra note 1, at *95.

¹¹ For a discussion of ISRA and its criticisms, see infra notes 152-183 and accompanying text.

¹² Farer, ECRA, supra note 4, at 113.
tle legislation existed to effectuate the cleanup of the sites. ECRA, therefore, sought to decrease the growing number of waste sites by requiring businesses to perform environmental audits.

Additionally, ECRA mandated businesses to develop and implement cleanup plans, approved by NJDEPE, on the occurrence of certain specified events or transactions. These events include closures, sales, and transfers of operations involving hazardous substances and wastes. This transaction-triggered aspect of ECRA differentiated it from other cleanup statutes, which are triggered by discharge of hazardous substances or by the determination of an environmental agency.

More specifically, ECRA required an owner or operator of an industrial establishment to notify NJDEPE of any closing, selling,


14. Farer, ECRA, supra note 4, at 114. Section 13:1K-7 of ECRA describes the legislature's intent:

The Legislature finds and declares that the generation, handling, storage and disposal of hazardous substances and wastes pose an inherent danger of exposing the citizens, property and natural resources of this State to substantial risk of harm or degradation; that the closing of operations and the transfer of real property utilized for the generation, handling, storage and disposal of hazardous substances and wastes should be conducted in a rational and orderly way, so as to mitigate potential risks; and that it is necessary to impose a precondition on any closure or transfer of these operations by requiring the adequate preparation and implementation of acceptable cleanup procedures therefore.

N.J. Stat. Ann. § 13:1K-7. See also Haley, supra note 8, at 88 (stating that ECRA was remedial statute designed to prevent abandonment of sites by requiring enumerated steps prior to closure or sale).


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

Id. § 13:1K-8d. Hazardous wastes are defined as "any amount of any waste substances required to be reported to the Department of Environmental Protection on the special waste manifest pursuant to N.J.A.C. § 7:26-7.4, or as otherwise provided by law." Id. § 13:1K-8e.

16. Farer, ECRA, supra note 4, at 115.

17. An "industrial establishment" is:
or transferring of operations.\textsuperscript{18} The owner was then required to submit a negative declaration\textsuperscript{19} or cleanup plan\textsuperscript{20} for approval, guaranteeing it by a surety bond or other financial security.\textsuperscript{21} Fail-

[A]ny place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or wastes on-site, above or below ground, having a Standard Industrial Classification number within 22-39 inclusive, 46-49 inclusive, 51 or 76 as designated in the Standard Industrial Classifications Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States. . . .


19. A "negative declaration" is:

[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.

\textbf{N.J. STAT. ANN.} § 13:1K-8g.

20. A "cleanup plan" is defined as follows:

[A] plan for the cleanup of industrial establishments, approved by the department, which may include a description of the locations, types and quantities of hazardous substances and wastes that will remain on the premises; a description of the types and locations of storage vessels, surface impoundments, or secured landfills containing hazardous substances and wastes; recommendations regarding the most practicable method of cleanup; and a cost estimate of the cleanup plan.

\textit{Id.} § 13:1K-8a.

21. Section 13:1K-9 requires:

a. The owner or operator of an industrial establishment planning to close operations shall:

(1) Notify the department in writing, no more than five days subsequent to public release, of its decision to close operations;

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

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

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

(2) Submit within 60 days prior to transfer of title a negative declaration to the department for approval, or within 60 days prior to transfer of title, attach a copy of any cleanup plan to the contract or agreement of sale or any option to purchase which may be entered into with respect to the transfer of operations. In the event that any sale or transfer agreements or options have been executed prior to the submission of the plan to the department, the cleanup plan shall be transmitted, by certified mail, prior to the transfer of operations, to all parties to any transaction concerning the transfer of opera-
ure to comply with ECRA resulted in harsh penalties, including the NJDEPE’s levying fines and/or voiding the property transfer.22

B. Complaints About ECRA

The problems with ECRA included imprecise statutory definitions, lack of definitions for key terms, excessive costs, and procedural delays. ECRA’s imprecise drafting resulted in major criticism from both the environmental bar and the business community attempting to comply with ECRA’s requirements.23 For example, the drafters of ECRA defined “industrial establishment” to include twenty-four major groups in the SIC Manual without any further clarification.24 Failure to clarify “industrial establishment” resulted in the over-inclusion of certain non-hazardous waste or substance

tions, including purchasers, bankruptcy trustees, mortgagees, sureties, and financiers;
(3) Obtain, upon approval of the cleanup plan by the department, a surety bond or other financial security approved by the department guaranteeing the performance of the cleanup plan in an amount equal to the cost estimate for the cleanup plan.

c. The cleanup plan and detoxification of the site shall be implemented by the owner or operator, provided that the purchaser, transferee, mortgagee or other party to the transfer may assume that responsibility pursuant to the provisions of this act.

N.J. STAT. ANN. § 13:1K-9. See also More on ISRA, N.J. INDUST. ENVTL. ADVISOR no.15 (August 16, 1993) [hereinafter More on ISRA] (commenting that financial assurance requirements tie up company’s capital or credit line).

22. N.J. STAT. ANN. § 13:1K-13. See also Farer, ECRA, supra note 4, at 115. Owners and operators were strictly liable for cleanup costs for failure to comply with ECRA. Id. § 13:1K-13a. Transferees were also entitled to void the transaction, and to be compensated by the transferor for damages. Id. In addition, if the transferor failed to submit a negative declaration or cleanup plan the NJDEPE was entitled to void the transaction. Id. § 13:1K-13b. Knowing violators of ECRA, including officers and management officials, were held personally liable for a penalty not in excess of $25,000 for each offense. Id. § 13:1K-13c.

23. See Farer, ECRA, supra note 4, at 117 (stating ECRA was “artlessly drafted,” “imprecise and confusing”). In McGraw-Edison Co. v. Edwards, No. 85-2430-A (D.NJ. filed May 23, 1985), the constitutionality of ECRA was challenged in the context of a tender offer by Cooper Industries for the stock of McGraw-Edison, a company which owned four manufacturing facilities in New Jersey subject to ECRA. Farer, ECRA, supra note 4, at 131. NJDEPE notified Cooper that ECRA was implicated and wanted Cooper to enter into an Administrative Consent Order and put up a five million dollar financial assurance. Id. at 131-32. Cooper made three constitutional challenges. Id. at 132. First, Cooper maintained that ECRA conflicted with the Williams Act, violating the Supremacy Clause. Id. In addition, Cooper contended that ECRA violated the Commerce Clause and Due Process Clause of the United States Constitution. Id. These constitutional questions were not resolved since the dispute ended in settlement. Id.

24. Farer, ECRA, supra note 4, at 119-20. The SIC Manual divides businesses into ‘Major Groups’ and then further divides within each ‘Major Group.’ Id. at 119.
related operations within the definition.25 Furthermore, this over-
inclusive definition caused backlogs in processing at NJDEPE.26 In
addition, the imprecise statutory definition of "closing, terminating
or transferring operations" caused confusion as to what events trig-
ggered ECRA.27

ECRA also left many of its key terms undefined, creating signif-
icant uncertainty as to ECRA's bite. The fact that "owner" and "op-
erator" were not defined created ambiguity as to the chain of
responsibility under ECRA, such as when the owner of the real
property was not the operator of the property.28 The statute also
failed to specify what levels or amounts of hazardous wastes or sub-
stances triggered the application of ECRA.29 These ambiguities
were compounded by ECRA's failure to provide a procedure
whereby a business could determine if its proposed transaction
would be subject to ECRA.30

The two major criticisms regarding the costs of ECRA focused
on its provision requiring a surety bond of financial assurance (FA)

25. Id. at 120. For example, travel agencies (Major Group 47) which are
heated by oil would be subject to ECRA, while a gas station was not because its SIC
code was not among those provided in the statute. Id.

26. Id. ECRA allowed the NJDEPE to exempt certain sub-groups within the
SIC major groups listed upon a finding that the operation of the industrial estab-
lishment does not pose a risk to public health and safety. N.J. STAT. ANN. § 13:1K-
8f. For the statutory definition of "industrial establishment," see supra note 17.

27. Farer, ECRA, supra note 4, at 118. "Closing, terminating or transferring
operations" means:

[T]he cessation of all operations which involve the generation, manufacture,
refining, transportation, treatment, storage, handling or disposal of haz-
ardous substances and wastes, or any temporary cessation for a period of
not less than two years, or any other transaction or proceeding through
which an industrial establishment becomes nonoperational for health or
safety reasons or undergoes change in ownership, except for corporate reor-
ganization not substantially affecting the ownership of the industrial estab-
ishment, including but not limited to sale of stock in the form of a
statutory merger or consolidation, sale of the controlling share of the
assets, the conveyance of the real property, dissolution of corporate iden-
tity, financial reorganization and initiation of bankruptcy proceedings . . . .

