ECRA: a drama in one act

by Dennis J. Krumholz

Time: The present.
Place: A New Jersey law office.

Oscar O. Smith, out-of-state lawyer ("Smith"): Are all these wild stories true that we've been hearing out here about an environmental law in New Jersey that affects the sale of industrial facilities?

Nathan Jones, New Jersey lawyer ("Jones"): Yes, Oscar, they're probably accurate. ECRA is the most controversial piece of environmental legislation in effect in New Jersey. (Sighs) It's driving most of us crazy.

Smith: Thankfully, Nathan, I'm not an environmental lawyer.

Jones: (Chuckles) That's all right. All New Jersey lawyers, particularly real estate and corporate ones, are environmental lawyers now.

Smith: Please, just what is ECRA and how does it work?

Jones: ECRA, the New Jersey Environmental Cleanup Responsibility Act,[1] was signed into law on September 3, 1983 and became effective on December 31, 1983.[2] Most simply stated, ECRA requires a complete environmental review, and possible site remediation, as a precondition to the transfer or closure of certain industrial property.

ECRA applies only to industries, more accurately "place[s] of business," whose activities come within Standard Industrial Classification categories 22-39 inclusive, 46-49 inclusive, 51 or 76 as set forth in the Standard Industrial Classifications Manual and which generate, manufacture, refine, transport, treat, store, handle or dispose of hazardous substances or waste.[3] The Act takes effect upon the closure, termination or transfer of operations of these facilities as therein defined. ECRA requires the transferor of the facility to notify the New Jersey Department of Environmental Protection ("NJDEP") prior to closing or transferring operations and thereafter mandates the transferor's filing of either a "cleanup plan" outlining methods of site remediation or a "negative declaration" verifying that no adverse environmental conditions exist on site.[4] And that's still putting it simply.

Smith: When can you finally close a transaction or terminate operations?

Jones: Usually only upon NJDEP's approval of a seller's negative declaration or, if cleanup is necessary, upon the department's approval of a cleanup plan, although the Act does provide that the purchaser or other party to the transaction may assume these responsibilities[5] and, in certain instances, may defer them until the use of the establishment changes or it becomes non-operational.[6] Exceptions to this procedure can be made where compelling business reasons require an earlier closing or termination.[7]

Smith: Does the statute provide for the imposition of penalties?

Jones: Rather extraordinary ones. The failure of a transferor to comply with any provision of ECRA entitles the transferee to void the transaction and to recover damages and costs from the transferor.[8] NJDEP may void the transaction if the transferor does not submit either a negative declaration or a cleanup plan acceptable to the department.[9] Failure to comply with the provisions of ECRA may subject the offender, including an officer or management official in his personal capacity, to significant civil penalties.[10] I'm frankly doubtful that a court would uphold all these remedies.

Smith: How did ECRA come about?

Jones: The roots of ECRA may be traced to the so-called "Decommissioning Bill" conceived within NJDEP in 1981 as a mechanism to compel site cleanup of industrial facilities upon closure of operations. NJDEP persuaded Senator (then Assemblyman) Raymond Lesniak (D-Union) to sponsor this legislation. In the absence of much legislative history it is not really clear how the scope of the "Decommissioning Bill" expanded to include the transfer, in addition to the closure, of industrial establishments. What is certain is that the genesis of ECRA involved lengthy discussions among Senator Lesniak, representatives of NJDEP and a number of lobbyists representing industrial and commercial organizations.[11]

The business representatives who participated in the negotiations concerning what eventually came to be ECRA seem to have supported, or at least did not strongly oppose, the Act's unique and fundamental concept that transfer or closure of industrial properties ought to trigger environmental remediation. Instead, they focused their attention upon several substantive issues posed by the Act, such as the identifi-

cation of industrial facilities over which the Act would exert jurisdiction and the ability of establishments to certify, where appropriate, that no contamination exists on site (i.e., negative declaration).[12]

Smith: No kidding. I'm surprised that business groups did not oppose the basic issue of allowing environmental considerations to dictate the timing and even the conditions of business transactions.

