



TRANSACTION-TRIGGERED ENVIRONMENTAL LAWS AND TRANSFER NOTICE LAWS

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I. Current Transaction-Triggered Environmental Laws

A. (a) New Jersey ISRA: Industrial Site Recovery Act, N.J. Stat. Ann. §13:1K-6 et seq.

[Original legislation, Environmental Cleanup Responsibility Act ("ECRA"), enacted in 1983 and amended in 1991; reform ISRA legislation enacted in 1993 and 1997; related Brownfield legislation enacted in 1993, 1997 and 2001; amended in 2003 and 2007; further reforms pursuant to 2009 Site Remediation Reform Act.]

Rules and Guidance: N.J. Admin. Code tit. 7, §26B-1.1 et seq.

[Adopted in 1987; repealed and new rules adopted in 1997; amended in 1999, including model documents; readopted with amendments in 2003; amended rules on applicability adopted in 2004; amended in 2006, 2007 and 2008; special adopted repeals, new rules and amendments in 2009 pursuant to SRRA]; further amended October 3, 2011 and last amended May 7, 2012.]; DEP Guidance for the Issuance of Response Action Outcomes (January 26, 2010, last revised May 25, 2011).

Technical Requirements: N.J. Admin. Code tit. 7, §26E-1.1 et seq.

[Adopted in 1993; amended in 1997 and 1999; readopted with amendments, repeals and new rules in 2003; amended in 2005; amended and portions repealed in 2008; special adopted repeals, new rules and amendments in 2009 pursuant to SRRA; further amended October 3, 2011 and last amended May 7, 2012.]

Remediation Oversight ("ARRCS" rule): N.J. Admin. Code Tit. 7, §26C-1.1 et seq.

[Adopted in 1993; readopted with amendments in 1997; amended in 1999; readopted with amendments in 2003; amended in 2006 (pursuant to Grace Period Law, N.J.S.A. §13:1D-125 et seq., for correcting compliance deficiencies under ISRA and other DEP programs), 2007 and 2008; special adopted repeal and new rules in 2009 pursuant to SRRA; further amended October 3, 2011 and last amended May 7, 2012.]

Groundwater Quality Standards: N.J. Admin. Code tit. 7, §9-C-1.1 et seq.

[Adopted in 1978; repealed and new rules adopted in 1993; readopted and recodified (as N.J. Admin. Code tit. 7, §9C) with amendments in 2005, 2007 and 2008; special adopted amendments in 2009 pursuant to SRRA; last amended July 22, 2012]; DEP Memorandum of February 5, 1997 on Safe Drinking Water Act changes and impact on standards; DEP November 1998 Guidance on Classification Exception Areas; DEP Guidance Document on Interim Specific and Generic Ground Water Quality Criteria (last revised December 20, 2002); DEP Memorandum of February 1, 2006 on "Sheen" Remediation Policy Initiative.

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Soil Remediation Standards: N.J. Admin. Code tit. 7, §26D-1.1 et seq. (40 N.J.R. 3187(c), June 2, 2008) [DEP Guidance Document for the Remediation of Contaminated Soils (November 18, 1998; soil cleanup criteria appendix last revised on May 12, 1999; draft soil remediation standards proposed by DEP on July 19, 2004); new soil remediation standards proposed on May 7, 2007, final soil remediation standards adopted on June 2, 2008; special adopted new rules and amendments in 2009 pursuant to SRRA; further amended October 3, 2011 and last amended May 7, 2012]; Soil Remediation Standard Guidance pursuant to June 2008 Soil Cleanup Criteria; DEP Guidance Document for the development of site-specific Impact to Ground Water Soil Remediation Standards (December 2008, last updated January 25, 2009); DEP Guidance Document for the phase-in of new petroleum hydrocarbon protocol (November 12, 2009, last updated August 9, 2010); DEP Guidance Document for the Chromium Soil Cleanup Criteria (September 2008, revised April 2010); Historic Pesticide Contamination Task Force Findings and Recommendations (March 1999); and DEP Presumptive and Alternative Remedy Technical Guidance (issued July 22, 2011).

DEP Vapor Intrusion Guidance: Drafted in June 2005; finalized in October 2005; updated screening level tables and new volatile organic air standing methodology issued March 2007. Amended March 2009 and last amended January 13, 2012.

Administrative Fees: N.J. Admin Code Tit. 7, §26B-8.1 et seq. and N.J. Admin Code Tit. 7, §26C- 4 et seq.

1. Legislative Purpose

- To impose preconditions on the occurrence of particular events in the real estate and business world, including closure of industrial operations, transfers of real estate where such operations are located and transfers of companies owning or operating such real estate.
- Law mandates that subject parties undertake environmental audits at the time of targeted business and real estate events and requires that remedial plans be developed should contamination be found. Transactions may not be closed until the state environmental agency, the New Jersey Department of Environmental Protection ("DEP"), either approves of site conditions or approves a cleanup plan. Cleanups must be financially assured.
- With a new Licensed Site Remediation Professional ("LSRP") program having been established by DEP pursuant to the Site Remediation Reform Act ("SRRA," see overview above), ISRA-subject parties are now proceeding under the oversight of an LSRP rather than DEP, unless one of the exceptions apply pursuant to which DEP maintains or takes on direct oversight under SRRA.
- The LSRP program became fully effective on May 7, 2012.

2. Subject Parties

- Two-part test defines subject "industrial establishments":
 - a. Place of business, or real property where such a business is conducted, within particular groupings of the North American Industrial Classification System ("NAICS"); and

- b. Engaged in operations (on or after December 31, 1983) involving the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of defined hazardous substances and wastes above or below ground.

Note: From the inception of ECRA in 1983 until August 2003, applicability under part a. of the above test was determined by reference to particular groupings within the Standard Industrial Classification Manual ("SIC Manual") of the Executive Office of the President, Office of Management and the Budget; namely, major groups 22-39, 46-49 and 51 and 76.

The SIC Manual was conceived as a tool for measuring rates of development within American industry and commerce, and was first prepared prior to the modern environmental legislation without any consideration as to whether a particular business was a user or producer of hazardous substances or wastes. In delineating industries subject to ISRA, the statute goes no further than to specify the major groups covered. Most are within the manufacturing sector. Certain subgroups have been exempted by regulation.

As a result of NAFTA, the SIC system was replaced by the North American Industrial Classification System ("NAICS"). In August 2003, Assembly Bill 3648 was signed into law, requiring that DEP adopt regulations replacing ISRA subject NAICS codes. A.B. 3648 required that DEP seek to ensure that the universe of ISRA regulated businesses remains as consistent as practicable with previously subject businesses. See definition of "industrial establishments" at N.J.A.C. 7:26B-1.4 and the updated NAICS codes at Appendix C of N.J.A.C. 7:26B (revised May 7, 2012).

On August 15, 2003, DEP adopted a rule to implement the requirements of A.B. 3648, including a listing of applicable NAICS codes. See 36 N.J.R. 4298(c).

- The New Jersey definition of hazardous substances includes petroleum products, so that the use of heating oil alone satisfies part b. of the definition.
- Certain facilities subject to closure and post-closure requirements under laws such as the New Jersey Solid Waste Management Act ("SWMA") and the federal Solid Waste Disposal Act are specifically exempt from ISRA.

3. ISRA Triggers

- Triggering events are defined as closing, terminating or transferring of operations by the owner or operator of an industrial establishment.

- This includes the following events involving either the owner or operator of an industrial establishment or real property where such an establishment is located:
- a. Cessation of all or substantially all of the operations of an industrial establishment which involve the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes;
 - b. Changes in operations sufficient to change the primary NAICS number from a subject to a non-subject classification;
 - c. Temporary cessation of all or substantially all operations for a period of two years or more;
 - d. Shutdown of operations by judicial or agency action for health or safety reasons;
 - e. Termination of a lease term, unless the lease is renewed with no disruption in operations, or assignment of lease; or
 - f. ANY CHANGE IN OWNERSHIP of the industrial establishment (except for specifically exempted transactions), including:
 - i. Transfer of shares of a corporation which results in a change in the controlling interest of the owner or operator of an industrial establishment;
 - ii. Sale of stock in the form of a statutory merger or consolidation;
 - iii. Sale of more than 50% of assets within any five year period;
 - iv. Conveyance of the real property;
 - v. Execution of a lease for a term of 99 years or longer;
 - vi. Dissolution;
 - vii. Initiation of bankruptcy proceedings under Chapter 7 of the federal Bankruptcy Code, or filing of a plan of reorganization involving dissolution under Chapter 11 of the Code;
 - viii. Sale or transfer of a partnership interest that would reduce, by 10% or more, the assets available to clean up an industrial establishment; or
 - ix. Municipality's sale of a tax sale certificate, or its notice of intent to foreclose for failure to pay taxes, assessments and other municipal charges; in which case:

- (a) Acquisition of title by a municipality does not relieve the prior owner or operator of its ISRA compliance obligations;
- (b) Any ISRA cleanup costs incurred by a municipality will be a debt of the immediate past owners of the industrial establishment, which debt will constitute a non-priority lien against all property owned by the prior property owner;
- (c) When the municipality seeks to convey the property, it must notify prospective purchasers in writing that the property may be subject to ISRA and other New Jersey environmental laws; and
- (d) If the municipality undertakes a cleanup, it must obtain prior DEP approval of its plan pursuant to ISRA.

Note: Since the array of ISRA triggers includes the conveyance of real property, and given the legislative declaration of intent, it is implicit in the law that one who owns real estate where an unrelated business carries on a subject operation must proceed through ISRA when the real estate is to be sold or where any of the other triggering events concern the ownership entity alone. DEP has so interpreted and applied the law. Thus, where, for example, all of the shares of a Nebraska company that owns New Jersey industrial real estate are purchased by a California corporation in a transaction negotiated and consummated in Los Angeles, the transaction affects ownership of subject property and ISRA applies. The Nebraska corporation is considered the "owner" of an "industrial establishment" and DEP considers the "controlling interest" of that corporation to have changed.

4. ISRA Exemptions

-- Specific statutory exemptions include:

- a. Corporate reorganization not substantially affecting ownership, which is narrowly defined by DEP regulations as a restructuring or reincorporation which does not diminish the availability of cleanup funds, or diminish DEP's ability to reach those funds, or diminish the company's ability to clean up its New Jersey sites;
- b. Transfer of shares or assets among entities under common ownership, where the net worth of the owner or operator is not diminished by more than 10% or where an equal or greater amount in cleanup funds is available after the transaction;
- c. Transactions involving stock or assets of indirect owners where indirect owner's assets would not have been available for cleanup if the transaction had not occurred;

- d. Transfer of an industrial establishment by devise or intestate succession;
- e. Transfer of an industrial establishment where the transferor is the sibling, spouse, child, parent, grandparent, child of a sibling, or sibling of the parent of the transferee;
- f. Execution of mortgage, filing of lien and granting of security interest;
- g. Granting or termination of easement or license; and
- h. Transfer through condemnation proceedings.

5. ISRA Process

- A subject party must commence the ISRA administrative review process within five calendar days of triggering events such as:
 - a. Execution of a sale agreement;
 - b. Closure of an industrial operation or public release of anticipated closure, whichever occurs first; or
 - c. Termination of a lease term or notice of termination, whichever occurs first.
- Initial notice must contain basic information as to the applicant and its authorized agent, the ISRA trigger and the nature of the proposed transaction. Subject party must submit a completed General Information Notice (GIN), with required information including site identification information including site identification number, current property owner identification and contact information, current business operator identification and contact information, the applicable fees and written authorization to provide access.
- Additional notice provisions include:
- Owner or operator may withdraw initial notice if it determines that none of the listed transactional events will occur.
- Owner of operator closing operations is to amend its GIN for any subsequent transactional event that occurs prior to issuance of a final remediation document or the LSRP's certification of a Remedial Action Workplan (see below).
- Subsequent tasks must then be undertaken as necessary pursuant to a four-phase procedural scheme:
 - a. Preliminary Assessment: a first phase process involving identification of areas of potential environmental concern; hazardous substance and waste use, generation, storage, disposal and discharge history; cleanup history; current and historical documentation;

- b. Site Investigation: a second phase process of data collection, environmental sampling, documentation and evaluation where warranted due to site history;
- c. Remedial Investigation: a third phase process where contamination has been found and it is necessary to delineate the nature and extent of the problem and develop a cleanup strategy;
- d. Remedial Action: the final phase, comprising all activities necessary to address and resolve the contamination.