For example, it was unclear whether the definition of "cessation of opera-
tions" included circumstances where all operations involving hazardous wastes or
substances were terminated, but all other operations continued. Farer, ECRA,
supra note 4, at 118. In addition, ECRA failed to explain whether cessation in-
cluded a situation where all operations ceased, but a caretaker remains at the opera-
tion. Id. Further, no distinction was drawn between a Chapter 7 bankruptcy
involving liquidation and a Chapter 11 reorganization. Id. at 118-19. The latter
proceeding does not necessarily involve closing, terminating, or transferring oper-
ations. Id. at 118-19.

28. Id. at 120-21.

29. Farer, ECRA, supra note 4, at 121.

30. Id. at 121-22.
and its schedule of fines, fees, and penalties.\textsuperscript{31} The FA is a separate fund, established to guarantee the remediation costs of transferred property.\textsuperscript{32} Not only was raising this substantial sum of money a problem, but these funds were often tied up for years during the lengthy cleanup process.\textsuperscript{33} In many instances, the cost of cleanup and remediation under ECRA exceeded the value of the property.\textsuperscript{34} The fines, fees, and penalties inflicted by ECRA have been labelled "punitive and excessive."\textsuperscript{35} Moreover, innocent owners and operators were burdened with the costs of contamination caused by prior owners.\textsuperscript{36}

ECRA's remediation review process also received much criticism.\textsuperscript{37} Under the review process, regulatory authorities surveyed the site to define what remedial action was necessary.\textsuperscript{38} Often this process took several years, and until the contaminated site was cleaned up the property could not be sold.\textsuperscript{39} ECRA also required that a business go through a review process when it was being sold, even if it had previously undergone review.\textsuperscript{40} Furthermore, despite the fact that ECRA legislation directed NJDEPE to create cleanup stan-

\begin{itemize}
\item \textsuperscript{31} See Lewis Goldshore & Marsha Wolf, \textit{Cleanup Costs Reduced Under ISRA Self-guarantee Provision}, N.J. LAW., Nov. 15, 1993, at 14 (noting financial assurances (FA) tied up large amounts of money and prevented reimbursement of capital); \textit{More on ISRA, supra} note 21 (commenting that already exorbitant filing fees are likely to rise). \textit{See also} N.J. STAT. ANN. § 13:1K-9 ("[o]wner or operator shall submit a . . . surety bond or other financial security . . . .").
\item \textsuperscript{32} Goldshore & Wolf, \textit{supra} note 31, at 14.
\item \textsuperscript{33} \textit{Id.} When the transaction involved the sale of property, the funds necessary for a FA would normally be taken from sale proceeds. \textit{Id.} However, in transactions which did not involve sales, separate funds would have to be raised which were sufficient to cover the FA. \textit{Id.} An additional concern was that the FA hampered the reinvestment of capital in businesses in New Jersey. \textit{Id.} ISRA addresses this problem by establishing a self-guarantee procedure to satisfy the remediation funding source requirement. \textit{Id.} \textit{See also} N.J. STAT. ANN. § 58:10B-3 (West Supp. 1995). For a detailed discussion of the self-guarantee procedure, see \textit{infra} notes 124-27 and accompanying text.
\item \textsuperscript{34} Perkiss, \textit{supra} note 7, at 16.
\item \textsuperscript{35} \textit{More on ISRA, supra} note 21. Filing fees alone averaged $20,000 for a medium-sized case. \textit{Id.}
\item \textsuperscript{36} Farer, \textit{ISRA's Substantive Measures Cure Persistent Ills}, N.J. L.J., July 12, 1993, at 10 [hereinafter Farer, \textit{ISRA}]. The amount of the FA is based on the highest anticipated cost of the cleanup action. \textit{Id.}
\item \textsuperscript{37} \textit{New Jersey Replaces ECRA}, HAZNEWS, August 1993. \textit{See also}, Farer, \textit{ECRA, supra} note 4, at 129-30.
\item \textsuperscript{38} \textit{New Jersey Replaces ECRA, supra} note 37.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} Molnar, \textit{supra} note 4, at 1.
\end{itemize}
dards, the agency did not create these standards until ECRA reform hearings were already underway.41

In 1987, the NJDEPE promulgated regulations which, rather than clarifying ECRA’s application, resulted in even more inconsistencies and ambiguities.42 Thus, the uncertainties created by the statutory language and the threat of penalties under ECRA impeded many transactions.43

III. ISRA: How it Works

The New Jersey Legislature adopted ISRA in June, 1993, to amend ECRA’s administrative and substantive weaknesses.44 ISRA reiterates ECRA’s basic premise of conditioning transfers of industrial establishments on environmental cleanliness; however, it clarifies many of ECRA’s procedures and definitions.45 ISRA significantly expands ECRA leaving many details for NJDEPE to promulgate through regulations.46 ISRA both codifies NJDEPE’s regulations and adds new provisions.47

A. Activating ISRA

As with ECRA, transactions, rather than severe hazardous waste problems, trigger ISRA.48 Prior to transferring an industrial establishment, owners or operators must determine whether the transaction triggers ISRA. If a transaction triggers ISRA, the owner or operator may not complete the transaction without following statutory procedures and conditions.49

41. Farer, ISRA, supra note 33, at 10.
42. See also Farer, ECRA, supra note 4, at 126-28. For example, no sampling or cleanup standards for environmental audits or cleanups were included in the regulations. Id. at 128-29.
43. Id. at 121-22.
45. See generally id.
47. See generally N.J. STAT. ANN. § 13:1K-6, -18.
48. For a discussion of transactions which trigger ECRA, see supra note 27.
49. For further discussion of ISRA’s conditions and procedures for transferring the property, see infra notes 59-83 and accompanying text.
Specifically, the transactions which trigger ISRA are “closing operations” 50 or “transferring ownership or operations” 51 at “industrial establishments.” 52 ISRA provides “bright line tests” in the definitions of “closing operations” and “transferring ownership or operations” to assist owners and operators in determining whether ISRA applies. 53 To further clarify the tests, ISRA separately defines

50. N.J. STAT. ANN. § 13:1K-8. ISRA provides six tests for “closing operations” which are set forth as:
   (1) the cessation of operations resulting in at least a 90 percent reduction in the total value of the product output from the entire industrial establishment, as measured on a constant, annual date-specific basis, within any five year period, or, for industrial establishments for which the product output is undefined, a 90 percent reduction in the number of employees or a 90 percent reduction in the area of operations of an industrial establishment within any five year period; provided, however, the department may approve a waiver of the provisions of this paragraph for any owner or operator who, upon application and review evidences a good faith effort to maintain and expand product output, the number of employees, or area of operations of the affected industrial establishment;
   (2) any temporary cessation of operations of an industrial establishment for a period of not less than two years;
   (3) any judicial proceeding or final agency action through which an industrial establishment becomes nonoperational for health or safety reasons;
   (4) the initiation of bankruptcy proceedings pursuant to Chapter 7 of the federal Bankruptcy Code, 11 U.S.C. § 701 et seq., or the filing of a plan of reorganization that provides for a liquidation pursuant to Chapter 11 of the federal Bankruptcy Code, 11 U.S.C. § 1101 et seq.;
   (5) any change in operations of an industrial establishment that changes the industrial establishment’s Standard Industrial Classification number to one that is not subject to this act; or
   (6) the termination of a lease unless there is no disruption in operations of the industrial establishment, or the assignment of a lease . . . .

Id.

51. Id. ISRA contains four tests for “transferring ownership or operations,” set forth as:
   (1) any transaction or proceeding through which an industrial establishment undergoes a change in ownership;
   (2) the sale or transfer of more than 50% of the assets of an industrial establishment within any five year period, as measured on a constant, annual date-specific basis;
   (3) the execution of a lease for a period of 99 years or longer for an industrial establishment; or
   (4) the dissolution of an entity that is an owner or operator or an indirect owner of an industrial establishment except for any dissolution of an indirect owner of an industrial establishment whose assets would have been unavailable for the remediation of the industrial establishment if the dissolution had not occurred . . . .

Id.

52. Id. ISRA’s definition of “industrial establishment” reiterates ECRA’s definition. N.J. STAT. ANN. § 13:1K-8. For ECRA’s definition of “industrial establishment,” see supra note 17.