Jones: (Nods) In hindsight, I'm also surprised by agreement on this issue among groups with such seemingly disparate interests as NJDEP and industrial lobbyists. Perhaps even more significant has been the absence of a larger public debate about the wisdom of ECRA as a matter of both business as well as environmental policy.

Smith: Perhaps you might discuss philosophy a bit later. Instead, can you tell me why the Legislature enacted ECRA?

Jones: Let me suggest several specific factors that contributed to its passage. Organized industry in New Jersey was greatly concerned during this same period with the possible enactment of the New Jersey Worker and Community Right to Know Act.[13] In concept, the Right to Know Act seeks to provide workers and community residents with access to health and safety data concerning hazardous materials found in the workplace. This Act was the subject of extensive and often acrimonious legislative debate during this period and it probably diverted attention from ECRA. In addition, dioxin, one of the most toxic substances known, was discovered in a residential section of Newark immediately prior to the passage of ECRA, raising concerns that additional legislation was necessary to protect New Jersey from the effects of hazardous waste disposal. Finally, it has also been suggested that ECRA was enacted as a response to *State v. Ventron,*[14] a case that was working its way through the courts during this time involving decades of mercury pollution in the Hackensack Meadowlands. Those aware of the facts in *Ventron*, particularly NJDEP, supported ECRA as a vehicle to prevent environmental contamination from remaining undiscovered and unremediated as it had in that case.[15] One general reason for adoption of ECRA, of course, was to prevent the creation of abandoned hazardous waste sites requiring the expenditures of significant public remedial funds.[16]

Smith: Let's return to the Act itself. I'm confounded by the logic of relying upon the Standard Industrial Classification Manual to determine whether a facility may present an environmental hazard.

Jones: (Smiles) Frankly, while I do see some logic, I agree that it makes little environmental sense. Let me explain. The Standard Industrial Classification Manual ("the SIC Manual") is prepared by the Statistical Policy Division of the Office of Management and Budget in the Executive Office of the President. According to its Preface, the SIC Manual includes all economic activities and classifies industries according to the structure and composition of the economy. The purposes of the Manual are succinctly stated in its Introduction:

> The Standard Industrial Classification was developed for use in the classification of establishments by type of [primary] activity in which they are engaged; for purposes of facilitating the collection, tabulation, presentation and analysis of data relating to establishments; and for promoting uniformity and comparability in the presentation of statistical data collected by various agencies of the United States Government, State agencies, trade associations, and private research organizations.

The SIC Manual was developed originally for use within government for statistical purposes, but is currently used by many businesses and other non-governmental organizations for market research and other functions.

It may at least be logical for the Legislature to assume that certain industrial categories as classified by the SIC Manual are more likely to pollute than others and, therefore, to subject only those businesses to pre-transaction scrutiny. But in actual practice the inclusion within ECRA of certain SIC industrial groups and the exclusion of others is a distinction with only a limited relationship to the likelihood of environmental contamination. For example, mining (10-14) and construction (15-17) activities are excluded from ECRA but lumber and wood products industries (24) are included; railroad (40), bus (41) and truck (42) transportation are excluded but certain transportation (47) and communication (48) services are included; durable wholesale goods (50), including electrical, metallic and industrial goods, are excluded from ECRA but nondurable wholesale goods (51), including clothing, groceries and alcoholic beverages, are included.[17]

Supporters of the use of the SIC concept in determining ECRA applicability may claim that the particular distinctions drawn within the SIC could be improved to classify industrial groups more rationally for ECRA purposes, or even that the current classification scheme is the best available. But if the underlying policy of the Act is truly to discover and remedy environmental contamination caused by hazardous materials, it makes more sense to require environmental review simply for *all* industrial and commercial establishments that use hazardous substances, perhaps in certain significant quantities,[18] without regard to industrial classification. In my judgment, simplifying ECRA in this manner would tie environmental analysis directly to the appreciable use of hazardous materials. It would eliminate the arcane analyses and strained reasoning sometimes necessitated by the SIC portion of the "industrial establishment" test, such as the "auxiliary establishment" question.[19] Hopefully, in this way some of the absurd current results of ECRA applicability would be eliminated.[20]

Smith: Isn't it unlikely that industry will permit such wholesale expansion of ECRA jurisdiction?