-- With SRRA enacted and the LSRP program implemented:

-- The initial notice of the ISRA trigger, including the description of the anticipated transaction or cessation of operations, is still to be provided to DEP by the owner or operator of the industrial establishment under existing regulatory timeframes.

-- The balance of the ISRA program requirements are to be submitted by the LSRP.

-- In ISRA cases under DEP oversight, where complete submissions have been made to DEP, including details of any remedial action, and DEP determines that further remediation is required, those further activities may be performed using an LSRP.

-- Parties under DEP oversight by November 4, 2009 for existing cases had until May 7, 2012 (three years after implementation of SRRA) to switch over to the LSRP program, provided they did not fall within one of the exceptions, and further provided that if a penalty became due on a remediation, or DEP issued a final order on a remediation, or an uncontested stipulated penalty was due, then DEP may require that the matter be switched over to the LSRP program at any time.

-- Transactions may not be completed until the following has been accomplished:

a. For ISRA submissions prior to implementation of the LSRP program:

i. The applicant completed all required work, submitted a "negative declaration" that there have been no discharges or that all contamination has been cleaned up to DEP standards, and received a final sign-off from DEP known as a "No Further Action Letter"; or

ii. The applicant received DEP approval of a Remedial Action Workplan ("RAW") and established a funding source such as a line of credit or self-guarantee to assure DEP of the applicant's financial ability to fund the cleanup; or

- iii. The applicant entered into a Remediation Agreement (a pre-SRRA form of consent order) with DEP, prior to completion of all ISRA obligations, pursuant to which the applicant undertook to proceed with whatever sampling and cleanup requirements are thereafter required by DEP and established and maintains a funding source to pay for any necessary cleanup.
 - b. Subsequent to enactment of SRRA and implementation of the LSRP program;
 - i. Rather than entering a Remediation Agreement with DEP, the subject party will close pursuant to an LSRP's Remediation Certification, which includes the LSRP's evaluation of the appropriate financial assurance and certification that the assurance has been established;
 - ii. Rather than awaiting DEP approval of a Remedial Action Workplan ("RAW"), an LSRP-certified RAW will suffice; and
 - iii. Rather than seeking a DEP NFA, whether as a pre-condition to closing or as a post-closing requirement, a subject party will conclude its ISRA requirements through an LSRP-issued Response Action Outcome ("RAO").
- For existing ISRA cases or cleanups over which DEP retained direct oversight under SRRA and until May 7, 2012, a negative declaration could have been submitted once the applicant established the environmental soundness of the subject property, and DEP had forty-five days to respond with either a requirement of further work or a "No Further Action Letter". If the case continued after May 7, 2012, the applicant had to engage an LSRP, and the case will be concluded with an RAO, not a negative declaration approval.
- ISRA provides a series of alternative, streamlined submission methods tailored to expedite the process in a variety of circumstances.
- Where DEP has or assumes direct oversight, work up to and through development of a Remedial Action Workplan may nonetheless be performed without prior DEP review and approval so long as work is compliant with DEP technical regulations.
- Once remediation has been completed at a site, or at a particular area of concern at a site, the LSRP issues an RAO.
- Copies of approved Negative Declarations, Remedial Action Workplans, Remediation Agreements, No Further Action letters, Response Action Outcomes or Remediation Certifications must be attached to sale agreements for affected property. If a contract has already been executed, then copies of the documents must be provided to all other parties to a transfer, specifically including buyers and lenders.

- In cases of landlord/tenant disputes, parties may petition DEP to review the lease provisions, and if DEP finds the clauses “clear” it will first require compliance by the party responsible under the lease terms.

6. Remediation Standards

- While soil cleanups were long guided by DEP’s guidance documents for the remediation of contaminated soils (referenced above), DEP was required by legislature to develop standards based on statutory benchmarks (for example, carcinogens in soil may not increase the cancer risk to humans by more than one in a million), and was further required to differentiate between stricter residential benchmarks and more relaxed industrial standards. Until the rules were adopted, DEP was proceeding upon its interim guidance documents.
- Draft soil remediation standards were then proposed in 2004, and in May 2007 a new rule proposal was published setting forth soil remediation standards, 39 N.J.R. 1574(a) (May 7, 2007). In June 2008, following public comment, new soil remediation standards were adopted and codified at N.J.A.C. § 7:26D (40 N.J.R. 3187(a), June 2, 2008.) The soil remediation standards replace DEP’s previously relied-upon soil cleanup criteria guidelines. N.J.A.C. §7:26D was further amended October 3, 2011 and last amended May 7, 2012.
- The new rule continues DEP’s methodology as to two categories of standards: residential direct contact and non-residential direct contact. However, DEP did not adopt the proposed numerical soil remediation standards for the third of the categories, impact to groundwater, indicating instead that further study is necessary. See N.J.A.C. 7:9C, last amended July 22, 2010, and N.J.A.C. 7:26D-2, last amended May 7, 2012.
- A series of guidance documents was issued in June 2008 to help remediating parties with the new soil remediation standards. DEP continues to require minimum impact to groundwater soil remediation standards on a site-by-site basis, using health-based groundwater quality criterion. A specific guidance document for groundwater impact standards was published in June 2008, and revised in December 2008 and January 2009.
- A number of the new soil remediation standards differ from the 1999 informal standards by more than an order of magnitude. The new standards also include additional contaminants that were not regulated under prior guidance. If either of these situations applies to a site that has been issued a No Further Action Letter, DEP has the authority to re-open the case and require further remediation notwithstanding prior approvals. A guidance document for order of magnitude evaluations was published in June 2008 and updated in August 2009. See N.J.A.C. 7:26D, last amended May 7, 2012.
- The soil remediation standards under the informal 1999 guidance may be applied to sites where remedial action workplans and remedial action reports are compliant with the Technical Requirements for Site

Remediation and are received by DEP by December 2, 2008. However, if the standard for a particular contaminant has been made more stringent by at least an order of magnitude or has not been previously regulated, the new remediation standards are to apply. For Technical Requirements for Site Remediation, see N.J.A.C. 7:26E, last amended May 7, 2012.

- In a response to urban renewal needs and problems, ISRA also requires that DEP develop special alternative standards for large areas of historical environmental contamination or historical fill. In the case of fill, there is a rebuttable presumption that DEP may not require cleanup or treatment to meet health risk or environmental standards. Instead, the emphasis is on engineering or institutional controls such as capping or a recorded document memorializing restrictions in future use.
- Such institutional or engineering control alternatives are available in other contexts where cost, time and effectiveness do not justify standard procedures. Institutional controls include deed notices, the purpose of which are to notify future owners and operators, and other affected parties, of particular environmental conditions at a property.
- As mandated by ISRA and the state's Brownfield Law, the new soil remediation standards set forth a procedure for applying for site-specific alternative soil remediation standards, N.J.A.C. §7:26D-7.1. The site-specific alternative soil remediation standards, N.J.A.C. §7:26D-7, were further amended October 3, 2011 and last amended May 7, 2012.
- A party performing a cleanup may: (a) clean up to unrestricted use standards, where no engineering or institutional controls are required; (b) clean up to limited restricted use standards, where only institutional controls, and not engineering controls, are required; or (c) clean up to restricted use standards, where both engineering and institutional controls are required to meet the established health risk or environmental standards.
- In addition to the categories of soil cleanup standards based on use, DEP also considers "risk based" corrective actions, allowing for even further flexibility.
- While there is a legislatively-declared preference for unrestricted use and limited restricted use remedial actions over restricted use actions, DEP may not disapprove a restricted use action so long as the proposal meets the health risk standards established by law. The choice is that of the party performing the cleanup.
- SRRA requires that for any remediations started a year after the May 7, 2009 enactment of the reform law where: (1) new construction is proposed for residential, child care or school use; or (2) there will be a change of use to residential, child care or school purposes, or to any other purpose involving use by a sensitive population (such as residences, schools, child care facilities, parks and playgrounds); DEP must require the use of:
 - a. an unrestricted use remedial action;

- b. a presumptive remedy; or
 - c. an alternative remedy.
- For any remediations started upon enactment of SRRA at a site to be used for residential, child care or school purposes, or by sensitive populations, DEP may require use of an unrestricted use remedial action or a presumptive remedy.
 - SRRA directs DEP to establish presumptive remedies; that is, remedial actions; for use at residential, child care and school sites.
 - DEP is to base presumptive remedies on:
 - a. the historic use of the property;
 - b. the nature and extent of contamination there;
 - c. the future use of the site; and
 - d. other factors that DEP deems relevant.
 - Presumptive remedies may include institutional and engineering controls.
 - In the event the party conducting the remediation can demonstrate to DEP that both unrestricted use and presumptive remedies would be impractical due to site conditions, and that an alternative remedy would be equally protective, then an alternative remedy may be proposed for review and approval.
 - Under SRRA, DEP may authorize a party undertaking a remediation to divide the site into separate areas of concern, and to employ different remedial actions for each consistent with the planned future use of the property.
 - Under SRRA, construction of single family homes, schools and day care centers is prohibited on landfills where engineering controls are required for management of landfill gas or leachate.
 - SRRA empowers DEP to disapprove selection of a remedial action that would render the property unusable for future redevelopment or for recreational use.
 - DEP may also require treatment or removal of contamination that would pose an acute health or safety hazard upon failure of an engineering control.
 - Use of groundwater "classification exception areas" permits a flexible, relaxed approach to certain aquifer contamination problems, such as allowing for natural attenuation over time rather than requiring an expensive cleanup system.
 - DEP may not require cleanup beyond "natural background" levels, require cleanup of contamination originating from off-site, or require that

groundwater leaving a targeted site be cleaner than the water entering the property.

- Once a cleanup plan is approved by DEP or certified by an LSRP, DEP may not later impose a tougher benchmark unless its cleanup standards have grown stricter by at least an order of magnitude. As noted above, the recently promulgated soil remediation standards could lead to triggers of a re-opener where the remedy does not control exposure to the new remediation standard. Where engineering or institutional controls continue to be protective, notwithstanding a stricter remediation standard, no additional remediation should be necessary. See also the sections below on Covenants Not to Sue and Liability Protection.

7. Public Notification

- In January 2007, the legislature amended several of New Jersey's remedial programs by way of S.B. 2261, as amended by A.B. 3104 dated June 29, 2012.
- Among other things, the bill amended ISRA by requiring that when ISRA applicants file ISRA General Information Submissions, proposed Negative Declarations, proposed Remedial Action Workplans or Remediation Agreement applications, notice must be given to the relevant municipality, and that upon request from the municipality, the submission information be promptly provided to the municipality.
- In 2008, new "public outreach" rules became effective, which were designed to assure that local communities are aware of remediation projects in their areas.
- This supplements existing requirements that notices and information on remediation projects be provided to the applicable municipality.
- The rules require, among other things, that parties who undertake remedial investigations or activities must provide specific prior notifications and information to nearby property owners and tenants (with copies to local officials and DEP) as to the nature and source of the contamination and the intended investigatory or cleanup activities.
- If DEP requires further outreach, a forum must be provided for community response and interaction.
- The rules also require prompt notification of neighbors and the community as to discovery of off-site migration of contaminants, unless the migration is limited to the soil of one adjacent property, in which case the owner and tenants must be notified. If only historic fill is affected, no notice is required.