53. One of the major complaints under ECRA was the lack of certainty as to which transactions acted as triggers. Over the 10 years of ECRA’s existence, case
“change in ownership.”\textsuperscript{54} It also expressly identifies which transactions do not constitute a “change in ownership.”\textsuperscript{55}

ISRA’s tests resemble the tests set forth in NJDEPE’s regulations to ECRA; however, ISRA’s tests are codified to provide more guidance to owners and operators of industrial establishments.\textsuperscript{56} ISRA also modifies former regulations expanding exemptions to ensure certain transactions will not trigger the statute.\textsuperscript{57}

law clarified which transactions triggered it. For a discussion of how certain transactions were handled under ECRA, see State Bar Association ECRA Committee; Non-Applicability Report No. 8, N.J. L.J., Aug. 23, 1993, at 35. NJDEPE’s regulations further clarified which transactions triggered ECRA. N.J. ADMIN. CODE. tit. 7, § 26B-1.5 to 1.9.

\textsuperscript{54} N.J. STAT. ANN. § 13:1K-8. ISRA defines “change in ownership” as:
(1) the sale or transfer of the business of an industrial establishment or any of its real property;
(2) the sale or transfer of stock in a corporation resulting in a merger or consolidation involving the direct owner or indirect owner of the industrial establishment;
(3) the sale or transfer of stock in a corporation, or the transfer of a partnership interest, resulting in a change in the person holding the controlling interest in the direct owner or operator or indirect owner or operator of an industrial establishment;
(4) the sale or transfer of title to an industrial establishment or the real property of an industrial establishment by exercising an option to purchase; or
(5) the sale or transfer of a partnership interest in a partnership that owns or operates an industrial establishment, that would reduce, by 10% or more, the assets available for remediation of the industrial establishment . . .

\textit{Id.}

\textsuperscript{55} \textit{Id.} Some of the changes which do not constitute a “change in ownership” include: a corporate reorganization which does not substantially affect the ownership of the industrial establishment, the sale or transfer of a property as a result of a condemnation proceeding under the Eminent Domain Act of 1971, and a transfer of property pursuant to a valid security interest. \textit{Id.} In addition, a transfer of property between family members, including a sibling, spouse, child, parent, grandparent, niece or nephew, aunt or uncle is excluded from consideration as a "change in ownership." \textit{Id.}

\textsuperscript{56} See supra notes 50-56 and accompanying text.

\textsuperscript{57} See generally N.J. STAT. ANN. § 13:1K-8. For example, ISRA expands the intra-familial exemption to include nieces, nephews, aunts, and uncles, who were specifically excluded from this exemption under NJDEPE’s regulations to ECRA. N.J. ADMIN. CODE. tit. 7, § 26B-10.1; N.J. STAT. ANN. § 13:1K-8. The intra-familial exemption ensures that a transfer of an industrial establishment between family members does not trigger ISRA. N.J. STAT. ANN. § 13:1K-8. ISRA specifically excludes “a transfer where the transferor is the sibling, spouse, child, parent, grandparent, child of a sibling, or sibling of the parent of the transferee" from its definition of “change in ownership." \textit{Id.} For ISRA’s definition of “change in ownership,” see supra notes 54-55 and accompanying text.

In addition, ISRA adds a good faith exception to the definition of “closing operations." N.J. STAT. ANN. § 13:1K-8. This exception applies where a business made a good faith effort to maintain production and expand, yet otherwise would be considered to have closed operations at the industrial establishment. \textit{Id.} For the definition of “closing operations,” see supra note 50.
B. Complying with ISRA

After a transaction activates ISRA, the "owner or operator"\(^{58}\) must comply with strict procedures and meet substantive requirements to complete the transaction.\(^{59}\) For example, before transferring the establishment, the owner or operator must: 1) give NJDEPE proper notice; 2) remediate the site; and 3) obtain NJDEPE's approval of the transfer.\(^{60}\)

1. **Proper Notice**

To commence the transfer process, an owner or operator of an industrial establishment must provide initial notice to NJDEPE.\(^{61}\) Notice must come within five days of closing or transferring operations, or within five days of notifying the public of the decision, whichever comes first, or within five days of executing an agreement to transfer the establishment.\(^{62}\) The notice must be in writing and must include certain specific information.\(^{63}\)

2. **Remediation**

After informing NJDEPE, the owner or operator must undertake remediation,\(^{64}\) a four-step process for investigating and cleaning up contamination at the industrial establishment and off-site locations.\(^{65}\) The four phases of remediation are: 1) preliminary as-

\(^{58}\) For a discussion of how ISRA clarifies the definitions of "owner and operator," see infra note 134 and accompanying text.


\(^{61}\) *Id.*

\(^{62}\) *Id.*

\(^{63}\) *Id.* This notice is called a General Information Submission (GIS). See Motiuk, supra note 46, at 592-94 (noting that initial notice requirement upon ISRA triggering event is significantly reduced). The notice to NJDEPE must identify the industrial establishment, describe the transaction requiring compliance, state the date of closing operations, and include addresses and telephone numbers for the parties involved in the transaction, among the listed requirements. N.J. STAT. ANN. § 13:1K-9.

\(^{64}\) *Id.* Remediation or to remediate means: "all necessary actions to investigate and clean up any known, suspected, or threatened discharge of hazardous substances or hazardous wastes, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action . . . ." *Id.*

\(^{65}\) N.J. STAT. ANN. § 13:1K-9(b)(3). While the owner or operator is responsible for remediation, any other party may assume responsibility pursuant to the provisions of P.L. 1983, c. 390. *Id.*
sessment;\textsuperscript{66} 2) site investigation;\textsuperscript{67} 3) remedial investigation;\textsuperscript{68} and 4) remedial action.\textsuperscript{69} During the remediation process, the owner or operator investigates any discharges of hazardous waste and performs a cleanup where necessary.\textsuperscript{70} An owner or operator undertaking remediation must additionally comply with NJDEPE’s Technical Regulations.\textsuperscript{71} These regulations provide a uniform standard for remediation in New Jersey.\textsuperscript{72}

In addition, ISRA codifies ECRA’s practice of permitting “at risk” remediation. An owner or operator who proceeds “at risk” Remediation the site prior to NJDEPE approval.\textsuperscript{73} Under ISRA, some risk still remains since the owner or operator must submit plans and results of Remediation to NJDEPE for review, and the owner or operator may undertake preliminary assessment, site investigation, or remedial investigation prior to NJDEPE approval.\textsuperscript{74} NJDEPE may approve or reject the remediation, or may order additional remediation.\textsuperscript{75}

\textbf{3. Obtaining NJDEPE Approval to Complete the Transaction}

The owner or operator must obtain NJDEPE approval to transfer the property.\textsuperscript{76} The owner or operator may apply to NJDEPE for authorization to complete the transaction at any point during remediation.\textsuperscript{77} To apply for authorization, the owner or operator

\textsuperscript{66} Id. § 13:1K-9(b)(3). The preliminary assessment is the first phase in remediation and includes reviewing documents to determine if any discharges occurred which may require remediation. \textit{Id.} § 13:1K-8.

\textsuperscript{67} Id. § 13:1K-9(b)(3). The site investigation involves the collection and evaluation of data to determine whether further action is required. \textit{Id.} § 19:1K-8.

\textsuperscript{68} N.J. STAT. ANN. § 13:1K-9(b)(3). During remedial investigation, the owner or operator determines the “nature and extent” of any discharges and any problems which may result from the discharges. \textit{Id.} § 13:1K-8. During this period, the owner or operator undertakes data collection, sampling, and all other measures to determine the necessity of remedial action. \textit{Id.} § 13:1K-8.

\textsuperscript{69} Id. § 13:1K-9(b)(3). During remedial action, hazardous substances at the industrial establishment and those which have migrated offsite are cleaned up to meet the appropriate remediation standards. \textit{Id.} § 13:1K-8. Remedial action may include removal, treatment, containment, or other measures to ensure the removal or control of hazardous wastes or substances. \textit{Id.}

\textsuperscript{70} Id. ISRA’s definition of “hazardous substances” is the same as ECRA’s definition. \textit{See id.} For ECRA’s definition of “hazardous substances,” see \textit{supra} note 15.

\textsuperscript{71} For a discussion of the Technical Regulations, see Motiuk, \textit{supra} note 46, at 624-27.

\textsuperscript{72} See \textit{generally} N.J. ADMIN. CODE tit. 7 §§ 26E-1.1 to -7.1.

\textsuperscript{73} See Motiuk, \textit{supra} note 46, at 594-96.

\textsuperscript{74} N.J. STAT. ANN. § 13:1K-9f.

\textsuperscript{75} Id. § 13:1K-9d(1) to -9d(2).

\textsuperscript{76} Id. § 13:1K-9c.