Jones: Perhaps. You know, early drafts of the Act defined an "industrial establishment" by application

of only the hazardous materials test.[21] Since the determination of jurisdiction was one of the subjects of the lengthy pre-enactment negotiations, it does seem likely that the current applicability test already expresses political compromise rather than sound environmental policy. By the way, because ECRA is such a large program to administer, it wouldn't surprise me if NJDEP is content with the current jurisdictional limitations.

Smith: All right, let's talk about the way ECRA actually works. Let's assume a company meets the jurisdictional test. To which transfers of the establishment does ECRA apply?

Jones: (Taking a deep breath) ECRA applies to:

> Change in ownership, except for corporate reorganization not substantially affecting the ownership of the industrial establishment, including but not limited to sale of stock in the form of a statutory merger or consolidation, sale of the controlling share of the assets, the conveyance of the real property, dissolution of corporate identity, financial reorganization and initiation of bankruptcy proceedings.[22]

Smith: This section seems cumbersome.

Jones: It seems apparent even to me, an environmental practitioner, that this provision was not drafted by experienced corporate counsel. Perhaps it need not have been. After all, ECRA is remedial environmental legislation, and everyone ought to recognize a sale of a business or transfer of real property without being distracted by complex definitional tests. In practice, however, the analysis of transactions for determination of ECRA applicability has often proven troublesome and, in my judgment, requires some clarification.

For example, assume that an industrial establishment is owned by a corporation. Generally speaking, the sale of any amount of stock issued by that corporation does not change ownership of the establishment.[23] As long as the corporation remains a distinct, viable entity, the corporation continues to own the establishment. ECRA, however, considers that the industrial establishment has undergone a change in ownership where the stock of the corporation is transferred, even though it is the corporate entity whose ownership has changed, not ownership of the establishment.

Smith: But shouldn't the Act apply to the transfer of stock as well as to a change in legal ownership?

Jones: Maybe so. But why should a full scale environmental review be undertaken, possibly at considerable expense and disruption to corporate activities, where the ownership of the establishment will remain the same and where the daily operations of the business will not change? Not only that, but the liability, if any, of the corporation for environmental remediation at this site will remain fully in place.[24]

Smith: I think you may be elevating the form of the transaction over its substance. Don't you think that ECRA should be applicable to sale of the assets of the corporation?

Jones: I agree that ECRA applies to "sale of the controlling share of the assets."[25] (By the way, I'm not certain there often is a "controlling" share of assets. Assets such as machinery and real estate, for example, are independent and may be transferred separately, without the existence of a "controlling share." Perhaps this part of the definitional test ought to be reexamined.) But, under current New Jersey law, sale of assets resulting in a continuity of business operations also results in the adoption of environmental liabilities by the successor corporation.[26] I concur with the applicability of ECRA where there will be no adoption of liabilities so as to force the departing corporation to remain fully responsible for its own pollution. But where the purchasing corporation is merely continuing the activities of its predecessor, or where it agrees to assume its predecessor's liabilities, I don't see the need to force immediate environmental remediation.

Smith: Aren't you forgetting that ECRA is intended to do more than merely insure that a responsible party will remain liable for environmental cleanup at some future time? The Act also helps to eliminate ecological contamination *before* the environment is irreparably harmed.

Jones: Look who is discussing environmental policy now. ECRA certainly does force an examination of environmental conditions where none might otherwise have occurred, thus ensuring timely discovery and prompt remediation of problems. But the sale of an industrial establishment has got to be the worst time for compelling an environmental review. The sale of a business often arises quickly and demands considerable business-related activities within a short period of time. Environmental remediation, by contrast, can be a lengthy process of investigation and removal. Remediation of groundwater pollution, for example, often takes years to achieve. ECRA imposes an extraordinary burden upon a business to undertake a full-scale environmental remedial program during a period already encumbered with activity and often with anxiety. I'm also afraid that we may not be doing justice to the environmental program itself when it is rushed by the exigencies of a business transaction.

Smith: Didn't you tell me that implementation of cleanup could be deferred until after closing under certain circumstances? Anyway, please return to your criticism of the corporate transfer portion of ECRA.