8. Covenants Not to Sue

- Under the 1997 ISRA and Brownfields reforms, any No Further Action Letter issued by DEP was to be accompanied by a DEP Covenant Not To Sue (“Covenant”).
- Under SRRA, once an LSRP issues an RAO to the person responsible for conducting the remediation, that person will now be deemed, by operation of law, to have received a Covenant Not to Sue from the State of New Jersey.
- SRRA initially provided that once licenses are issued to LSRPs, DEP will no longer issue Covenants Not to Sue, except that DEP may issue such a Covenant in conjunction with an NFA concerning an unregulated heating oil tank.
- Under a legislative amendment signed into law on January 17, 2010, the Covenant Not to Sue will also apply by operation of law where responsible persons receive No Further Action letters from DEP.
- The Covenant releases the person who undertook the remediation from civil liability to the State to perform further cleanup in any areas of concern addressed in the No Further Action Letter or the Response Action Outcome, or for natural resource damage, loss or restoration in all areas addressed.
- The Covenant protects:
 - a. the person who undertook the cleanup;
 - b. subsequent owners of the property;
 - c. subsequent tenants of the property; and
 - d. subsequent operators at the property.
- The Covenant does not protect dischargers, or those deemed "responsible" parties under the Spill Act, including those responsible solely due to property ownership, unless those parties can establish their innocence.
- The Covenant does not apply to any new discharge occurring after the issuance of the No Further Action Letter or the Response Action Outcome.
- The Covenant requires the recipient, or any subsequent owner, tenant or operator, to monitor and maintain any engineering or institutional controls, and to submit a biennial certification that the controls are being properly maintained and continue to be protective. Failure to do so may result in DEP revoking a Covenant it has issued as to the non-complying party.
- By operation of law where an LSRP issues a RAO, the Covenant is deemed to provide that:

- a. the Covenant is revoked if the engineering or institutional controls are not being maintained or are no longer in place (see below);
 - b. where the remediation involves use of engineering controls, the person benefiting from the use of the engineering controls may not make a claim against the State's Spill Fund or Sanitary Landfill Facility Contingency Fund ("Landfill Fund") for costs or damages concerning the property or its cleanup; and
 - c. where the remediation involves use of an institutional control only, claims against the Spill Fund or the Landfill Fund are not barred if DEP orders additional remediation after a validly-issued RAO, except that the Covenant is deemed to bar such a claim if DEP orders additional remediation in order to remove the institutional control.
- If DEP finds that the property no longer meets the conditions of the RAO, it must provide notice to the person responsible for maintaining compliance with the RAO, and DEP has the option of allowing a reasonable period of time for the person to achieve compliance with the RAO terms.
 - If the party fails to come into compliance in the required period of time, or if DEP does not allow such a period of time, then the Covenant Not to Sue is deemed to be revoked by operation of law.
 - Where a Covenant Not to Sue is revoked, liability for further remediation does not apply retroactively to a party for whom the Covenant remained effective during its ownership, tenancy or operation.

9. Exemption Procedures

Non-applicability determinations:

- Given the ambiguities in the statute and regulations, and the concerns of buyers and lenders, DEP issues letters of ISRA applicability and non-applicability to concerned applicants who seek confirmation as to whether they are or are not subject to the ISRA process. This procedure was at first ad hoc under ECRA (there was no provision for such applications in the law) and is now regulated under ISRA. Applicants fill out a standardized form, append any necessary explanatory material describing either the operation itself or the proposed transaction, and receive from the DEP a determination as to whether or not the business or transaction described is subject to ISRA.
- Due to the continuing high volume of non-applicability applications for places of business specifically exempted by ISRA and its regulations, DEP announced a new policy in April 2004 that it would no longer process certain non-applicability submissions for properties and transactions that are clearly not subject to ISRA. These include mortgage and loan refinancing, construction loans, gas station and dry cleaner operations, and retail stores other than print shops.

- On April 30, 2008, DEP announced that its Site Remediation Program would discontinue the issuance of applicability determination pursuant to ISRA, citing budgetary and resource constraints. DEP has implemented that decision.

De minimis quantity exemptions:

- Through the years of ECRA, DEP developed a "de minimis quantity exemption" for otherwise subject businesses that used only small amounts of hazardous substances. However, the gauntlet was a difficult one, and involved accounting for use of hazardous substances through the entire history of a site.
- ISRA now provides that DEP will have to accept a snapshot of usage by the current owner or operator only, and use or generation of no more than 500 pounds or 55 gallons of any hazardous substance or waste (220 gallons for hydraulic and lubricating oils) at any given time during the operation will qualify the owner or operator for the exemption. See N.J.A.C. 7:26B-5.9, last amended May 7, 2012.
- See New Jersey Superior Court decision in Des Champs Laboratories, Inc. v. Robert Martin, Commissioner, New Jersey Department of Environmental Protection, 427 N.J. Super 84 (App. Div. 2012). The appeals court held that DEP could not impose conditions on a de minimis quantity exemption that are beyond its legislatively-delegated powers, such as by requiring that an applicant provide information on pre-existing environmental conditions at the site in question.
- Pending legislation was introduced in late 2012, following the Des Champs decision, to require that an applicant for a de minimis exemption certify as to no actual knowledge of contamination exceeding remediation standards. (AB 3367; SB 2332).

Limited conveyance exemption:

- An applicant may convey a portion of real property which is the site of an ISRA-subject industrial establishment, but only upon complying with ISRA as to the targeted portion of the property.
- The standard for the maximum allowable conveyance is that the sale price or market value of the real property to be conveyed, together with the diminution in value to the remaining real property (where the industrial establishment is or was located), must be no more than one-third of the total appraised value of the entire premises.
- This exemption has rarely been used. Among the reasons has been DEP's pre-ISRA requirement of an appraisal performed no more than sixty days prior to submission of the exemption request. Such appraisals are often costly. ISRA allows the use of appraisals which are up to one year old, and once granted exemptions are now good for up to three years.
- The certificate of limited conveyance is valid for three years from the date of issuance.

- The owner or operator submits an ISRA Alternate Compliance Application to DEP with the requisite information and application fee.

10. Fee-based Program

- Costs of DEP oversight, from initial submissions, sampling and remedial investigation through cleanup and post-cleanup monitoring, have been borne by the private sector.
- Small businesses are eligible for lower fees for certain stages of submissions.
- Initially, flat fees were imposed based on the type of submission and anticipated sampling or cleanup cost.
- Now, DEP has been using a fee structure based on "direct billing." While certain simple filings are still accompanied by flat fees, most full submissions are billed based on DEP's costs of review and response, including indirect program costs and expenses. See N.J.A.C. 7:26C-4 for Fees and Oversight Costs, last amended May 7, 2012.

11. ISRA Hammer: Violation and Penalty Provisions

Voiding provisions:

- Failure of a transferor to comply with ISRA renders a subject transaction voidable by the transferee, but only after the transferee provides notice of the failure to the transferor and affords the transferor a reasonable amount of time to comply.

Damages:

- Failure of a transferor to comply with ISRA entitles the transferee to recover damages from the transferor and renders the owner or operator of the subject industrial establishment strictly liable for all cleanup and removal costs and for all direct and indirect damages resulting from failure to implement a remedial action plan.

Fines and penalties:

- Any person who knowingly gives false information, causes false information to be given or fails to comply with ISRA is liable for fines of up to \$25,000 for the first violation and up to \$50,000 per day, per violation for the second and subsequent offenses. If the violation is of a continuing nature, each day it continues shall constitute an additional and separate offense
- Under the 2003 Oversight Rule amendments, new penalties were added for failure to remediate under a number of DEP programs, including ISRA.

- Under 2007 legislative changes pursuant to S.B. 2261, the fine and penalties provision was removed from N.J.S.A. 13:1K-13 and replaced with a new fines and penalties provision at N.J.S.A. 13:1K-13.1.

Personal liability of officers or managers:

- Any officer or management official who knowingly directs or authorizes violations of ISRA is personally liable for penalties under ISRA.

12. Grace Period Rules

- In August, 2005, DEP issued proposed rules covering grace periods to be accorded to applicants, under ISRA and other DEP programs, where DEP has determined deficiencies in the submissions and activities of applicants.
- The rules were adopted on August 15, 2006, 38 N.J.R. 3821(a).
- The rules set out circumstances in which DEP will determine compliance deficiencies, assess violations, and accord grace periods for correcting deficiencies pursuant to the state's Grace Period Law, and amend the ISRA rules as well as those covering DEP cleanup oversight, technical regulations, and the underground storage tank program.
- The rules set out the bases upon which DEP will identify violations as minor and non-minor, how penalties are assessed, how grace period extensions are to be granted, and how unresolved violations will be handled, and includes a penalty matrix.
- Base penalties range from \$10,000 for minor violations and from \$15,000 to \$20,000 for non-minor violations and can be assessed for each day that the violation continues. See N.J.A.C. 7:26C-9.5.
- The rules also amend the standard ISRA Remediation Agreement to reflect the new requirements and penalty provisions.

13. Other ISRA Highlights

- New Jersey's Brownfield law created a loan and grant program -- the Hazardous Discharge Site Remediation Fund -- for a range of eligible parties including ISRA applicants, those deemed responsible under the state's Spill Compensation and Control Act (the "Spill Act"), those who voluntarily undertake cleanups, and municipalities that wind up owning or holding contaminated properties of defaulting taxpayers. Outright grants are available to municipalities and to others who can establish that they acquired property pre-ECRA and that they were not themselves the dischargers of contaminants. Additional grants are available -- without regard to innocence -- to parties who implement a permanent remedy (one that does not employ engineering controls), or who use an innovative technology as part of the cleanup. Loans are not conditioned upon establishing innocence. In all cases, financial hardship must be proven. The legislature appropriated an initial sum of \$45 million for the fund, with an additional \$5 million available to DEP where responsible

parties default on their cleanup obligations. The fund has also been further replenished by subsequent legislative appropriations.

- ECRA required that where cleanup plans had been approved by DEP, the applicant was then obligated not only to fund the cleanup, but also to provide to the state a separate financial assurance in the highest anticipated cost of cleanup. Most applicants accomplished this objective by establishing collateralized letters of credit or surety bonds. Many parties were hard pressed, or unable, to come up with both the cleanup funds and the equivalent sum in financial assurances. The Brownfield Act eliminated the double burden, substituting instead a single "funding source," a line of credit or a funded trust that can be drawn upon as the cleanup proceeds, or, in the alternative, sufficient proof of financial wherewithal to qualify for a self-guaranty. SRRA also renewed the availability of letters of credit as a financial assurance mechanism. See discussion in SRRA overview above.

- There was no mechanism under ECRA for challenging DEP positions on sampling or cleanup. ISRA provides a process pursuant to which applicants may pursue expedited appeals of DEP determinations at successive levels of DEP management on a seven-day turnaround per level. DEP has also established procedures for expedited internal reviews of determinations that have been challenged by subject parties.

(b) New Jersey Private Well Testing Act, N.J. Stat. Ann. §58:12A-26 et seq. [Enacted in 2001, effective September 14, 2002; amended in 2003].

Rules: N.J. Admin. Code tit. 7, §9-E 1.1 et seq. [Adopted in 2002, amended and readopted 2008].

1. Legislative Purpose

- To precondition real estate property sales on testing of private potable water wells and written disclosure of test results to buyers.
- To require landlords to sample private potable water wells within 18 months after the effective date of the law (that is, by March 2004), to sample such wells at least once every five years afterward, and to provide written copies of test results to all tenants within 30 days of receipt.
- To require landlords to provide written copy of latest test results to new tenant of rental unit on such property.

2. Subject Parties and Properties

- Owners of real property for which the potable water supply is either:
 - a. a private well located on the property; or
 - b. a well that has less than 15 service connections or that does not regularly serve an average of at least 25 individuals daily at least 60 days per year.