\textsuperscript{77} Id. § 13:1K-9d(1).
must submit a negative declaration, which certifies that no discharged substances are present at or have migrated from the industrial establishment.\textsuperscript{78} NJDEPE must respond to the application within forty-five days, and it may approve the negative declaration by sending the owner or operator a "no further action" letter.\textsuperscript{79} Otherwise, NJDEPE may require the owner or operator to submit a remedial action workplan (RAW)\textsuperscript{80} or to perform additional remediation.\textsuperscript{81}

Alternatively, the owner or operator may complete the transfer before NJDEPE approval of a negative declaration or a RAW, if NJDEPE approves a remediation agreement.\textsuperscript{82} ISRA also requires NJDEPE to promulgate regulations guiding the manner in which documents are to be submitted.\textsuperscript{83}

C. Remediation Standards

While NJDEPE proposed uniform standards for cleaning up establishments under ECRA, the agency never adopted Cleanup Regulations.\textsuperscript{84} In ISRA, the New Jersey Legislature dictates the manner

\textsuperscript{78} N.J. STAT. ANN. § 13:1K-9d(1).
\textsuperscript{79} Id.
\textsuperscript{80} A remedial action workplan (RAW) sets forth the intended plan for the remedial action of the industrial establishment. \textit{Id.} § 13:1K-9. It includes a description of the remedial action, a time schedule and cost estimate, and additional required information. \textit{Id.} § 13:1K-9(e). A funding source may also be required before transferring subject to a RAW. \textit{Id.} § 13:1K-9c.
\textsuperscript{81} Id.
\textsuperscript{82} \textit{Id.} § 13:1K-9e. To receive a remediation agreement, the owner or operator must provide: (1) an estimate of the cost of the remediation; (2) a certification of statutory liability to perform and complete the remediation; (3) evidence of a remediation funding source; (4) a certification that the owner or operator is subject to ISRA, including liability for penalties; and (5) evidence of payment of fees. \textit{Id.} The remediation agreement replaces ECRA's Administrative Consent Order (ACO). \textit{See} Motuk, \textit{supra} note 46, at 636. In practice, remediation agreements are similar to ACOs. \textit{Id.}
\textsuperscript{83} N.J. STAT. ANN. § 13:1K-9e. \textit{See also} N.J. ADMIN. CODE tit. 7, § 26E-1.6 (describing NJDEPE's requirements for documenting compliance with its technical regulations).
in which uniform remediation standards will be promulgated, and implemented.

1. Minimum Remediation Standards

The Legislature directs NJDEPE to promulgate minimum remediation standards for soil, groundwater, and surface water. To determine minimum remediation standards, NJDEPE must consider generally accepted and peer reviewed scientific evidence. NJDEPE must also analyze reasonable exposure scenarios as to the amount of contaminants which might be exposed to humans. Additionally, NJDEPE must avoid the use of redundant conservative assumptions in determining minimum standards. Further, the Legislature advocates the use of numeric or narrative standards to regulate concentration levels for each contaminant.

In addition, the Legislature distinguishes between health-based and ecology-based standards. NJDEPE must develop minimum health-based standards for soil, groundwater, and surface water; however, it may only develop minimum ecology-based standards for surface water and groundwater until the Environmental Advisory Task Force (EATF) conducts a study. Until this study is completed and the EATF recommends protective standards, NJDEPE must determine, on a case by case basis, whether standards are necessary for soil remediation.

85. N.J. Stat. Ann. § 13:1K-8. ISRA defines remediation standards as "the combination of numeric and narrative standards to which hazardous substances or hazardous wastes must be investigated or remediated as established by the Department . . . ." Id.

86. N.J. Stat. Ann. § 58:10B-12a-d. Until the regulations are promulgated, NJDEPE is directed to proceed on a case by case basis. Id. § 58:10B-12a.

87. Id. § 58:10B-12g. The implementation of a standard must ensure the protection of public health, safety, and environment. Id.

88. Id. The minimum standards differ from NJDEPE's proposed Cleanup Regulations in that they do not cover the interior of buildings. See Motiuk, supra note 46, at 606.


90. Id.

91. N.J. Stat. Ann. § 58:10B-12b(3). To avoid redundant conservative presumptions, NJDEPE should use parameters that provide an adequate margin of safety and which avoid unrealistic conservative exposure parameters, using the guidance and regulations for exposure assessment developed in CERCLA. Id. § 58:10B-12b(3).

92. Id. § 58:10B-12b(4).


94. Id. § 58:10B-12, -14. The Environmental Advisory Task Force (EATF) is composed of 15 members, including the Commissioner of the Department of Environmental Protection and Energy or his designee. Id.

95. Id. at § 58:10B-12a.
In developing health-based standards, the Legislature mandates NJDEPE to consider public health and safety, as well as the location, surroundings, and use of the property.\textsuperscript{96} In addition, the Legislature offers guidance relating to the development of minimum remediation standards for contamination which may adversely affect humans.\textsuperscript{97} These health-based standards, particularly the one-in-a-million standard, are very stringent.\textsuperscript{98}

2. \textit{Flexible Soil Standards}

ISRA permits flexible minimum standards for soil, depending on the use of the industrial establishment.\textsuperscript{99} NJDEPE must set both residential and non-residential minimum standards.\textsuperscript{100} Non-residential standards may be less harsh, while still continuing to advance the public health, safety, and welfare.\textsuperscript{101} Moreover, if a site is remediated to the non-residential standard, the property use must be restricted to non-residential activities.\textsuperscript{102} However, both residential and non-residential use properties must meet the one-in-a-million standard.\textsuperscript{103}

3. \textit{Implementing Remediation Standards}

NJDEPE must consider nine factors when determining procedures for remedial action at a particular site.\textsuperscript{104} After consideration

\textsuperscript{96} Id.
\textsuperscript{97} N.J. STAT. ANN. § 58:10B-12d. If a contaminant may adversely effect humans, the Legislature requires that minimum remediation standards are to be determined as follows: (1) for carcinogens, an increased cancer risk of one in one million (one-in-a-million standard), (2) for noncarcinogens, the Hazard Index must be less than or equal to one. Id.
\textsuperscript{98} Id.
\textsuperscript{99} N.J. STAT. ANN. § 58:10B-12c.
\textsuperscript{100} Id. § 58:10B-12(b)(4)(c).
\textsuperscript{101} Id. § 58:10B-12c(1).
\textsuperscript{102} Id.
\textsuperscript{103} Id. § 58:10B-12d(1).
\textsuperscript{104} N.J. STAT. ANN. § 58:10B-12(g). The Department must base its decision on the following nine factors:

(1) Permanent and nonpermanent remedies are allowed; permanent remedies are preferred over non-permanent remedies.
(2) Institutional and engineering controls may be used if they result in the protection of public health, safety and welfare.
(3) If soil is not remediated to residential soil remediation standards, or soil groundwater or surface water meets the health risk level only with the use of engineering or institutional controls, the property may be used for residential purposes if the soil where persons may come into contact with the property meets the residential standards and the institutional and engineering controls enable the property to meet the health risk levels.
(4) Remediation shall not be required beyond the regional background levels for any particular contaminant. . .
of these factors, NJDEPE is authorized, in certain situations, to allow non-permanent remedies, such as institutional and engineering controls. In addition, ISRA provides special rules for remediating sites which contain large quantities of historical fill material.

D. Expedited Processes under ISRA

1. Expedited and Limited Site Reviews: Area of Concern Waivers

ISRA provides expedited reviews to facilitate the sale of properties which have already undergone a cleanup. The owner or op-

(5) If contamination comes from another property, the owner or operator is only required to remediate if they are responsible for contamination.
(6) Groundwater need not be remediated beyond the contamination migrating from another's property.
(7) The reliability and effectiveness of the remedial action in meeting the standards; the ability of the owner or operator to implement remedial action within a reasonable time without adversely affecting public health, safety or the environment.
(8) Whether permanent remedies are cost prohibitive. Until NJDEPE promulgates regulations, a permanent remedy shall not be required where the cost exceeds a non-permanent remedy by fifty percent.
(9) The use of the nonresidential soil standard shall not be unreasonably rejected by NJDEPE.

Id.

105. Id. "Engineering controls" are defined as "any mechanism to contain or stabilize contamination or ensure the effectiveness of a remedial action." Id. § 58:10B-1. These controls may include "caps, covers, dikes, trenches, leachate collection systems, signs . . . ." etc. Id. "Institutional controls" are defined as "a mechanism used to limit human activities at or near a contaminated site . . . . [including] structure, land, and natural resource use restrictions . . . and deed notices." Id.