Jones: Certainly. One of the more troublesome questions left unaddressed by ECRA and its implementing regulations[27] is the amount of stock of an industrial establishment that must be transferred to be considered a "change in ownership" under the Act. Although the phrase "controlling share" is used in ECRA to apply to assets, I think it probably was meant to be applicable to stock.

Under principles of corporate law a shareholder is considered "controlling" if, in actual practice, he has the ability to control corporate conduct according to his wishes.[28] In New Jersey, the ability to exercise control depends upon the provisions of the New Jersey Business

Corporation Act[29] and, more importantly, upon specific requirements of a company's certificate of incorporation and by-laws. A precise determination of corporate control and hence of ECRA applicability therefore can be made only with reference to individual corporate requirements. Control may also depend upon the particular question at hand. For example, a corporation's by-laws may provide for simple majority rule for certain actions and for a super-majority vote for other determinations.

Smith: Is there a working definition of "control" used by NJDEP in determining ECRA applicability?

Jones: In most cases the department asserts ECRA jurisdiction where ownership of at least 50 percent of stock is transferred, although the department has even claimed coverage where the largest shareholder, owning less than 50 percent of outstanding stock, transfers her shares. The 50 percent standard comports with portions of the federal tax and antitrust laws defining "control"[30] but does not always agree with certain other tax law provisions.[31] Also, control is more often achieved with a substantially reduced percentage of ownership in larger, publicly traded corporations than in smaller, privately held companies, adding additional uncertainty.

I agree with the department's current practice, though, and think the 50 percent standard is the most sensible and easiest to apply. Different standards of control for publicly traded and privately held corporations might be a workable alternative, as would use of a rebuttable presumption that a certain percentage of ownership results in control. By the way, Oscar, how would you treat a limited partnership for ECRA purposes?

Smith: A limited partnership poses a bit of a dilemma, since control and ownership are functionally and legally distinct.

Jones: Doesn't that prove the point I started to make earlier? Of what relevance to environmental conditions is the fact that the identity of limited partners or even general partners may change? Please don't argue that ECRA will prevent the creation of hazardous, abandoned sites which will require public monies to remedy; you've already pointed out that ECRA is not primarily concerned with ultimate liability.

Smith: When did I become the ECRA expert?

Jones: Then you'll admit that, at bottom, ECRA is no more than a convenient enforcement tool that arbitrarily applies as a triggering mechanism to the transfer of establishments. ECRA performs NJDEP's enforcement work by compelling establishments, upon transfer or closure, to confess all environmental sins and to agree to their investigation and remediation. Even assuming that forced self-disclosure is a laudable goal, which is a dubious proposition, why compel assessment at the time of transfer?

Smith: Surely you can't oppose giving the authorities all necessary assistance in environmental enforcement, particularly at an early stage. New Jersey is renowned for its pollution problems.

Jones: Yes, it is true that New Jersey has more sites on the National Priorities List than any other state.[32] It is also true that the statistics on ECRA cleanups are impressive, both in themselves and in comparison with other environmental enforcement programs.[33] And yes, it may also be said that seller benefits under the Act because an ECRA cleanup rarely, if ever, results in penalties for violation of environmental laws, whereas penalties will often accompany the same cleanup undertaken in response to an NJDEP enforcement action. Frankly, while we're singing ECRA's praises, I'm surprised you haven't yet pointed out the benefits the Act provides to purchasers of industrial properties.

Smith: I will. ECRA must be an extraordinarily effective consumer protection statute because it forces full environmental disclosure before sale. As you explained, a purchaser may even void the transfer if the transferor fails to comply with any provision of the Act. NJDEP also offers protection by voiding the transaction under more limited circumstances.

Jones: I don't quarrel with disclosure. Even without ECRA, you know, a transferor of real property in New Jersey may not fraudulently misrepresent or conceal adverse environmental conditions.[34] ECRA extends beyond this, however, and, in compelling investigation and remediation, dictates to the parties one of the business conditions of the transfer, i.e. that adverse environmental conditions will be fully remediated by the transferor. In my opinion, this aspect of ECRA improperly intrudes into the transactional relationship of the parties.