3. Conditions on Sale and Lease of Real Property

- Sale agreements for subject properties must include a provision requiring well testing as a precondition to closing.
- Closing of title on subject property cannot occur until seller and buyer have reviewed written test results and have so certified in writing.
- Subject landlords must provide written copy of most recent test results to new tenants.
- Beginning in March 2004, subject landlords must sample wells once every five years, and must provide written copies of results to all tenants within 30 days of receipt.

4. Well Sampling Requirements

- Water samples have to be analyzed by a state certified laboratory for at least the following parameters: bacteria (total coliform), nitrates, iron, manganese, pH, volatile organic substances for which maximum contaminant levels have been established under the state Safe Drinking Water Act, lead, and -- if DEP finds sufficient number of certified laboratories able to perform test -- radium.
- DEP may require additional parameters specific to county or area of county, and may exclude specific parameters by county or smaller area. (Rules add certain additional parameters for particular counties).
- Current regulations, as amended and adopted pursuant to N.J.A.C. 7:9E-2 in February 2008, provide state-wide criteria as well as county-specific criteria.
- DEP is also to establish maximum time period for which test results are to remain valid for disclosure purposes. (Rules set one year limitation for all parameters except for coliform, to which a six month limit applies.)
- Lab results must include comparison of results to maximum contaminant levels or other applicable water quality standard, on a standardized form to be developed by DEP.
- Pursuant to a proposed rule published in March 2009 in the New Jersey Register at 41 N.J.R. 1128, DEP proposed amendments to the Private Well Testing Act Rules to include perchlorate among the sampling parameters. Under the proposal, laboratories would have been required to inform the test requester and local health authority within 24 hours when perchlorate exceeds the maximum contaminant level of five micrograms per liter established by the proposed rule. This rule was not adopted.

5. Laboratory, DEP and County Disclosure Requirements

- Lab is obligated, within five days after completion of tests, to submit test results to DEP, but lab may not release results to parties other than applicable seller, buyer or landlord unless authorized by one of those parties or DEP, or by court order.
- DEP is obligated, within five days after receiving report of any water test failure, to report failure to applicable county authorities.
- County authorities may then, at their own discretion, issue general notices to property owners with private wells in vicinity, suggesting sampling for parameters at issue, but may not identify private well in question.

6. Five Year Report

- In July 2008, DEP issued a report as to the impact and effectiveness of the law.

- The report documents that approximately 13% of the wells tested showed drinking water contaminants in excess of primary drinking water standards.
- Other than lead, the most prevalent exceedences were naturally occurring substances such as arsenic.
- The study also concluded that lead levels were typically found where taps had not been flushed, and that high lead concentrations were typically a consequence of plumbing.

B. Iowa Environmental Quality Act, Iowa Code Ann. §455B.430 [Enacted in 1984; amended in 1986, 1990 and 1991].

Regulations: Iowa Admin. Code R. §567-148.1 *et seq.* (§567-148.6(5) pertains specifically to transfers) [Adopted in 1992; rescinded in 2012]. [See also Iowa Code Ann. §455B.426 as to registry of disposal sites discussed below].

1. Legislative Purpose

- To precondition sale, conveyance or transfer of title to a hazardous waste or hazardous substance disposal site upon obtaining written approval of the state.
- In 2012, Iowa DNR rescinded §567-Chapter 148, as a regulatory process was no longer needed for placing new sites on the Registry.

2. Subject Parties

- Transferors of real property listed in the state registry of hazardous waste or hazardous substance disposal sites.

Note: Pursuant to 2011 amendments in Iowa Code Ann. §455B.426 (enacted 2011, effective July 1, 2011), no additional sites are being placed on the registry, as Iowa has adopted the Uniform Environmental Covenants Act (see below and see also the materials below on Institutional Controls). Sites currently in the registry may be removed upon execution of an environmental covenant, and once there are no longer any sites listed in the registry, repeal of the registry requirements is to be recommended by the Iowa Department of Natural Resources. Thus, while the transfer law remains in effect, it too, will eventually become moot.

3. Trigger

- Prior to sale, conveyance or transfer of title to a disposal site in the registry, the transferor must notify the Iowa Department of Natural Resources ("DNR"), of its intent to transfer.
- The DNR must respond to a request for a change in ownership within thirty days of receipt of the transferor's notification.
- Decisions by the DNR may be appealed.

4. Violation and Penalty Provisions

- If the DNR believes that §455B.430 has been violated, or is in imminent danger of being violated, the agency may institute an action for injunctive relief and for assessment of a maximum penalty of \$1,000 per day of the violation.

- C. (a) **Connecticut “Transfer Act,” Conn. Gen. Stat. Ann. §§22a-134 to -134e, 134h, and -134i**
[Enacted in 1985; amended in 1987, 1990, 1993, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2003, 2005, 2006, 2007, 2009 and 2012].
1. Legislative Purposes
- Law requires that prior to the transfer of certain business establishments, transferors must certify to transferees that subject real property is environmentally sound. The certification must thereafter be filed with the state Department of Energy & Environmental Protection ("DEEP"). If the transferor is unable to certify that the property is environmentally sound, then a party associated with the transfer must, prior to the transfer, prepare and sign an agreement certifying either that: (1) the property is contaminated or its environmental condition is unknown, and accept responsibility for investigating and remediating the land; or (2) the property is contaminated and has been remediated except for post-remediation monitoring, and agree to take such further action as may be necessary to monitor or remediate the land.
 - Law provides that Connecticut's Super Lien may not be imposed against property occupied by a service station if the transferee of real property has received certification from the transferor documenting the acceptable environmental quality and management of the site.
2. Subject Parties
- Subject "establishments" are any real properties, or business operations, at which:
 - a. On or after November 19, 1980 there was generated, except as the result of remediation activities, more than 100 kilograms of hazardous wastes in any one month;
 - b. Hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated, transported or disposed of;
 - c. The process of dry cleaning was conducted on or after May 1, 1967;
 - d. Furniture stripping was conducted on or after May 1, 1967; or
 - e. A vehicle body repair facility was located on or after May 1, 1967.
 - "Service stations", while specifically exempt from the compliance requirements of the Transfer Act, are defined as retail operations involving resale of motor vehicle fuel for purposes of the Super Lien safe harbor discussed below.
 - A 2003 amendment (P.A. 03-218; S.H.B. 6402) allows parties appointed by a state court to sell or convey property, and bankruptcy trustees, to convey properties without complying with the Transfer Act.

- There is no reference to SIC or NAICS codes.
- Original provisions of the law applied only to the class of establishments defined in 2.a. and b. above, did not provide the November 19, 1980 cutoff date, and did not provide a Super Lien safe harbor for certain transferees of property where service stations were located.

3. Transfer Act Triggers

- Requirements are triggered by any transaction or proceeding through which an "establishment" undergoes a CHANGE IN OWNERSHIP, except for:
 - a. Corporate reorganization not substantially affecting the ownership of the establishment, defined as implementation of a business plan to restructure a corporation through a merger, spin-off or other plan or reorganization under which the direct owner of the establishment does not change;
 - b. The transfer of stock, securities or other ownership interests representing less than 40% of the ownership of the entity that owns or operates the establishment;
 - c. The issuance of stock or other securities of an entity which owns or operates an establishment;
 - d. Any conveyance of an interest in an establishment where the transferor is the sibling, spouse, child, parent, grandparent, niece, nephew, aunt or uncle of the transferee;
 - e. Conveyance of a security interest including rights under a mortgage that comports with the state's secured lender liability exemption (Conn. Gen. Stat. Ann. §§22a-452f);
 - f. Conveyance or extinguishment of an easement;
 - g. Conveyance of an establishment through a foreclosure, foreclosure of a municipal lien, or tax warrant sale;
 - h. Exercise of eminent domain or condemnation, or purchase by resolution of a municipality authorizing acquisition through eminent domain for a brownfield;
 - i. Subsequent transfer by a municipality that has foreclosed on the property, foreclosed municipal tax liens or otherwise acquired title to property for taxes due, provided the establishment is within the pilot program of the state Office of Brownfield Remediation and Development to identify brownfield opportunities in certain municipalities; or acquired title by exercise of eminent domain, condemnation or resolution of a municipality authorizing acquisition through eminent domain for a brownfield, provided that:

- i) The party acquiring the property from the municipality is not responsible for the contamination and is not affiliated with any person who is responsible for the contamination or with any person who is or was the owner or certifying party of the establishment, and
 - ii) On or before the date of acquisition from the municipality, such party or municipality enters and remains in DEEP's voluntary remediation program, and remains in compliance with schedules and approvals.
- j. Conveyance of a deed in lieu of foreclosure to a lender who qualifies under the state's secured lender liability exemption;
- k. Conveyance, assignment, execution or termination of a lease for a period of less than ninety-nine years, including options for extensions of such period, or any other terms that extend the leasehold for a total of less than ninety-nine years;
- l. Any change in ownership approved by a probate court;
- m. Devolution of title to a surviving joint tenant, or to a trustee, executor, or administrator under the terms of a testamentary trust or will, or by intestate succession;
- n. Any conveyance of a portion of a parcel upon which portion no establishment is or has been located and upon which there has not occurred a discharge, provided either that the area of the portion is not greater than fifty percent of the area of the entire parcel or that written notice of the proposed conveyance and an Environmental Condition Assessment Form ("ECAF") for such parcel is provided to DEEP sixty days prior to the conveyance (see Section 4 below as to ECAF);
- o. Conveyance of a service station;
- p. Conveyance of an establishment that was developed solely for residential use prior to July 1, 1997, so long as the residential use has not changed;
- q. Conveyance of an establishment to any entity created or operating under chapter 130 or 132 of the state's urban redevelopment law, or to an urban rehabilitation agency, or to a municipality in connection with a development project, or to the Connecticut Development Authority or any of its subsidiaries;
- r. Conveyance of a parcel in connection with the state's convention center and stadium project in Hartford pursuant to Public Act 99-241;
- s. Conversion of general or limited partnership to limited liability company (but see Note 1 below);

- t. Transfer of property from one general partnership to another, where all of the general partners of the transferor are also general partners of the transferee (but see Note 1 below);
- u. Transfer of property from a general partnership to a limited liability company, where all of the general partners of the transferor are also members of the transferee;
- v. Conveyance of an interest in an establishment to a trustee of an inter vivo trust created by the transferor solely for the benefit of one or more of the sibling, spouse, parent, grandchild, child of a sibling or sibling of a parent of the transferor;
- w. Acquisition of an establishment by any governmental or quasi-governmental condemning authority;
- x. Conveyance of any property or operation that would qualify as an establishment solely as a result of activities as a universal waste handler or universal waste transfer facility, provided that such activities have not resulted in a discharge of universal wastes (with universal waste defined as certain batteries, pesticides, thermostats, lamps and used electronics);
- y. Conveyance of a unit in a residential common interest community, provided that where an establishment is subject to remediation within the community, the declarant for the community is a certifying party under the Transfer Act and has provided an acceptable financial assurance to DEEP;
- z. Acquisition of a site that is in the state's abandoned brownfield cleanup program, and all subsequent transfers, provided that the cleanup is proceeding in accordance with law;
- aa. Transfer of title from a bankruptcy court or a municipality to a nonprofit organization;
- bb. Acquisition of a site in the state's brownfield remediation and revitalization program, and all subsequent transfers, provided that the site is in compliance with the brownfield investigation and remediation schedule, and otherwise in compliance with the brownfield program;
- cc. Conveyance of a property to effectuate development of a project certified and approved under the state's smart growth program, provided the property is investigated and remediated in compliance with law. (Effective January 1, 2014; see Note 1 below); or
- dd. Conveyance from the DOT to state Airport Authority of properties comprising Bradley International Airport and any other airport owned, operated or managed by the Connecticut Airport Authority.

Note 1: Pursuant to 2012 statutory changes, exceptions "s" and "t" above, pertaining to conversion of general or limited partnerships, and pertaining to certain transfers from one general partnership to another, are being deleted effective January 1, 2014; and exception "cc" on smart growth projects is being added effective January 1, 2014.