When institutional controls are used, NJDEPE must require that the notice of contaminants be filed in the appropriate county office. Id. § 58:10B-13(a)(2). ISRA limits the availability of notices as an appropriate institutional control in order to help maintain the marketability of the property. N.J. STAT. ANN. § 58:10B-12h(3). In doing so, the Legislature hoped to avoid the detrimental impact of deed restrictions under ECRA. Richard J. Conway Jr. & Ritaelen M. Casavechia, ISRA Gives Flexibility in Cleaning Sites, N.J. LAW., Aug. 9, 1993, at 1. For further discussion of deed restrictions, see id.

106. N.J. STAT. ANN. § 58:10B-12h. Historic fill material is defined as "large volumes of non-indigenous material, used to raise the topographic elevation of a site, which were contaminated prior to emplacement and are in no way connected with the operations at the location. . . ." Id. If NJDEPE determines that a large quantity of historic waste is present, there is a rebuttable presumption that the waste may remain on the site. Id. By limiting the owner or operator's liability for historic waste, ISRA allows the use of property which would otherwise be abandoned. See Steven A. Hann, New Jersey's Industrial Site Recovery Act . . . A New Beginning or ECRA II?, LEGAL INTELLIGENCER, Aug. 9, 1993, at 6.

107. N.J. STAT. ANN. § 13:1K-11.2a(2). Under this provision, an owner may transfer or close operations under the expedited review if the site has already been remediated, and the owner complies with procedures. Id. § 13:1K-11.2a(3). The owner must provide evidence that a RAW has previously been undertaken, and that a "no further action" letter has been granted or a negative declaration has been approved. Id. The owner may also be granted an expedited review by show-
erator must certify that all sites meet current standards, and that no additional discharge of hazardous waste occurred. Furthermore, remediation under RCRA, CERCLA, or a similar act is transferable to remediation under ISRA, which will relieve the owner of performance of a remediation under ISRA.

A limited site review will apply if NJDEPE sent the owner or operator of the industrial establishment a "no further action" letter, but areas of the industrial establishment do not meet remediation standards at the time of the transfer. One option under a limited site review is that ISRA may require the owner or operator only to remediate those areas not meeting the standards.

On the other hand, an "area of concern waiver" relieves the owner or operator from complying with ISRA for those areas which have previously undergone remediation. Moreover, the owner or operator may transfer a "limited parcel" of land that meets the remediation standards without remediating the entire establishment by applying for a certificate of limited conveyance.

109. Id. § 13:1K-11.2a(1). To qualify for a limited site review, the owner must certify that the site has undergone remediation, under ISRA, or any other act and that either a negative declaration, or a "no further action" letter, or previous remediation has been approved. Id. § 13:1K-11.3a(2).
110. Id. § 13:1K-11.3.
111. Id. § 13:1K-11.3b(2). If a discharge occurred after the remediation, and all other areas meet current standards, as certified above, then the owner may seek a limited site review. Id. § 13:1K-11.3a.
112. N.J. STAT. ANN. § 13:1K-11.4. To qualify for an area of concern waiver, the owner must certify that the area of concern has been remediated under ISRA, or any similar act, and that a negative declaration, a no further action letter, or any similar certificate has been granted. Id. This provision is particularly important to those establishments which have small chunks remediated under RCRA. Kenneth H. Mack & Steven J. Picco, ISRA's Adoption Means More Than Just Reform, N.J. L.J., July 5, 1993, at 4.
113. N.J. STAT. ANN. § 13:1K-11.8a. The certificate of limited conveyance is predicated upon a finding that the sale price or market price of the area does not exceed one-third of the total appraised value of the property, including a diminution of the value of the rest of the property after the portion is sold. Id. § 13:1K-11.8c.
2. Areas of Minimal Environmental Concern

ISRA provides an exception to remediation requirements for areas of minimal environmental concern.\(^{114}\) Under this exception to the general remediation rules, the owner or operator must still complete preliminary assessment, site investigation, and remedial investigation for the establishment. However, the owner or operator may then apply for a certification that the area is of minimal environmental concern.\(^{115}\) If the information is accurate, the department will approve the application and the owner must then complete remedial action only on the subject areas of concern.\(^{116}\)

E. The Funding

Similar to ECRA, ISRA requires the owner or operator of an industrial establishment to establish a funding source for the total estimated cost of remediation prior to transferring the industrial establishment.\(^{117}\) ISRA, however, modifies ECRA's harsh funding provisions to mitigate the financial burden on industry.\(^{118}\) In fact, ISRA completely exempts owners or operators who voluntarily undertake remediation from providing any funding source.\(^{119}\) For those owners or operators who are required to undertake remediation, ISRA eases the burden of establishing a funding source.

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114. Id. § 13:1K-11.7. An area of minimal environmental concern contains no more than two areas contaminated above the requisite remediation standards, if those two areas can be remediated within a six months time frame. Id. § 13:1K-11.7. The two contaminated areas, however, may not be of special concern due to their proximity to a drinking area. Id. § 13:1K-11.7a(6).

115. Id. § 13:1K-11.7a.


117. For a discussion of funding sources under ECRA, see supra notes 31-36 and accompanying text. Under ISRA, a funding source must be established for the amount "equal to or greater than the cost estimate of the implementation of the remediation." N.J. Stat. Ann. § 58:10B-3(a). If the remediation cost estimate increases, the owner or operator must also increase the funding source by an amount at least equal to the new increase. Id. See infra note 120 for the definition of remediation funding source.

118. Id.

119. N.J. Stat. Ann. § 58:10B-3(a). This exemption specifically applies to persons voluntarily undertaking remediation pursuant to a memorandum of agreement (MOA). See Motiuk, supra note 46, at 613. A memorandum of agreement is defined as "a written agreement between the Department and one or more persons concerning the Department's oversight of remediation pursuant to this Chapter." N.J. Admin. Code tit. 7, § 26C-1.3. Under an MOA, the party agrees to undertake remediation without admitting liability or fault. Id. For further discussion of MOAs, see Dowd, supra note 59, at 13.
First, ISRA authorizes more types of funding sources for remediation than ECRA allowed.\textsuperscript{120} Under ISRA, the owner or operator may create a funding source by establishing a trust fund,\textsuperscript{121} an insurance policy,\textsuperscript{122} a line of credit,\textsuperscript{123} a self-guarantee,\textsuperscript{124} or any combination of these sources.\textsuperscript{125} The self-guarantee is perhaps the most important new funding source under ISRA.\textsuperscript{126} Many businesses should be able to meet the fairly liberal requirements for a self-guarantee, enabling this new source to greatly ease the burden of establishing a funding source.\textsuperscript{127} ISRA adds "environmental in-

\textsuperscript{120} N.J. Stat. Ann. § 58:10B-3. ISRA defines "remediation funding source" as "the methods of financing the remediation of a discharge required to be established by a person performing the remediation" under ISRA. \textit{Id.} § 58:10B-1.

\textsuperscript{121} \textit{Id.} § 58:10B-3b. To finance the remediation action with a trust fund, "an originally signed duplicate of the trust agreement shall be delivered to the department by certified mail within 14 days of receipt of notice from the department that the remedial action workplan or remediation agreement . . . is approved . . . ." \textit{Id.} § 58:10B-3(c). A remediation trust fund agreement must follow a model trust fund agreement established by NJDEPE. \textit{Id.} A certification that the trust fund agreement follows this model must accompany the trust fund agreement. \textit{Id.} Furthermore, the trust fund agreement must be irrevocable except upon written approval by NJDEPE. \textit{Id.}

\textsuperscript{122} N.J. Stat. Ann. § 58:10B-3b. To establish a remediation funding source through an environmental insurance policy, the policy must be provided by an insurance carrier licensed by the Department of Insurance to conduct business in New Jersey. \textit{Id.} An originally signed copy of the insurance policy must be delivered to NJDEPE by certified mail, overnight delivery, or personal service within 30 days of notification that a remediation agreement or RAW has been approved. \textit{Id.} § 58:10B-3d. The policy may not be revoked without written consent by NJDEPE. \textit{Id.}

\textsuperscript{123} N.J. Stat. Ann. § 58:10B-3b. The line of credit enables the owner or operator to borrow the money required for the remediation. \textit{Id.} § 58:10B-3e. An original signed copy of the agreement for the line of credit must be delivered to NJDEPE within 14 days of notification that a RAW or remediation is approved. \textit{Id.} The line of credit must be irrevocable except upon written approval by NJDEPE. \textit{Id.}

\textsuperscript{124} N.J. Stat. Ann. § 58:10B-3b. A person may self-guarantee a remediation funding source by documenting that the cost of remediation will not be greater than one-third of their tangible net worth and that the person has sufficient cash flow for remediation during the necessary time period. \textit{Id.} § 58:10B-3f. If the person's gross receipts exceed gross payments by the estimated costs of completing the RAW to be performed for 12 months after the application, the person has sufficient cash flow for the self-guarantee. \textit{Id.} Applications for the self-guarantee must be renewed on an annual basis. \textit{Id.}

\textsuperscript{125} N.J. Stat. Ann. § 58:10B-3b.