Smith: Nothing prevents the transferee from assuming all or a portion of ECRA costs as part of the terms of the transaction.

Jones: That is true in theory but not very likely in practice. Why should a purchaser defray costs of cleanup for problems clearly not of his making?

Smith: Precisely. ECRA rightfully compels the responsible party to bear the burden of remedial costs.

Jones: This is true where the current owner has been in possession throughout the life of the establishment. In that instance, the transferor has reaped the benefits of ownership and, as the party responsible for contamination, must also bear its burdens. But where the transferor has only acquired the facility recently, and was not the operator or owner while pollution occurred, it is indeed a harsh policy that places full responsibility for remediation of possibly decades of contamination upon the current owner.

Smith: Doesn't the transferor have a cause of action for remedial costs against previous owners?

Jones: Yes, a statutory action might be brought under the authority of the New Jersey Spill Act or CERCLA, the federal "Superfund" law. A common law cause of action, for example, might be based upon subrogation, fraudulent concealment of a latent defect, liability arising from the conduct of abnormally dangerous activities or an implied covenant warrantying the condition of the premises. Speaking of the common law, ECRA completely disrupts contract law principles pertaining to rescission and allows the trans-

feree to void the transfer if the transferor fails to comply with any provision of ECRA. The common law, by contrast, requires fraud, material misrepresentation or mistake before it will consider rescission of a real estate transaction.[35] If the transferor's omission is *de minimis*, causing no harm to the transferee, rescission will not lie under the common law of contract but, at least facially, it will be permitted by ECRA.

Smith: In our jurisdiction, a municipality may set aside a conveyance where subdivision approval has not been obtained. Is that the law in New Jersey and, if so, why isn't that voiding right analogous to the right granted by ECRA?

Jones: The New Jersey Land Use Law, under certain circumstances, does permit a municipality to institute an action to set aside a conveyance of real property if final subdivision approval has not been obtained.[36] But in that instance the action to void the transaction may be taken by the municipality, not by the transferee. In this sense, the voiding provision is analogous to the section of ECRA permitting NJDEP to void the transaction where the transferor has not filed a cleanup plan or negative declaration.

Smith: Does NJDEP's right to void the transaction trouble you?

Jones: Not in an absolute sense. Rescission by the government, as by the transferee, may make sense in a particularly egregious situation where, for example, a large industrial enterprise intentionally ignores ECRA and knowingly conceals from an unsophisticated purchaser the existence of latent and severe environmental contamination. Presumably rescission would be warranted in such a case both to protect the public from environmental contamination and the purchaser from a dishonest seller. Short of outrageous circumstances, however, NJDEP's use of its voiding remedy should be very narrowly circumscribed. In fact, to my knowledge, the department has never sought to rescind a transaction for failing to comply with ECRA. (Some say the threat of rescission is more effective unused!) Then, too, the mechanics of unraveling a complex corporate transaction no doubt would prove to be a substantial task. Perhaps a statute of limitations on a rescission action is in order here. Also, rescission might be avoided in certain cases by appointing a receiver to manage environmental remediation.

Smith: I'm getting tired, Nathan. Is there anything else I ought to consider when our Legislature proposes its own version of ECRA?[37]

Jones: May I suggest explicit inclusion of due process standards. New Jersey's ECRA is silent as to procedural safeguards. Certain determinations which NJDEP may make in the course of an ECRA review, such as the permissible levels of contamination which may remain on site, can result in significant monetary expenditures. Isn't this the determination of a property right which entitles a transferor to an administrative hearing?[38]

Smith: Hold it. I'm certainly not a constitutional or administrative lawyer. But I thought ECRA requires NJDEP to establish minimum standards necessary for detoxification of soil, groundwater and surface water.[39]

Jones: It does, but the department has not yet formally promulgated any minimum standards and has been proceeding on a case-by-case basis. Negotiations with NJDEP over the extent of cleanup are helpful but do not provide the same safeguards as would a formal administrative proceeding. (Pause) Can you excuse me? I must attend to another out-of-state attorney who is exercised over ECRA.

Smith: You've given me much to consider, Nathan.

Jones: Welcome to New Jersey, Oscar!