Note 2: The original definition of "transfer" closely tracked ECRA's "change of ownership" language while avoiding the class of ECRA triggers constituting cessation of operations, such as bankruptcy and termination of operations, absent a "transfer". Amendments to the definition have added a number of specific exemptions, many of which track ISRA exemptions from New Jersey's 1993 amendatory legislation.

4. Transfer Act Process

-- Prior to transferring an establishment, a transferor must submit one copy of the following forms, certifying to the transferee based on an appropriate investigation, that:

a. Form I

- i. there has been no discharge of hazardous substances or wastes at the property; or
- ii. there has been no discharge of hazardous wastes at the property, any discharge of hazardous substances has been remediated to the satisfaction of DEEP, with written verification from DEEP or a licensed environmental professional, and there has been no subsequent discharge; or,

b. Form II

- i. any pollution caused by a discharge of hazardous substances or wastes from the establishment has either:
 1. been cleaned up, with the cleanup approved in writing by a professional; or,
 2. it has been determined that no remediation is necessary, as approved by the DEEP or verified by a licensed environmental professional, and no subsequent discharge has occurred; or
- ii. a Form IV has already been submitted to DEEP, and no further discharge of hazardous substances or wastes has occurred (alternate Form II).

-- If the transferor cannot submit Form I or II, then an appropriate certifying party must, prior to the transfer, prepare and sign one of the following agreements certifying either that:

c. Form III

- i. there has been a discharge, or the environmental condition of the property is unknown, with the certifying party accepting responsibility for investigating and remediating pollution caused by the release ; or,

d. Form IV

- i. the discharge has been remediated except for post remediation monitoring or natural attenuation monitoring (with the concurrence of DEEP or a licensed environmental professional), with the certifying party agreeing to take responsibility for any further monitoring or remediation that may be required.

-- The "certifying party" can be any of the following persons: (i) in the case of a Form I or II, the transferor of the establishment; and (ii) in the case of a Form III or IV, a person "associated" with the transfer; namely, (a) the present or past owner of the establishment; (b) the owner of the real property on which the establishment is located; (c) the transferor, transferee, lender, guarantor or indemnitor; (d) the business entity that operates or operated the establishment; or (e) the state.

-- Within ten days after the transfer, the transferor must submit a copy of the relevant form to DEEP. Submission of a Form I, III or IV must be accompanied by a complete Environmental Condition Assessment Form ("ECAAF") prepared under the supervision of a licensed environmental professional, together with a certification that the information is correct and accurate to the certifying party's knowledge and belief.

-- Certifying parties to Forms I, III or IV must also, upon written request from DEEP, provide DEEP with copies of all technical plans, reports and other documentation as may be requested by DEEP.

-- Other than the Form I-IV certification process, there are no preconditions to transfer, no pre-transfer cleanup plan requirements, no pre-transfer state oversight, and consequently no potential state-instigated delays.

-- While there is no provision in the law for determinations by DEEP generally as to applicability or non-applicability of transactions to the Transfer Act, the 2001 amendments provide a procedure by which a party that has commenced the Transfer Act process by submission of a Form I, II, III or IV may petition DEEP to withdraw the submission on the basis that the transaction was not a subject transfer at the time of the submission.

-- Within ninety days after Form I and II submissions, DEEP must notify the transferor if DEEP deems the submission incomplete.

-- Within thirty days after receipt of a Form III or IV, DEEP must notify the certifying party whether the form is complete or incomplete.

-- Within seventy-five days of receipt of a complete Form III or IV, DEEP must notify the certifying party whether DEEP review and approval of remediation will be required, or whether DEEP will accept current

verification of the remediation in writing by a licensed environmental professional.

- Within seventy-five days of receipt of DEEP's determination that the Form III notice is complete, the certifying party must submit a schedule for investigation and remediation, including proposed completion dates, public notice, and submission of documentation to DEEP. The schedule must provide that investigation will be complete within two years of the DEEP notice date, that remediation will commence within three years of that date and that remediation will be completed within certain timeframes (see discussion of 2009 amendments below).
- 2007 amendments required that within two years of the certifying party's receipt of notice from DEEP that Form III or IV is complete, the certifying party must submit documentation that the investigation is complete, which must be verified in writing by a licensed environmental professional, unless DEEP has maintained review and approval authority. DEEP may extend the deadline. 2009 amendments limit this requirement to Form III submissions.
- 2007 amendments also required that within three years of receipt of notice from DEEP that Form III or IV is complete, the certifying party must document to DEEP that remediation has been initiated, with verification in writing by a licensed environmental professional unless DEEP has maintained review and approval authority. The certification must include a remedial plan verified by the licensed environmental professional. DEEP may extend the deadline. 2009 amendments limit this requirement to Form III submissions.
- 2007 amendments also provided that at any time in the process, DEEP may determine that DEEP review and approval is necessary.
- 2009 amendments establish new timeframes for completion of remedial actions where Form III or Form IV is submitted after October 1, 2009, as described below.
- 2009 amendments also establish a second type of verification that may be submitted by a licensed environmental professional in certain situations; namely, an "interim verification" that investigation and remediation have been completed except for long-term groundwater remediations that have begun but have not yet met remediation standards, in which case the professional must identify the long-term remedy and ongoing operation and maintenance requirements and must verify that there are no current exposure pathways that have not yet met remediation standards.
- For Form III or Form IV submissions made before October 1, 2009, the 2009 amendments do not impose new deadlines or provide for use of interim verifications.
- For Form III or Form IV submissions after October 1, 2009, the 2009 amendments provide that unless DEEP specifies a later date in writing, the certifying party must achieve remediation standards sufficient to

submit a final or interim verification within 8 years after receiving notice the DEEP has deemed the Form III or Form IV complete.

- DEEP may grant extensions of the new 8 year deadline on a satisfactory showing that the certifying party has made reasonable progress but that circumstances beyond the party's control have significantly delayed cleanup.
- Where interim verifications have been filed, the certifying party must continue to operate the long-term remedy in accordance with its plan and any DEEP approvals, continue to prevent exposure, and submit annual status reports.
- 2009 amendments also require that Form IV submissions include a schedule for groundwater monitoring and for recording an environmental land use restriction as applicable. (See materials on Institutional Controls below.)
- The certifying party to a Form III or IV must publish notice of the remediation in a newspaper with substantial local circulation, notify the Director of Health of the municipality where the property is located of the remediation, maintain a sign visible from the highway stating "Environmental Cleanup in Progress at this Site" and providing a contact telephone number, and mail notice of the remediation to each owner of record of property which abuts the affected parcel.
- Where a certifying party has completed remediation at certain portions of an establishment while the balance of the establishment remains under remediation, the party may be deemed to have satisfied its remedial requirements for those portions of the establishment. Where DEEP is accepting verification from a professional, the certifying party may submit the professional's verification for the portion. Where DEEP review has been required, the certifying party may seek a determination from DEEP that the remediation is complete at portions of the establishment.
- Pursuant to 2007 amendments, and applicable to final verifications received by DEEP after October 1, 2007, DEEP may audit any verification that is submitted, except that DEEP may not audit a final verification of an entire establishment if three or more years have passed since DEEP received the final verification, unless:
 - a. DEEP has reason to believe that the applicant's submission was materially inaccurate or erroneous;
 - b. DEEP has issued an order to a party that has failed to comply with the Transfer Act;
 - c. requisite post-verification monitoring, or operation and maintenance requirements, were not undertaken;
 - d. a requisite land use restriction was not recorded;

- e. DEEP determines that there has been a violation of the Transfer Act; or
- f. DEEP determines that the remediation may have failed to prevent a substantial threat to public health or the environment.

-- Where a certifying party intends to transfer such a portion of the establishment before completion of all remediation at the establishment, DEEP must be notified within 30 days of the transfer.

-- Parties who commenced Form III or Form IV submissions prior to the 2001 amendments may petition DEEP to comply with the amended investigation and remediation requirements of the law.

Note: Pursuant to the 1999 amendments, DEEP was to promulgate regulations by January 2002 setting new standards for verifications by licensed environmental professionals. To date, such regulations have not been proposed.

5. Fees

-- The 1990 amendments to the Transfer Act first imposed fees upon transferors. In 1993, P.A. Act 277 amended the fee schedule concerning cleanup oversight. In 1995, P.A. 95-183 again amended the fee schedule. In 1996, P.A. 96-113 further amended the fee schedule for filing Form III and Form IV. In 1999, P.A. 99-225, effective October 1, 1999, exempted municipalities from Transfer Act fees where they acquire real estate at a tax sale.

-- In 2001, P.A.01-204 amended the fee provisions to provide that fees are payable by the certifying party.

-- Each filing must be accompanied by a payment form.

-- The following fees were implemented as a result of Section 406 Public Act 09-3, effective October 1, 2009;

-- Form I

The flat fee for filing Form I is \$375 and is due in full upon filing.

-- Form II

a. Except as provided in subparagraph (b) below, the fee for filing Form II is \$1,300 and is due in full upon filing.

b. The fee for filing Form II, required for a parcel for which DEEP has issued written approval of a remediation within three years of the transfer, is as follows:

<u>Remediation Costs</u>	<u>Fee</u>
Less than \$ 25,000	\$ 250
\$ 25,000 - \$ 49,999	\$ 1,750

\$ 50,000 - \$ 99,999	\$ 4,000
\$ 100,000 - \$499,999	\$18,250
\$ 500,000 - \$999,999	\$27,250
\$1,000,000 or greater	\$31,750

-- Form III

- a. The initial fee due upon filing is \$3,000.
- b. If a licensed environmental professional verifies the remediation, no subsequent fee is due.
- c. If DEEP approves the remediation, the subsequent fee is based on the remediation cost, and is due prior to final approval as follows:

<u>Remediation Costs</u>	<u>Fee</u>
Less than \$ 25,000	\$ 250
\$ 25,000 - \$ 49,999	\$ 1,750
\$ 50,000 - \$ 99,999	\$ 4,000
\$ 100,000 - \$ 499,999	\$ 18,250
\$ 500,000 - \$ 999,999	\$ 27,250
\$1,000,000 or greater	\$ 31,750

-- Form IV

- a. The initial fee due upon filing is \$3,000.
- b. If a licensed environmental professional verifies the remediation, no subsequent fee is due.
- c. The subsequent fee is based on the total cost of remediation, and is due prior to final approval as follows:

<u>Remediation Costs</u>	<u>Fee</u>
Less than \$49,999	\$ 250
\$ 50,000 - \$ 99,999	\$ 675
\$ 100,000 - \$ 499,999	\$ 7,750
\$ 500,000 - \$ 999,999	\$12,250
\$1,000,000 or greater	\$14,550

6. Transfer Act Hammer: Violation and Penalty Provisions

-- Damages:

- a. Failure of the transferor to comply with the Transfer Act entitles the transferee to recover damages from the transferor, and renders the transferor strictly liable for all remediation costs and for all direct and indirect damages.
- b. 2009 amendments provide that a recovery action must commence within six years after the later of: (1) the due date for

filing the appropriate transfer form, or (2) the actual filing date of the appropriate transfer form. This applies to any action for reimbursement or recovery of costs associated with investigation and remediation under the Transfer Act, as well as all direct and indirect damages, except for actions that were already final and no longer subject to appeal as of October 1, 2009.

- Fines and penalties:
 - a. Any person who violates any provision of the Transfer Act or its regulations is subject to civil penalties of up to \$25,000 per day, per violation, pursuant to the penalty and fines provisions of Connecticut's environmental statutes, Conn. Gen. Stat. Ann. §§22a-438.
 - b. Knowing violations subject the offender to fines of up to \$50,000 per violation, per day, and imprisonment for up to three years, with fines for subsequent convictions rising to a maximum of \$100,000 per violation, per day, and imprisonment for up to ten years.
 - c.- Any person who knowingly makes false statements or certifications in any filing, or falsifies or tampers with monitoring devices or information, is also subject to fine and imprisonment.
- DEEP may issue an order against any person who violates the Transfer Act, or request the attorney general to bring an action for such equitable relief as may be necessary to assure that the appropriate forms are filed and to prevent or abate any contamination at a subject site.
- Neither the state nor the transferee have a right under the Transfer Act to void a transaction.