\textsuperscript{126} For further discussion of the self-guarantee, see Goldshore & Wolf, \textit{supra} note 31, at 14. One specific benefit of a self-guarantee as a funding source is that the one percent surcharge on all funding sources does not apply to self-guarantees. N.J. Stat. Ann. § 58:10B-11a.

\textsuperscript{127} Goldshore & Wolf, \textit{supra} note 31, at 14. To establish that the financial requirements for a self-guarantee are met, the owner or operator must provide a statement of income and expenses for that year plus a balance sheet stating the assets and liabilities. N.J. Stat. Ann. § 58:10B-3f. This financial information must be certified as true by a chief financial officer or other officer in a similar capacity.
surance” as an additional funding source; however, ISRA does not define “environmental insurance.”128

Second, ISRA eliminates ECRA's “double bite” by enabling the owner or operator to use the funding source to pay for the actual remediation, rather than requiring the funding source to remain untouched until the completion of the remediation.129 In addition, ISRA provides that FAs established under ECRA are to be re-funded for those who meet the requirements for a self-guarantee.

Finally, in order to assist municipalities, innocent parties, and other persons in establishing a funding source, ISRA creates the Hazardous Discharge Site Remediation Fund (HDSRF).130 The HDSRF may be used to provide grants and financial assistance to municipalities, innocent parties, and individuals who cannot establish a remediation funding source to cover the full expense of remediation.131 ISRA also creates the Remediation Guarantee Fund (RGF) to supply money for remediation when a person who was required to establish a fund defaults.132 The RGF maintains a

Id. The financial information does not have to be audited by a Certified Public Accountant, as was required under ECRA. See Motiuk, supra note 46, at 614.

128. For further discussion of the impact of environmental insurance as a funding source, see Motiuk, supra note 46, at 613-14.

129. N.J. STAT. ANN. § 58:10B-3b. ECRA required an FA above and beyond the money used to finance the remediation. See supra note 33 for a discussion of ECRA's FA.

130. Id. § 58:10B-4. The Hazardous Discharge Remediation Fund (HDSRF) contains money appropriated to it by the Legislature, including money from a one percent surcharge which ISRA imposes on remediation funding sources. Id. § 58:10B-11. The HDSRF includes:

(1) moneys as are appropriated by the Legislature;
(2) moneys deposited into the fund as repayment of principal and interest on outstanding loans made from the fund;
(3) any return on investment of moneys deposited in the fund;
(4) remediation funding source surcharges imposed pursuant to section 33 of P.L. 1993, c. 139 (C. 58:10B-11);
(5) moneys deposited into the fund from cost recovery subrogation actions; and
(6) moneys made available to the authority for the purposes of the fund.

Id. § 58:10B-4. ISRA authorizes $45,000,000 to be deposited into the HDSRF. Id.

131. N.J. STAT. ANN. § 58:10B-5a(1). Municipalities who hold a tax sale certificate may receive financial grants or assistance from the HDSRF. Id. § 58:10B-5c. Municipalities may also receive money from the HDSRF to remediate sites where a discharge occurred which poses a “threat to a drinking water source, to human health, or to a sensitive or significant ecological area.” Id. § 58:10B-6a(3).

In addition, persons qualifying as innocent parties may receive grants. Id. § 58:10B-6a(6). Innocent parties are persons who acquired the property before December 31, 1983, and who did not use the hazardous substance which was discharged at the site and who certifies that he did not discharge the substance. Id.

132. N.J. STAT. ANN. §§ 58:10B-20a & c. The Remediation Guarantee Fund (RGF) contains money “appropriated to it by law, all moneys collected in subrogation actions to recover moneys expended from the fund, and all moneys earned by
cause of action against the defaulting person for the amount NJDEPE expends on the remediation.\textsuperscript{133}

F. Miscellaneous Provisions

1. Owner/Operator

ISRA defines and further clarifies the terms “owner,” “operator,” “direct owner or operator,” and “indirect owner.”\textsuperscript{134} These definitions assist NJDEPE in determining who is responsible for the remediation, particularly where a corporate parent or subsidiary is involved.\textsuperscript{135}

2. Access to Property

Since an owner or operator of an industrial establishment is responsible for the remediation of migrating hazardous substances, owners and operators must have access to off site areas. Under ISRA, an owner or operator may enter another person’s property if an agreement in writing has been signed by the owner of that property.\textsuperscript{136} If the parties fail to reach an agreement concerning access to the property after a good faith effort, the owner or operator may apply to the Superior Court for reasonable access to the property.\textsuperscript{137}

\begin{footnotesize}
\begin{itemize}
  \item investment of the moneys in the fund.” \textit{Id.} § 58:10B-20a. ISRA authorized $5,000,000 for the RGF. \textit{See} Motiuk, \textit{supra} note 46, at 617.
  \item N.J. Stat. Ann. § 58:10B-20d.
  \item N.J. Stat. Ann. § 13:1K-8. Under ISRA, an “owner” is defined as “any person who owns the real property of an industrial establishment or who owns the industrial establishment.” \textit{Id.} An “operator” is defined as “any person, including users, tenants or occupants, having and exercising direct actual control of the operations of an industrial establishment.” \textit{Id.} An owner of a security interest or mortgage is not an owner or operator unless the person is no longer exempt or obtains title to the establishment. \textit{Id.} For a discussion of the ambiguity of the words “owner or operator” under ECRA, see \textit{supra} text accompanying note 22.
  \item A “direct owner or operator” is defined as “any person that directly owns or operates an industrial establishment.” \textit{Id.} An “indirect owner” means “any person who holds a controlling interest in a direct owner or operator, holds a controlling interest in another indirect owner, or holds an interest in a partnership which is an indirect owner or a direct owner or operator, of an industrial establishment.” \textit{Id.}
  \item \textit{See} Motiuk, \textit{supra} note 46, at 590.
  \item Id.
  \item Id.; see also Richard J. Conway, Jr., \textit{Access Provision Expedites Site Remediation}, N.J.L.J., Oct. 25, 1993, at 56. While good faith is not defined, the court may consider typical ideas of good faith, including fairness, and the neighbor’s response. \textit{Id.}
  \item The court may grant relief, including a temporary or permanent injunction, permitting the owner or operator to enter the property. N.J. Stat. Ann. § 58:10B-16a(2) (a).
\end{itemize}
\end{footnotesize}
3. Landlord/Tenant

ISRA clarifies the liability of landlords and tenants.\textsuperscript{138} If the landlord is the owner and the tenant is the operator of an industrial establishment, both parties are liable for remediation unless the lease clearly specifies which party is liable.\textsuperscript{139} If NJDEPE determines that the lease fails to clearly allocate responsibility, or if the responsible party fails to comply with ISRA, NJDEPE may hold both the landlord and tenant liable.\textsuperscript{140}

Additionally, ISRA imposes a duty of communication upon both landlords and tenants.\textsuperscript{141} The landlord or tenant must communicate any information to the other person, upon request, that is not available to the other person upon diligent inquiry.\textsuperscript{142}

4. Sanctions

Both NJDEPE and the purchaser of an industrial site were able to void a transfer of an industrial site if the owner or operator failed to comply with ECRA.\textsuperscript{143}

ISRA mitigates this harsh sanction by eliminating NJDEPE’s power to void the transaction, and limiting the purchaser’s ability to void the transaction.\textsuperscript{144} Before voiding the transaction, ISRA requires the purchaser to provide notice of non-compliance to the owner or operator and give the owner or operator an opportunity to comply with ISRA.\textsuperscript{145}

\textsuperscript{138} Id. \S 13:1K-11.9.
\textsuperscript{139} Id. \S 13:1K-11.9(c).
\textsuperscript{140} Id. The statute further allows the landlord or tenant to petition NJDEPE to compel the party responsible named in the lease to comply. Id. This petition must include a signed copy of the lease. Id.
\textsuperscript{142} Id. The statute also provides that in the landlord/tenant context, the party that effectuates the remediation must give a copy of all documents submitted to NJDEPE. Id. \S 13:1K-11.9(b).
\textsuperscript{143} See supra note 22 and accompanying text for a discussion of the voiding power under ECRA.
\textsuperscript{144} N.J. Stat. Ann. \S 13:1K-13(a). This provision is important in that it eliminates a potentially harsh sanction, although NJDEPE rarely used its power to void transactions. See Mack & Picco, supra note 112, at 4.
\textsuperscript{145} Id. In order for a purchaser to void the transaction, notice must be given to the owner or operator concerning that party’s failure to either perform remediation or obtain NJDEPE approval, as required under ISRA. Id. For a discussion concerning NJDEPE approval under ISRA, see supra notes 76-83 and accompanying text.