Dennis J. Krumholz

Dennis J. Krumholz is in practice with Riker, Danzig, Scherer, Hyland & Perretti, in Morristown and Newark. He is chairman of the Essex County Bar Association Environmental Law Committee and a director of the State Bar Association's Environmental Law Section. Mr. Krumholz also sits on the ECRA Industrial Advisory Board of NJDEP. This is his first play.

Footnotes

1. A-1231; *P.L.* 1983, *c.* 330; N.J.S.A. 13:1K-6 *et seq.*
2. *N.J.S.A.* 13:1K-16. Unless otherwise indicated, all section references herein shall be to *N.J.S.A.* 13:1K-6 *et seq.*
3. §8(f); N.J.A.C. 7:1-3.4(a)(1).
4. §9.
5. §9(c).
6. §11(b).
7. NJDEP has informally developed an Administrative Consent Order ("ACO") mechanism. This widely used tool enables the parties to close a transaction in advance of the fulfillment of statutory requirements where economic and other circumstances so require. In all but one ACO entered into to date NJDEP has specifically reserved its voiding rights as provided in §13(b) of the Act. Many parties, especially lending institutions, are unwilling to close title on this basis since the department's outstanding voiding right places a cloud upon title until a cleanup plan is approved.
8. §13(a).
9. §13(b).
10. §13(c).
11. Author's interview with Senator Lesniak, June 12, 1985 (the "Interview").
12. *Id.*
13. *N.J.S.A.* 34:5A-1 *et seq.* The Right to Know Act was declared unconstitutional on January 3, 1985 as it affects employers in the manufacturing sector (SIC Codes 20-39). *New Jersey State Chamber of Commerce, et al. v. Hughey, etc., et al.*, Civil Action No. 84-3255 (D.C.N.J.). On October 10, 1985 the Third Circuit Court of Appeals reversed the District Court opinion insofar as the lower court had declared identification and reporting of environmental hazards invalid. *New Jersey State Chamber of Commerce, et al. v. Hughey, etc., et al.*, Nos. 85-5087, 5088 & 5095 (3rd Cir. 1985).
14. *State, Dep't. of Environ. Protect. v. Ventron Corp.*, 94 N.J. 473 (1983).
15. Interview. For a more detailed discussion of the genesis of ECRA see Battista, "The Environmental Cleanup Responsibility Act (ECRA): New Accountability for Industrial Landowners in New

Jersey," 8 Seton Hall Legislative Journal 331 (1985).

16. The New Jersey Spill Compensation & Control Act, *N.J.S.A.* 58:10-23.11 *et seq.* ("Spill Act") and the federal Comprehensive Environmental Response Compensation & Liability Act of 1980, 42 U.S.C. §9601 *et seq.* ("CERCLA" or "Superfund") each provides for the governmental funding of cleanup at hazardous waste sites.

17. Standard Industrial Classification Manual, Executive Office of the President, Office of Management and Budget (1972). NJDEP anticipates exempting from ECRA jurisdiction in the spring of 1986 approximately 30 subgroups posing a lower risk to health and safety. *N.J.S.A.* 13:1K-8(f).

18. The federal Resource Conservation & Recovery Act, 42 U.S.C. §6901 *et seq.* ("RCRA"), for example, establishes specific requirements for facilities which, among other things, generate (i.e., produce) hazardous waste. RCRA generator requirements are applicable only to those facilities which generate at least 100 kilograms per month of hazardous waste. Perhaps this standard may be incorporated into ECRA jurisdictional requirements.

19. An "auxiliary unit," for example, is defined in the SIC as "an establishment primarily engaged in performing supporting services for other establishments of the same company. . . ." SIC Manual, Appendix A. These activities may include research and development laboratories, central warehouse and garages and sales offices. The SIC Manual classifies auxiliary establishments on the basis of the primary activity they serve. *Id.* A sales office heated by oil will fall within ECRA jurisdiction if, for example, it serves a chemical machinery company (SIC 35) but otherwise uses no hazardous materials.