7. Post-Compliance Exemption

- Where a Form I has already been filed, or where a Form II, III or IV has been filed and remediation has been completed and approved by DEEP or verified by a licensed environmental professional, and where subject activities have not been conducted since such time, then subsequent transfers are not subject to compliance with the Transfer Act.

8. Super Lien Safe Harbor for Service Stations

- A Connecticut state Super Lien (see section V.A.1. below) may not be imposed against real property where a service station has operated on or after May 1, 1967, provided a transferee of the real property has obtained a certification from the transferor establishing that:
 - a. The service station is in compliance with Connecticut underground storage tank regulations;
 - b. Either there have been no spills, or the spills have been cleaned up in accordance with state law and do not pose a risk; and,

- c. Any hazardous wastes, oils or petroleum liquids remaining on site are being properly managed.

9. Covenants Not to Sue

-- Discretionary Covenants with Owners and Prospective Purchasers:

- a. Where the DEEP has approved a written plan for remediation or final remedial action report, the DEEP may enter into a covenant not to sue with any owner or prospective purchaser who intends to redevelop the property for productive use, so long as the owner or prospective purchaser is not responsible for the contamination and is not affiliated with any person responsible for the contamination, and DEEP is satisfied that the covenant is in the public interest.
- b. Pursuant to 2007 amendments, DEEP may also provide a covenant not to sue to a party that has received DEEP approval for a brownfield investigation plan and remediation schedule.
- c. Where the successor to the original holder of a covenant not to sue requests, the DEEP may also extend the covenant to the successor so long as the required conditions in (a) above are met.
- d. A similar covenant may also be entered with any lending institution to which the prospective purchaser intends to convey a security interest, so long as the lending institution is not responsible for the contamination. The covenant would also be effective as to a successor in interest to the original lender.
- e. Any such covenant will only release DEEP claims for contamination prior to the effective date of the covenant.
- f. The covenant will not hold if:
 - i. The property is not remediated according to the written plan approved by the DEEP;
 - ii. DEEP finds substantial non-compliance with the plan and there has not been a good faith effort to substantially comply with it;
 - iii. The cleanup does not comply with state environmental standards as of the effective date of the covenant; or
 - iv. Any environmental land use restriction is not recorded in accordance with state law or there is a failure to comply with the provisions of such a restriction.
- g. The owner or prospective purchaser receiving a covenant not to sue must pay DEEP a fee equal to 3% of the value of the property, based on an appraisal as if it were clean. The fee is not required for a covenant issued to a successor in interest, for a covenant issued in connection with the remediation of

contaminated property which is deemed vital to the economic development of the state, or for a municipality, economic development agency or non-profit economic development corporation funded directly or indirectly by a municipality and the non-profit's officers and directors.

- h. The covenant may require post-remediation monitoring. The person obtaining the covenant must proceed with further remedial activities if post-remediation monitoring reveals that contaminants on site continue to be a threat to public health and the environment.
- i. The covenant will not preclude DEEP from requiring further remediation if DEEP determines that the covenant was based on information that the applicant knew or had reason to know was false and misleading.

-- Required Covenants with Owners, Prospective Purchasers and Lending Institutions:

- a. Where owners, prospective purchasers or lenders, and their respective environmental professionals, certify as to their plans, actions, and innocence of responsibility for contamination, the DEEP must enter covenants not to sue with such parties, as follows:
 - b. The DEEP is to enter into a covenant not to sue a prospective purchaser or owner of contaminated real property upon:
 - i. Certification by the owner or prospective purchaser that a detailed written plan for remediation of the property has been approved by the DEEP;
 - ii. Approval by the DEEP of a final remedial action report together with a certification from the applicant that no discharge has occurred after such approval;
 - iii. Approval by a licensed environmental professional of a detailed written plan for remediation;
 - iv. Verification by a licensed environmental professional that the property has been remediated, together with a certification from the applicant that no discharge has since occurred; or,
 - v. Approval by a licensed environmental professional of a final remedial action report, together with a certification from the applicant that no discharge has occurred since the date of approval.
- c. As an additional condition, DEEP may only enter into a covenant where the owner or prospective purchaser certifies that:

i. It will redevelop the property for productive use or continue its productive use;

ii. **It is not responsible for the contamination and is not affiliated with any person responsible for the contamination; and,**

iii. It has not established a facility or condition likely to contaminate.

d. **DEEP is also to enter similar covenants with any lending institution to which an owner conveys a security interest in such property, provided the lending institution certifies to DEEP that it is not responsible for the contamination or any likely contamination from existing facilities. The covenant would also be effective as to successors in interest to the original lender.**

e. **Any such covenant will only release DEEP claims for contamination prior to the effective date of the covenant.**

f. The covenant will not hold if:

i. The property is not remediated according to the plan submitted to DEEP;

ii. **DEEP finds substantial non-compliance with the plan and there has not been a good faith effort to substantially comply with it;**

iii. The cleanup does not comply with state environmental standards as of the effective date of the covenant; or

iv. Any required environmental use restriction is violated or not recorded in accordance with state law.

g. A covenant not to sue may provide for post-remediation monitoring. The person obtaining the covenant must proceed with further remedial activities if post-remediation monitoring reveals that contaminants on site continue to be a threat to public health and the environment.

h. **The covenant not to sue will not preclude the DEEP from requiring further remediation if:**

i. **The covenant was based on information that the applicant knew or had reason to know was false and misleading;**

ii. **New information confirms the existence of previously unknown contamination which occurred prior to the effective date of the covenant; or,**

- iii. The threat to human health or the environment exceeds an acceptable level at such property.
- i. DEEP must respond within forty-five days of receipt of all necessary submission documents and certifications.

(b) **Connecticut Act Concerning Termination of Certain Operations Regulated by DEEP, Conn. Gen. Stat. Ann. §22a-134g** [Enacted in 1999, effective October 1, 1999].

1. Legislative Process

-- To assure that businesses that use, produce, handle or store hazardous substances requiring state environmental permits -- but that are not otherwise regulated under the federal Resource Conservation and Recovery Act -- properly remove all regulated substances upon termination of operations.

2. Subject Parties and Facilities

-- Subject parties are owners and operators of facilities where there are businesses that produce, use, store or handle defined hazardous substances (including petroleum products and PCBs) requiring a permit from DEEP, but that are not otherwise regulated under RCRA.

3. Trigger

-- Termination of all business or other activities at a subject facility.

4. Process

-- By the date of termination, the owner or operator must file a notice with DEEP that includes information identifying an individual employed by the business who DEEP may contact concerning compliance with the law.

-- Within 90 days of termination, the owner or operator must:

- a. Submit to DEEP a list of all hazardous substances at the facility and in vessels there;
- b. Drain, remove or otherwise dispose of all hazardous substances in compliance with all laws;
- c. Post warning signs around any area of land where soils have been contaminated by hazardous substances; and
- d. Submit a certification to DEEP confirming whether the hazardous substances have been removed and disposed of in compliance with all laws.

-- Following receipt of the certification, DEEP is to conduct an inspection of the facility to determine whether the owner/operator has complied with the requirements of the law.

D. San Francisco Public Works Code, Article 20, §§1000-1014 and San Francisco Health Code, Article 22A, §§1220-1237 [Article 20 enacted in 1986 by Ordinance 253-86; amended in 1988 by Ordinance 348-88; certain sections repealed and reenacted as new Article 22A in 1999 by Ordinance 35-99; remaining sections amended in 1999 by Ordinance 35-99, §1227 amended in 2004 by Ordinance 303-04, §1237 amended in 2008 by Ordinance 150-08; amended by Ordinance 204-10 effective August 3, 2010].

1. Purpose of Ordinance

- To require building permit applicants to undertake site histories and soil sampling for hazardous wastes as a condition to issuance of certain permits.
- To require the cleanup of hazardous wastes prior to issuance of building permits if contamination is found.

2. Subject Parties and Sites

- Subject parties are applicants for building permits where the permit sought is for a construction project involving disturbance of at least fifty cubic yards of soil.
- Affected sites are those bayward of the high tide line, as well as any other sites designated by the Director of Public Health through regulations.
- The Director of Public Health may waive requirements of the Ordinance if an applicant proves that otherwise-subject property has continuously been zoned as residential since 1921 and there is no reason to believe that soils contain hazardous wastes.
- The Director of Public Health has the authority to require soil analysis at any construction site, bayward of the high tide line or not, if a building permit application has been made and the Director of Public Works suspects contaminants on the site.

3. Ordinance Process

- The applicant must submit a site history to the Director of Public Health for review. The site history must be prepared by a party with requisite experience in the field, and must indicate whether the site is on the National Priority List ("NPL") or is a California hazardous substance release site ("California List").
- Permit applicant must then undertake detailed sampling in line with specific sampling parameters outlined in the law.
- If no hazardous wastes are found, the Director of Public Health provides the applicant and the Director of Building Inspection with written notification that the applicant has complied with the Ordinance, and the building permit may then be considered.
- If the site is on the N.P.L. or the California List, the applicant must provide the Director of Public Health with a certification from the

appropriate state or federal agency that mitigation measures have been completed. The certification is binding on the Director of Public Health, who is then to provide the applicant and the Director of Building Inspection with written notification that the applicant has complied with the Ordinance. A building permit may then be considered.

-- **If hazardous wastes are found, and the property is not on the N.P.L. or the California List, then the applicant must submit a site mitigation report to the Director of Public Health. The report must be prepared and certified by a qualified professional and must either establish that no cleanup is necessary, or must propose a cleanup plan calculated to mitigate potential environmental risks.**

-- In the event the applicant submits a report concluding that no cleanup is necessary, the Director of Public Health must either accept or reject the conclusion. If the Director of Public Health accepts the applicant's conclusion, upon completion by the applicant of the final certification described below, the building permit may then be considered.

-- If cleanup is determined to be necessary by the qualified professional, the cleanup must proceed, and upon its completion the Director of Public Health must determine whether site mitigation is complete. If it is, then upon completion by the applicant of the final certification described below, the Director of Public Health must notify the Director of Building Inspection, and the building permit may then be considered.

-- Where the applicant has (a) provided the required proof of completion of an NPL or California List cleanup; (b) provided a site mitigation plan determining that no cleanup is necessary; or (c) provided acceptable proof of cleanup, then in order to complete the ordinance process, the applicant must certify to the city that the appropriate steps have been taken and that the applicant will remain liable for any failure to comply with the Ordinance.

4. Notification Requirement

-- Seller and seller's agents involved in the sale of any San Francisco real property must provide a copy of Ordinance 253-86 to buyers, and must obtain receipts from the buyers acknowledging the copies.

5. Fees

- An initial fee of \$501, for the first three hours of department review and consultation, is payable to the Department of Public Health upon filing a site history report.
- An additional fee of \$167 per hour is payable to the Department of Public Health for each hour of review or consultation in excess of three hours.

E. Oregon Environmental Cleanup Law, Or. Rev. Stat. §§465.200-260 and §465.900

[Enacted in 1987; amended in 1989, 1991, 1995, 2003 and 2009.]

Rules: Or. Admin. R. §340-122-0010 et seq. [Adopted in 1988; amended in 1989, 1990, 1991, 1992, 1997, 1998, 2000, 2002 and 2006].

1. Legislative Purpose

- To ensure that prior to transfer of ownership or operation of subject real property, transferors have disclosed to transferees knowledge of any releases of hazardous substances that occurred during the time of the transferor's ownership or operation.