ISRA contains amnesty provisions that allowed companies to correct past violations of ECRA or the New Jersey Spill Act, without fines or penalties, within ISRA's first year. Specifically, these groups hoped that ISRA would loosen ECRA's stranglehold on business. By changing the name, the Legislature sought to disassociate ISRA from ECRA and its bad reputation. Nevertheless, ISRA's critics contend that a name change is all that was accomplished rather than tangible reform.

Although a complete evaluation of ISRA's impact awaits NJDEPE's adoption of regulations to ISRA, the policy changes and the substantive reform mechanisms in ISRA represent a definite shift from the past. An analysis of these changes, however, dem-

146. N.J. Stat. Ann. §§ 58:10B-15, 13:1K-11.10. In addition to eliminating penalties, this section provides that no documents submitted to NJDEPE to obtain amnesty may be used in a criminal action against the responsible party. Id. For further discussion of the amnesty provisions, see Motiuk, supra note 46, at 611-12.


148. For a discussion of the penalties under ECRA, see supra note 35 and accompanying text.

149. See, e.g., Molnar, supra note 4, at 1 (discussing the expectations of New Jersey business and lending communities). Many prominent members of the business and lending communities voiced their concerns about ECRA to the legislature. See, e.g., Public Hearing before Senate Environment Committee regarding Senate Bill 1070 (1993).

150. ECRA has been called "a virus, a disease, and the albatross around the neck of New Jersey's economy" by various business groups. Molnar, supra note 4, at 1. For a discussion of the mixed reviews of ISRA in the business community, see id.

151. Rocco Cammarere, New Environmental Law, N.J. Law., June 21, 1993, at 1. Cammarere notes that changing the name of the statute shows a public relations move to escape the bad publicity that followed ECRA. Id.

152. See, e.g., Molnar, supra note 4, at 1.

153. Much of the effect of ISRA will depend on the actual implementation of ISRA by the NJDEPE. Joseph N. Schmidt, Jr., ECRA Reform: What Does The Industrial Site Recovery Act Mean for New Jersey Business Interests?, Legal Intelligencer, August 2, 1993, at 2. NJDEPE is responsible for implementing regulatory programs such as ISRA. Id. Some regulations were promulgated in anticipation of
onstrates that the legislature intended only moderate reform of ECRA. The following sections analyze both the substantive and policy reforms, and discuss the tension between the legislature's moderate reform goals, and the radical change favored by the business community.

A. Function and Policy Goals

The legislature, in ISRA, abandoned ECRA's pure environmental focus, and instead balanced business interests and environmental concerns, striving for a clean environment and a healthy economy. ISRA does, however, maintain ECRA's primary policy goal: the mitigatation of harm of hazardous waste on the environment.

Senator McNamara, a proponent of ECRA reform, stated that ISRA's policy goals are "to encourage clean-ups, reduce costs of compliance, provide financial resources for clean-ups, encourage the redevelopment of the State's industrialized areas, and protect the public health and environment." McNamara specifically stated that he advocated ECRA reform to help recharacterize New


154. New Jersey Senate Report, Henry P. McNamara, S. 1070 (July 23, 1992), at 35. Senator McNamara stated that "the bill attempts to carefully draw a balance between the public's interest in ensuring that hazardous contamination is cleaned up so that it poses no threat to public health or to the environment with the interest of businesses in performing expeditious and cost effective cleanups and with transferring property in a timely fashion." Id. at 36. See also Conway & Casavechia, Attention N.Y. Lawyers, supra note 153, at 1.

155. New Jersey Senate Report, Henry P. McNamara, S. 1070 (July 23, 1992), at 35. McNamara acknowledged that, despite the admirable goals of ECRA, the legislature did not anticipate the crippling effect the statute would have on business and property transfers. Id. ISRA's stated policy goals are "to promote efficient and timely cleanups, and to eliminate any unnecessary financial burden of remediating contaminated sites; . . .[to] [streamline] the regulatory process . . . for industrial establishments that have previously undergone an environmental review . . .: [and] to guard against redundancy from the regulatory process and to minimize governmental involvement in certain business transactions." Mack, supra note 112, at 4; N.J. STAT. ANN. § 13:1K-7.
Jersey as a state that works with business and property owners to solve environmental problems in an economically efficient manner.\textsuperscript{156}

Although ISRA’s proponents considered economic renewal a major policy goal, they continued to stress environmental factors.\textsuperscript{157} New Jersey’s business and industrial communities, on the other hand, favor ISRA’s economic aspects.\textsuperscript{158} Nevertheless, ECRA reform failed to meet the expectations of those groups anticipating the elimination of ECRA.\textsuperscript{159}

B. Specific Reform Mechanisms

While lawmakers, along with the business and industrial communities, support ISRA’s general policy and function goals, reaction to the specific areas of reform are mixed.\textsuperscript{160} The following sections examine ISRA’s significant reforms: the bright-line tests, the financial reforms, the procedural changes, the remediation standards, and several miscellaneous provisions.

\textbf{1. The “Bright-Line” Test}

Under ECRA, it was often unclear what types of transactions triggered application of the statute.\textsuperscript{161} This ambiguity often forced owners and operators to waste time and money litigating whether a specific transaction qualified as a transfer under the ambiguous language of the statute.\textsuperscript{162} Owners and operators lacked certainty as to which transactions would trigger ECRA despite emerging case law on the issue and regulations promulgated by NJDEPE which specified the triggering transactions.\textsuperscript{163} By codifying bright line tests to determine which transactions trigger ISRA, the legislature eliminated ECRA’s ambiguity and provided more certainty for owners and operators.\textsuperscript{164}

\textsuperscript{156} New Jersey Senate Report, Henry P. McNamara, S. 1070 (July 23, 1992), at 35.
\textsuperscript{157} See id. at 35-36.
\textsuperscript{158} See Molnar, \textit{supra} note 4, at 1.
\textsuperscript{159} See More on ISRA, \textit{supra} note 21.
\textsuperscript{160} See Rachelle Garbarine, \textit{In the Region: New Jersey; Making Industrial Site Cleanups Easier}, N.Y. \textit{TIMES}, July 11, 1993, at 9 (noting support for ISRA’s goals but questioning ability to realize them through its measures).
\textsuperscript{161} See More on ISRA, \textit{supra} note 21.
\textsuperscript{162} See \textit{supra} notes 28-30 and accompanying text for a discussion of the ambiguities under ECRA. See also Molnar, \textit{supra} note 4, at 1.
\textsuperscript{163} Id.
\textsuperscript{164} For a discussion of transactions which trigger ISRA, see \textit{supra} notes 50-55 and accompanying text. See also Mack, \textit{supra} note 112, at 4.
This new clarity under ISRA generally supported by business and industry, reduces the cost of compliance.\textsuperscript{165} Some critics, however, contend that the new tests remain unclear.\textsuperscript{166} For example, Angelo C. Morresi, an attorney and engineer, questions whether ISRA is triggered when inventory is devalued or must be sold.\textsuperscript{167} Such questions, unanswered by ISRA, are left to NJDEPE interpretation.\textsuperscript{168} It is too soon to tell exactly how the “bright-line” test will be affected by NJDEPE’s regulations and by the courts.\textsuperscript{169}

2. Financial Burdens

In ISRA, the legislature attempted to ease the financial burden of remediation by permitting insurance and self-guarantee as funding sources, establishing the Hazardous Discharge Site Remediation Fund, and eliminating the double bite of the FA under ECRA.\textsuperscript{170} Unlike the more favorable comments regarding the adoption of the “bright-line” tests, the reviews of the financial amendments to ECRA are less enthusiastic.\textsuperscript{171} Although the business community generally welcomes these changes, some critics contend that the amendments do not go far enough. Specifically, commentators criticize the fact that aid provided for in the form of funds or assist-

\textsuperscript{165} Public Hearing before Senate Environment Committee regarding Senate Bill No. 1070, at 27 (1993) [hereinafter Public Hearing]. According to James A. Sinclair, First Vice President New Jersey Business and Industry Association, “[y]ou have limited the events that trigger ECRA. That was our concern, and you have done that.” Id. at 27.

\textsuperscript{166} See, e.g., More on ISRA, supra note 21.

\textsuperscript{167} Id. Currently, NJDEPE has informally asserted that inventory changes will not trigger ISRA. Id. Morresi claims that ISRA’s standards could prove to be “cumbersome,” and that he would like to see them more clearly defined. Id.