20. *See* footnote 19. The SIC treats central administrative offices like auxiliary establishments, *i.e.* they are classified on the basis of the primary activity of the operating establishments they serve. An office building heated by oil may be covered by ECRA if it serves a clothing manufacturer; the same building would be exempt if it served a mining establishment. Note, however, that ECRA Policy Manual No. 8 dated November 25, 1985 eliminates central administrative offices from ECRA jurisdiction unless they are physically located on the site of the operating establishments they serve.

21. *See*, for example, drafts dated March 15, 1982 and May 3, 1982.

22. §8(b).

23. Fletcher, Cyclopedia of Corporations, §31. *See Historic Smithville Develop. v. Chelsea Title and Guaranty Co.*, 184 N.J. Super. 282, 295 (Ch. Div. 1981) aff'd 190 N.J. Super. 567 (1983).

24. *See N.J. Transportation Dep't. v. PSC Resources, Inc.*, 175 N.J. Super. 447, 453 (Law Div. 1980).

25. §8(b).

26. *N.J. Transportation Dep't. v. PSC Resources, Inc., supra.*

27. Interim ECRA regulations were adopted at N.J.A.C. 7:1-3 *et seq.* These regulations will expire on March 6, 1986 at which time it is anticipated that final regulations will not be in place, necessitating an extension of the interm regulations for an additional year. A fee schedule attempting to reflect actual costs of processing ECRA applications has been adopted based upon the authority of §10(a) of ECRA. N.J.A.C. 7:1-4 *et seq.*

28. *See Kaplan v. Centex Corp.*, 284 A.2d 119 (Del. Ch. 1971).

29. *N.J.S.A.* 14A:1-1 *et seq.*

30. For example, §304 of the Internal Revenue Code ("Code"), applicable to transfers of stock by a shareholder of one corporation to a related corporation, defines "control" as ownership of at least fifty percent (50%) of the total combined voting power of all classes of stock entitled to vote, or ownership of stock whose value is at least equal to fifty percent (50%) of the total value of all classes of stock. Regulations adopted pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18(a) (Supp. 1985), at 16 C.F.R. §801.1(b) (1984), define "control" as fifty percent (50%) or more of outstanding voting securities of an issuer or having contractual power to designate a majority of corporate directors.

31. For example, a control test of 80 percent is applicable to certain tax free transactions. Code §368(c).

32. Eighty-five New Jersey sites out of a total of 541 sites were listed as of October 1, 1985 on the National Priorities List, a ranking of the most toxic sites nationwide. See 42 U.S.C. §9605(8)(B). Michigan ranks second with 47 sites. Over 52 million Superfund dollars have been dedicated to New Jersey through 1984; Missouri is next with a commitment of $39 million.

33. As of July, 1985, 150 ECRA cleanup projects were underway as compared with a total of 225 additional cleanup projects in progress from all other NJDEP enforcement programs combined. NJDEP Press Package, July 24, 1985. As of January 15, 1986, NJDEP was handling or had completed 1316 cases, had inspected 900 sites and had approved 484 negative declarations. Cleanup had been completed on 234 sites. Anthony J. McMahon, Chief, Bureau of Industrial Site Evaluation, NJDEP, to meeting of ECRA Industrial Advisory Board, January 15, 1986.

34. *State, Dep't. of Environ. Protect. v. Ventron Corp., supra.*

35. 8A *Thompson on Real Property* §4465 (1963); *Norton v. Poplos*, 443 A.2d 1 (Del. Supr. 1982).

36. *N.J.S.A.* 40:55D-55. *See Pasaro Builders, Inc. v. Piscataway Township*, 184 N.J. Super. 344 (App. Div. 1982), certif. granted 91 N.J. 278 (1982), appeal dismissed 93 N.J. 267 (1983).

37. Maryland has considered and, to date, rejected legislation substantially identical to ECRA. Senate Bill No. 97, Introduced January 11, 1984. Connecticut enacted a bill similar to ECRA effective October 1, 1985. This law eliminates the SIC portion of the applicability test, closing an establishment as a jurisdictional trigger and, most notably, the rights of the environmental agency and transferee to void the transaction. Connecticut Public Act No. 85-568.

38. *See In Re North Jersey Dist. Water Supply Comm'n.*, 175 N.J. Super. 167, 203 (App. Div. 1980); N.J.S.A. 52:14B-9(a).

39. §10(a).