2. Subject Parties and Property

- Subject owners and operators are those who owned, leased, controlled or exercised significant control over the operation of a "facility".
- Subject "facilities" include buildings, structures, installations, equipment, tanks, sites or areas where any hazardous substances have been deposited, stored, disposed of, placed or otherwise located, but only where a release has occurred or is threatened.

3. Trigger and Process

- Any owner or operator who has obtained actual knowledge of a release at its facility during the time the party was the owner or operator of the facility must disclose such knowledge to any transferee prior to transfer of ownership or operation.

4. Violation and Penalty Provisions

- Failure to disclose renders the non-disclosing owner or operator strictly liable for all remedial action costs incurred by the state or any other person, and for all damages for injury to or destruction of any natural resources caused by a non-disclosed release.
- Any person liable under the law who fails without sufficient cause to conduct a removal or remedial action required by the state environmental agency, the Oregon Department of Environmental Quality, is liable to the state for any remedial action costs of the state, treble punitive damages and for the state's reasonable legal expenses incurred in enforcing the law.
- Failure to comply also subjects violators to civil penalties of up to \$10,000 per day until December 31, 2010. Violations occurring on or after January 1, 2011, are subject to civil penalties of up to \$25,000 per day.

F. Indiana Responsible Property Transfer Law, Ind. Code §§13-25-3-1 to –15 [Enacted in 1989; amended in 1990; recodified in 1996; amended and portions repealed in 2006].

1. Legislative Purpose

- Law requires that prior to delineated transfers of subject real property, transferors must provide transferees and mortgage lenders with a disclosure document describing the environmental history and status of the property.
- Law generally tracks the original provisions of the Illinois Responsible Property Transfer Act that was enacted in 1988 but repealed in 2001 (see section II. A. of these materials below), but the 1990 Indiana amendments include substantive alterations from the Illinois model.
- The legislation applies to subject transactions after December 31, 1989.

2. Subject parties and transactions

- Subject party is the "transferor" of subject property.
- Subject transfers are the following conveyances of interests in subject real property:
 - a. Deed or other instrument of conveyance of title to property;
 - b. Lease of real property the term of which, considering all options that may be exercised, exceeds 40 years;
 - c. Assignment of more than 25% of the beneficial interest in a land trust;
 - d. Collateral assignment of a beneficial interest in a land trust;
 - e. Installment contract for the sale of property;
 - f. Mortgage or trust deed; or
 - g. Lease of any duration if it includes an option to purchase.
- Specific exemptions:
 - a. Deeds or trust documents which, without additional consideration, confirm, correct, modify, or supplement a deed or trust document previously recorded;
 - b. Deeds or trust documents which, without additional consideration, change title to property without changing beneficial interest;
 - c. Tax deeds or deeds from a county transferring property that the county received pursuant to a tax sale certificate;

- d. Instruments of release of interests in properties which are security for a debt or other obligation;
- e. Deeds of partition;
- f. Conveyances resulting from foreclosure of a mortgage or other lien;
- g. Easements;
- h. Conveyances of an interest in minerals, oil or gas, including leases;
- i. Conveyances by operation of law upon the death of a joint tenant with right of survivorship;
- j. Inheritance or devise;
- k. Deeds in lieu of foreclosure;
- l. UCC sales or other foreclosures of collateral assignments of beneficial interests in land trusts;
- m. Deeds that convey title pursuant to an installment contract for sale of property; or
- n. Deeds that convey title pursuant to exercise of a purchase option in a lease.

-- Subject real property:

Defined as any specific and identifiable parcel of real property, together with improvements, which has not already been subject to bonding or other financial assurances and thereafter released following compliance with applicable state laws, and which meets at least one of the following conditions:

- a. Contains one or more facilities subject to the reporting requirements of the federal Emergency Planning and Community Right-to-Know Act of 1986;
- b. Is the site of one or more underground storage tanks subject to registration under federal underground storage tank law; or
- c. Is listed on the CERCLA Information System ("CERCLIS").

-- "Transferee" is defined as: a buyer, mortgagee, grantee or tenant of real property; an assignee of a greater than 25% interest in a land trust; or in the case of a transfer to the trustee of a land trust, the owners of the beneficial interest in the land trust. The term includes prospective transferees.

3. Transfer Law Process

- For subject transfers after January 1, 1990 the transferor must, within 30 days prior to the transfer, deliver a disclosure document, in a form prescribed by the state environmental agency, the Indiana Department of Environmental Management ("IDEM") to:
 - a. The transferee; and
 - b. Any lender providing a loan to be secured by an interest in the property or by an assignment of beneficial interest in a land trust.
- Buyer of subject property who finances the purchase by way of a mortgage loan is not required to deliver a disclosure document to the mortgagee.
- The disclosure document must contain the information prescribed by the IDEM and required by the Transfer Law, including:
 - a. Notification of potential liabilities for ownership of real property;
 - b. A description of operations at the property which have involved the generation, manufacture, processing, transportation, treatment, storage or handling of hazardous substances and wastes and petroleum products;
 - c. The existence at the property of any operational or non-operational landfills, surface impoundments, waste piles, underground and above ground storage tanks, injection wells, septic systems, transfer stations and other storage and treatment areas;
 - d. Site plans;
 - e. Storage, use and discharge permits;
 - f. Filings with EPA and the Department;
 - g. The history of any releases or discharges of hazardous substances or petroleum products on the property;
 - h. The history of any cleanups and sampling events at the property;
 - i. The history of prior ownership and operations of and at the property; or
 - j. The existence of "environmental defects" on the property.

"Environmental defect" is defined as an environmentally related commission, activity, or condition that:

 - i. constitutes a material violation of an environmental statute, regulation, or ordinance;

- ii. would require remedial activity under an environmental statute, regulation, or ordinance;
 - iii. presents a substantial endangerment to public health, public welfare, or the environment;
 - iv. would have a material, adverse effect on the market value of the property or of an abutting property; or
 - v. Would prevent or materially interfere with another party's ability to obtain a permit or license that is required under an environmental statute, regulation, or ordinance to operate the property or a facility or process on the property.
- Pursuant to 2006 amendments, law provides that the form for the disclosure document prescribed by the IDEM must elicit at least the following information:
- a. property identification and characteristics;
 - b. nature of transfer, including identities of parties;
 - c. environmental information including:
 - i. regulatory information from transferor's ownership;
 - ii. site information from other ownership or operation.
 - d. certification by transferor that information is true and accurate to best of transferor's knowledge and belief.
 - e. certification by transferee that disclosure document was delivered with all elements completed.

Note: The definition of environmental defect does not include a condition at a property that has been the subject of voluntary remediation that received a Certificate of Completion from the IDEM.

- Parties to the transfer may waive the 30-day time period imposed by the Transfer Law, but the disclosure document must in any event be delivered to all required parties on or before the date of the transfer.
- The 30-day deadline does not apply to the transferor if the lender is not identified to the transferor at least 30 days before the transfer.
- The transferor must deliver the disclosure document to the lender immediately after the lender is identified to the transferor even if such identification is made less than 30 days before the transfer.
- If the disclosure document reveals one or more environmental defects previously unknown to the parties to the transfer, then any of the parties to the transfer, including the lender, may at its own discretion void any

obligation to accept a transfer or finance a transfer which has yet to be closed or finalized.

- If the transferor fails to meet the time requirements of the law and has not obtained a time waiver from the other parties, or if the transferor obtains a waiver of the time requirements of the law but fails to deliver the disclosure document on or before the date the transfer is scheduled to be closed or finalized, then any party to the transfer, including the lender, may at its own discretion IDEM and the disclosure document. That party may thereafter void any obligation to accept a transfer or finance a transfer if the disclosure document is not received within 10 days after IDEM and, or if the document reveals one or more environmental defects previously unknown to the party.

Note: The Transfer Law does not allow for voiding of obligations following completion of a transaction.

- Within 30 days after the date of any subject transfer, the disclosure document must be:
 - a. Recorded by the transferor or transferee in the office of the recorder of the county in which the property is located; and
 - b. Filed by the transferor with the IDEM.
- Responsibility for recording the disclosure statement with the county recorder is placed jointly and severally upon transferor and transferee.
- A mortgage lender is not required to record or file a disclosure document.
- If a disclosure document has been recorded, and the environmental defect has subsequently been remedied, then a person with a financial interest in the property may record a document reporting that the environmental defect has been eliminated from the property. The document must be certified by a registered professional engineer who has no financial interest in the property.

4. Violation and Penalty Provisions

- Failure of the transferor to deliver a disclosure document to a party renders the transferor liable for a civil penalty of up to \$1,000.
- A transferor who knowingly makes a false statement in a disclosure document is liable for a civil penalty of up to \$10,000. Each day that the transferor knows of the falsity, but fails to correct it, constitutes a separate violation.
- Failure to record the disclosure document in the office of the county recorder renders the transferor and transferee jointly and severally liable for a civil penalty of up to \$10,000. However, the transferee is exempt from liability if the disclosure document was not delivered to it within

the applicable time limit or if the document contains one or more false statements about substantive matters.

- The county prosecutor is empowered to enforce the provisions of the law.
- Any party to a transfer may bring a civil action against another party to the transfer to recover consequential damages resulting from a violation of the law, in which event the court may award reasonable costs and attorneys' fees to a prevailing party.

- G. (a) New Hampshire Waterfront Property Septic Disclosure Law, N.H. Rev. Stat. Ann. §485-A:39** [Enacted in 1989; effective January 1, 1990; amended in 1992, 1995, 1996, 2007 and 2008, effective January 1, 2009].
Rules: N.H. Code Admin. R. Env-Wq §1025.01 et seq. [Effective January 1, 1990; amended in 1993; readopted in 1997; amended in 1999].

1. Legislative Purpose

- To precondition the execution of a purchase and sale agreement for any developed waterfront property utilizing a septic disposal system upon the owner having a site assessment study performed, and disclosed to the buyer.

2. Subject Parties

- Owners of developed waterfront property using a septic disposal system.

3. Trigger and Process

- Prior to the execution of a sale agreement for any developed waterfront property using a septic disposal system, the owner must engage a permitted subsurface sewer or waste disposal system designer to perform a site assessment study to determine whether the property meets current standards for septic disposal systems established by the New Hampshire Department of Environmental Services (the "DES"). If the septic disposal system has a flow of more than 2500 GPD, the assessor must also be a New Hampshire-licensed civil or sanitary engineer.
- The site assessment study must include an on-site inspection and must be documented by completion of a "Site Assessment Form". The Site Assessment Form must be attached to the sale agreement, and receipt of the Site Assessment Form must be acknowledged in writing by the buyer and the seller. Pursuant to 1999 rule changes, there is no longer a requirement that a copy of the Site Assessment Form be submitted to the DES.
- If the site assessment is not completed prior to buyer and seller entering into a purchase and sale contract, then the contract must be conditioned upon buyer's acceptance of the contents of the completed site assessment.
- 2008 legislation (2008 Laws, c. 349) requires that if a septic disposal system designer discovers evidence of a sewage discharge while performing a site assessment, the designer is to notify, in writing, the DES and the local health officer and is to include the information in the site assessment report.

4. Violation and Penalty Provisions

- Failure of seller or seller's agent to notify buyer of, or deliver to the buyer, the completed site assessment study form is punishable by a fine of up to \$500.
- The DES may issue an order requiring correction of any violation of the law. The order must be recorded by the DES in the registry of deeds for the county in which the property is located.
- Any person who fails to comply with the law, or who knowingly produces erroneous or false data, or who knowingly fails, neglects, or refuses to obey an administrative order, is guilty of a misdemeanor (if a natural person), or a felony (if a business entity).
- Any violator is subject to civil forfeiture of up to \$5,000 and administrative fines of up to \$2,000 for each offense.

5. Legislative Initiative

- A 1998 house proposed bill, H.B. 1425, would have mandated that site evaluations be performed by a certified site evaluator, rather than a permitted subsurface sewer or waste disposal system designer. The proposal died in February 1998.