\textsuperscript{168} Id. The NJDEPE regulations implementing ISRA provide the arena in which such questions can be addressed. More on ISRA, supra note 21.

\textsuperscript{169} See id.

\textsuperscript{170} N.J. Stat. Ann. §§ 58:10B-3, -4. The heavy financial burden ECRA placed on businesses engaged in cleanup was one of its major problems. See supra notes 31-36 and accompanying text. ISRA attempts to eliminate some of the financial hardships created by ECRA.

\textsuperscript{171} According to Barbara W. McConnell, Commissioner of the New Jersey Department of Commerce and Economic Development, the proposed financial assistance programs succeed in helping industry to meet cleanup standards without going bankrupt. Public Hearing, supra note 165, at 25. On the other hand, Joseph Maraziti, New Jersey Committee Regional Plan Association urges that more funding be earmarked for cites in urban area, as opposed to being spread throughout the state. Id. at 48. According to Mr. Maraziti, the goal of stimulating growth in the state can be accomplished more effectively if aid is focused on urban cites. Id.
ance programs is equally available to all applicants.\textsuperscript{172} These critics also contend that the legislature failed to accomplish its goal of stimulating the economy, since funds should have been designated to industry located in key areas rather than to everyone who qualifies for assistance.

New Jersey businesses have generally criticized the legislature for failing to meet its goals of economic renewal.\textsuperscript{175} Although the legislature succeeded in creating more sources for funding, it failed to use these newly created resources in the most economically beneficial manner. ISRA's financial policies have also been criticized for failing to alleviate the heavy economic burden on industry and business.\textsuperscript{174} Critics contend that the legislature should have set its goals higher and attempted to lighten this financial burden.\textsuperscript{175}

In amending the statute, the legislature did not intend to do away with financial burdens but intended to boost the economy by ensuring that remediation is not totally unaffordable. ISRA reflects the compromise that while someone must pay for the cost of cleanup, the legislature will work with businesses to find less burdensome methods of funding. In terms of providing funding, ISRA goes as far as it can, economically, without totally compromising the environmental goals.\textsuperscript{176} Still, ISRA arguably should have found better methods for channeling its resources.

\textsuperscript{172} For a discussion of funding sources and assistance under ISRA, see supra notes 118-33 and accompanying text.

\textsuperscript{173} See Molnar, supra note 4, at 1. Some business persons still refuse to set up business in New Jersey believing that ISRA has done nothing more than institutionalize ECRA. Id.

\textsuperscript{174} See, e.g., More on ISRA, supra note 21. For example, "[t]he requirements for the 'low-cost' financing of cleanups are too complicated. Small businesses, will not be able to afford to finance their cleanups and still have enough capital left over to keep their businesses running." Id.

\textsuperscript{175} See More on ISRA, supra note 21. According to Angelo Morresi, an engineer and an attorney, the financial assistance fund requirement still ties up a company's credit line or capital. This financial requirement hurts primarily small businesses who cannot afford to have such a large amount of their capital tied up. Id.

\textsuperscript{176} New Jersey Senate Report, Henry P. McNamara, S. 1070 (July 23, 1992). "[T]he bill attempts to carefully draw a balance between the public's interest in ensuring that hazardous contamination is cleaned up so that it poses no threat to public health or to the environment with the interest of businesses in performing expeditious and cost effective cleanups . . . ." Id. at 36. Senator McNamara went on to point out that ISRA provides loans and grants to encourage cleanup and promote the redevelopment of industrial areas. Id.
3. The Administrative Process

ISRA attempted to streamline the administrative processes involved in a site cleanup.\textsuperscript{177} Under ECRA, owners or operators were forced to execute ECRA's administrative formalities, even if they were immediately reselling the property.\textsuperscript{178} In addition, ECRA failed to provide for exceptions in areas of minimal environmental concern.\textsuperscript{179} The bureaucracy surrounding ECRA not only made compliance difficult, but forced businesses to spend thousands of dollars litigating issues that they thought had been resolved.

Again, critics of ECRA welcome the amendments but find them insufficient. The most common criticism is that the amendments do not provide a way to bypass the administrative bureaucracy. Many business persons and industrialists would prefer options such as alternative dispute resolution or arbitration. Although ISRA streamlined the administrative process, it failed to acknowledge that agreements can be reached without this formal process.

4. The One-in-a-Million Rule

Business persons unanimously condemn the one-in-a-million rule as unfair and misguided.\textsuperscript{180} Under this standard, a site is not deemed clean unless there is less than a one-in-a-million cancer risk.\textsuperscript{181} This standard is unusually harsh. As critics point out, even an ordinary apple contains fifty parts per million of natural carcinogens.\textsuperscript{182} This standard places a great demand on business while not significantly benefitting the environment.\textsuperscript{183}

\begin{itemize}
  \item 177. Joseph N. Schmidt, Jr., ECRA Reform: What Does The Industrial Site Recovery Act Mean for New Jersey Business Interests?, The Legal Intelligencer, Aug. 2, 1993, at 2 (stating that one goal of ISRA was to streamline regulatory process).
  \item 178. Molnar, supra note 4, at 1 (noting that with ECRA businesses were never sure that if they went through the process once, they would not have to repeat it).
  \item 179. Andrew B. Robins, ISRA: Will the New Act Bring Reform to ECRA?, N.J. Law., June 28, 1993, at 5 (noting that ISRA reforms include de minimis exemptions and exemptions for NJDEP prior cleanup approval).
  \item 180. Molnar, supra note 4, at 1 (citing comments from Steve Picco, a partner in the Trenton law firm of Picco, Mack & Herbert, stating one of ISRA's shortcomings is the one-in-a-million standard).
  \item 181. N.J. Stat. Ann. § 58:10B-12(d)(1). This section states that the Department shall set minimum soil remediation standards. \textit{Id.} § 58:10B-12(a). For human carcinogens, as categorized by the United States Environmental Protection Agency, the standard is one-in-a-million. \textit{Id.} § 58:10B-12(d)(1).
  \item 182. More on ISRA, supra note 21.
  \item 183. Molnar, supra note 4, at 1. Steve Picco, a partner from Picco, Mack & Herbert, criticized the one-in-a-million standard as overly harsh and stated there is no scientific basis for the chosen level. \textit{Id.}
\end{itemize}
V. Conclusion

ISRA modifies the worst aspects of ECRA. However, it is only the first step in reform. ISRA's ultimate impact depends on the regulations and the statutory interpretation of NJDEPE officials. Although the basic policy goals are stated in the statute, the regulations could drastically alter the effect of the statute.

Critics have suggested that ISRA is merely "old wine in a new bottle." Despite this criticism, ISRA fundamentally changes New Jersey's approach to environmental cleanup by favoring more realistic cleanup goals, providing better financial assistance, and streamlining administrative processes. In these areas, ISRA represents true reform.

ISRA is more than just a name change but it does not represent a complete shift in policy goals. Despite real changes in financing, defining a transaction, and streamlining the administrative process, however, ISRA is not representative of an abandonment of environmental concerns in favor of the economy. It is, rather, a recognition that a healthy environment and a prosperous economy are both legitimate goals. ISRA is indicative of the legislature's awareness that a balance must exist in order to promote both goals.

ISRA has not remedied all of the economic hardships ECRA caused New Jersey businesses and industry, but this was never the goal of ISRA. Despite the environmental regulations that still affect New Jersey businesses, the fact that the legislature set out to remedy the statute, was cognizant of economic concerns in making the reforms, attempted to fix structural and procedural problems,


185. Molnar, *supra* note 4 (recognizing that effectiveness of ISRA reforms still largely depends on how NJDEPE interprets and implements the new standards).

186. Rosenberg, *supra* note 184 (warning that the effectiveness of the reforms depends in large part on future regulations and the attitude of Department officials).

187. *Id.* (denying that ISRA is "old wine in a new bottle").

188. *See* Farer, *Lender Liability,* *supra* note 153, at 6. (stating ISRA represents true reform because of financial assurance scheme, alternative streamlined methods of administration, and specific guidelines for development and implementation of cleanup standards).


190. For a discussion of the policy goals furthered by ISRA, see *supra* notes 154-59 and accompanying text.
and actually accomplished many of these goals, render ISRA a success.\footnote{Compare \textit{supra} notes 154-59 and accompanying text (stating the policy goals of ISRA to reduce costs of compliance, provide financial resources to facilitate cleanups, encourage redevelopment of industrialized areas, and to protect the environment) with \textit{supra} notes 117-33 and accompanying text (illustrating how ISRA has eased financial burdens). \textit{See also} \textit{supra} notes 177-79 and accompanying text (discussing how ISRA has streamlined administrative process).} 

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