(b) New Hampshire Water and Sewer Disclosure Law, N.H. Rev. Stat. Ann. §§477:4-c to -d [Enacted in 1992, effective January 1, 1993; amended in 1994].

1. Legislative Purpose

- To ensure that sellers of real property disclose information to purchasers relative to private water supplies and septic and sewage disposal systems.

2. Subject Parties

- Sellers of any interest in real property which includes a building.

3. Trigger and Process

- Prior to executing a sale agreement, the seller must disclose, in writing, the following information to the buyer:
 - a. Specific information concerning any private water supply system at the property, including its location, any malfunctions experienced, date of installation, date of the most recent water test and whether or not the seller has experienced a problem such as an unsatisfactory water test; and
 - b. Information relative to the sewage disposal system at the property, including the type of system and its location, the size of the tank, any malfunctions experienced, age of system, date of most recent service and the name of any contractor who services the system.

- Prior to or during the preparation of an offer for sale of property to be used as a dwelling for up to four families, similar information must be disclosed in writing from the seller to the buyer.
- If the required information is unknown by the seller, that fact must also be disclosed in writing.
- The buyer must acknowledge receipt by signing a copy of the disclosure.

4. Legislative Initiative

- A 1995 house proposed bill, H.B. 388, would have deleted certain overlapping requirements of §477:4-c and 4-d of the law. The proposal was tabled at the end of the 1995 session. It was reintroduced during the 1996 session, but died in the House when the session ended, and has not been reintroduced since.
- A 2001 house proposed bill, H.B. 1212, would have required sellers of improved real property to disclose "potentially adverse off-site conditions" offensive to the senses. The bill would have required written disclosures in the sale agreement, the deed, the mortgage, and any other instrument of conveyance. The proposal died in January 2002.

(c) **New Hampshire Methamphetamine Lab Disclosure Law, N.H. Rev. Stat. Ann §477:4-g** [Enacted in 2006, effective January 1, 2007].

1. Legislative Purpose

- To ensure that sellers, transferors, and lessors of real property disclose information to purchasers, transferees, and lessees relative to former use of a property for methamphetamine production, where there is risk that such use has resulted in environmental contamination.

2. Subject Parties

- Sellers, transferors, and lessors of any interest in real property.

3. Trigger and Process

- Prior to executing a sale, transfer, lease, or rental agreement, the seller, transferor, or lessor must disclose, in writing, to the buyer, transferee, or lessee that methamphetamine production has occurred on the property.
- Disclosure must only be made if the DES or a licensed environmental or hazardous substances removal specialist has yet to determine that the property meets the state's remediation cleanup standards.

H. (a) Minnesota Well Disclosure Law, Minn. Stat. Ann. §103I.235 [Enacted in 1989; effective July 1, 1990; amended in 1991, 1992, 1994, 1999, 2001, 2005, 2007, 2008 and 2011].

1. Legislative Purpose

-- To ensure that prior to transfer of subject real property, transferors disclose to transferees the status and location of all known wells on the property.

2. Subject Parties and Transactions

-- Subject parties are owners of real property.

-- Subject transactions are sales or transfers of any real property, except for:

a. Transfers of severed mineral rights, or

b. Transfers of individual condominium units.

-- Where the state is the transferor, the lessee at the time of the sale is the party responsible for compliance.

3. Triggers and Process

-- Prior to signing an agreement to sell or transfer real property, the seller or transferor must disclose to the transferee, in writing, whether any wells exist on the property, and, if so, information about the status and location of all known wells, including:

a. Legal description;

b. Map showing the location of the wells;

c. Whether each well is in use, not in use or sealed.

-- At closing of the sale or transfer, the disclosure information must also be provided to the transferee by way of a "well disclosure certificate". If the seller knows of no such wells, no well disclosure certificate need be provided so long as the seller and buyer certify on the deed or other instrument of conveyance that no wells are known to exist.

-- **If the seller fails to provide such a certificate, the buyer may sign a well disclosure certificate based on the information provided in the seller's initial disclosure statement.**

-- The county recorder or registrar of titles may not record a deed or other instrument of conveyance for which a certificate of value is required, or any deed or contract for deed from governmental body exempt from the payment of the State deed tax, unless the deed confirms that there are no wells on the property, or unless a well disclosure certificate is also filed and the requisite filing fee paid.

- The county recorder or registrar of titles must note on each deed or other instrument of conveyance accompanied by a well disclosure certificate that the certificate was received. If the certificate indicates that there are no wells on the property, the recorder or registrar must also note that fact.
- The county recorder or registrar of titles is required to transmit well disclosure certificates to the Minnesota Commissioner of Health by the tenth day of each month.
- Where a well disclosure certificate already exists from a prior conveyance, then no new well disclosure certificate is required on a property if the buyer, seller or an authorized representative of either certifies that the status and number of wells have not changed since the last previously filed well disclosure certificate.

4. Violation and Penalty Provisions

- Unless the buyer and seller agree to the contrary, in writing, before the closing of the sale, a seller who fails to disclose the existence or known status of a well at the time of sale, and who knew of or had reason to know of the existence or known status of a well, is liable to the buyer for costs and reasonable attorneys fees relating to the sealing of any undisclosed wells.
- An action based on failure to disclose must be commenced by the buyer within six years after the date the buyer purchases the real property where the wells are located.
- When a seller has not complied with the disclosure law, the Department of Health may issue an administrative order requiring that the seller file the certificate. If the seller fails to comply, he may be subject to a \$250 fine.
- Failure to comply also renders the seller liable for a misdemeanor. Willful violation constitutes a gross misdemeanor.

5. Fees

- A \$50.00 fee is paid to the county recorder or registrar of titles by the buyer or person seeking to record a deed or other instrument of conveyance. The fee is due at the time a complete well disclosure certificate is filed. By the tenth calendar day of each calendar quarter, the county recorder or registrar of title is to transmit \$42.50 of this fee to the commissioner of health.

6. Legislative Initiatives

- A 2001 proposed bill, S.F. 1464, would have required sellers of real property with potable water wells to provide buyers, prior to contract, the results of a well test for nitrates and coliform bacteria performed by a certified laboratory. Failure to comply, or provision of false or misleading information, would not have invalidated a deed, or other instrument of conveyance, but would have rendered seller liable for the

costs of ensuring that well water met acceptable sampling criteria, as well as for attorney's fees. The proposal was excluded from later versions of the bill.

- Another 2001 proposed bill, S.F. 1954, would have extended the well disclosure requirements to septic systems, creating a single well and septic system disclosure certificate. S.F. 1954 died in the Environment and Natural Resources Committee in March of 2001. The sponsor, Senator Krentz, has no plans to reintroduce it.

(b) Minnesota Sewage Treatment System Disclosure Law, Minn. Stat. §115.55, Subd. 6
[Enacted in 1994; amended in 1997 and 2009].

1. Legislative Purpose

- To ensure that prior to transfer of subject real property, sellers or transferors disclose to buyers or transferees the manner in which sewage generated at the property is managed, and the presence, status and location of subsurface sewage treatment systems on the property or serving the property.

2. Subject Parties and Transactions

- Subject parties are transferors or sellers of real property.
- Subject transactions are transfers of any real property.

3. Triggers and Process

- Prior to signing an agreement to transfer real property, the transferor or seller must disclose to the transferee or buyer, in writing, information on how sewage generated there is managed. The disclosure must be made by delivering a written statement to the transferee or buyer that either:
 - a. The sewage goes to a permitted facility; or
 - b. The sewage does not go to a permitted facility, in which the system in use must be described and a map provided.
- The disclosure statement must also include a map showing the location of any known abandoned subsurface sewage treatment systems which exist on the property.
- The seller or transferor must disclose to the buyer or transferee what knowledge the seller or transferor has relative to the compliance status of the subsurface sewage treatment system, and whether, to the best of the seller's knowledge, a straight-pipe system exists.
- A seller or transferor in possession of a prior inspection report by a licensed inspection business or certified local government inspector must attach a copy to the disclosure statement provided to the buyer.
- A seller or transferor who fails to disclose the existence or known status of a subsurface sewage treatment system at the time of sale, and who

knew or had reason to know of the existence or known status of the system, is liable to the buyer or transferee for costs relating to bringing the system into compliance with applicable rules, and for reasonable attorney's fees for collection of costs from the transferor or seller, unless there is an agreement in writing to the contrary prior to the closing of sale.

- An action under this section must be commenced within two years after the date on which the buyer or transferee closes the transfer of the real property where the system is located.

Note: A Sewage System Disclosure Form has been developed by the Minnesota Pollution Control Agency as a non-mandatory guidance document for the type of information the Agency believes sellers or transferor should disclose to prospective buyers or transferees about a sewer system that is on or serving the subject real property. The form seeks more detailed information than is required by statute.

4. Legislative Initiative

- A 2001 proposed bill, S.F. 1954, would have required that a seller test its sewage treatment system within eighteen months of sale of the property and to certify to the buyer, by closing of title, that the system passed its test or was repaired and was successfully retested. In the event that the system was not operating properly, the seller would have had to establish an escrow fund to assure proper repair. This bill died in the Environment and Natural Resources Committee in March 2001. The sponsor, Senator Krentz, has no plans to reintroduce it.

I. Michigan Natural Resources and Environmental Protection Act, Mich. Comp. Laws §§324.20116, and 324.20139 [Underlying statute enacted in 1982; relevant amendments enacted in 1990; recodified in 1994; amended in 1995; §§324.20139 amended by Act 230, effective December 14, 2010].

1. Legislative Purpose

- To ensure that prior to transfer of an interest in subject real property, transferors with knowledge or information concerning, or on notice of, a hazardous substance release, disclose to transferees by written notice the general nature and extent of the release.

2. Subject Parties and Transactions

- Subject parties are transferors of interests in subject real property.
- Subject properties are those at which hazardous substances in excess of the allowable concentrations have been released, deposited, disposed of or otherwise come to be located. A portion of a property where a release has occurred is known as a "facility".

3. Trigger and Process

- Any transferor who has obtained knowledge or information or who is on notice that a parcel of property is a facility must, prior to transfer of the property, provide written notice to the transferee that the property is subject and that there has been a release.
- Written notice must disclose the general nature and extent of the release.
- Written notice must be recorded with the register of deeds in the county in which the property is located if the instrument of conveyance is recorded.
- Allows that if remedial action is subsequently completed to the satisfaction of the state, the owner may record notice of completion of remedial action with the register of deeds in the county in which the property is located.
- A transferor must also disclose, prior to the transfer of an interest in real property, any land or resource use restrictions that apply to the real property as part of a remedial action that has been or is being implemented due to the release.

4. Violation and Penalty Provisions

- A transferor who intentionally provides false or inaccurate information or who knowingly causes a release that could result in personal injury or property damage is subject to felony prosecution, and may be fined not less than \$2,500 or more than \$25,000 per violation or imprisoned for up to two years.
- In addition, a fine of up to \$25,000 may be imposed for each day during which a release occurred.
- A subsequent conviction renders the transferor liable for penalties of not less than \$25,000 or more than \$50,000 per day of ongoing violation, and up to two years imprisonment.
- In addition, where a release has posed substantial endangerment to public health, safety or welfare through knowing and reckless conduct, a court may impose, in addition to the penalties above, a fine of \$1 million or more and a sentence of five years imprisonment.
- Michigan Department of Environmental Quality (“DEQ”) is authorized to pay informants up to \$10,000 for information leading to the arrest and conviction of a person for a violation of the act.

Note: DEQ may not make any awards until rules are promulgated prescribing the criteria for granting such awards. To date, no such rules have been promulgated.

J. Sleepy Hollow, New York Environmental Protection and Abandoned Industrial Property Reclamation Law, Code of the Village of Sleepy Hollow ch. 17A [Adopted in 1993; amended in 1994 and 1996; recodified at Chapter 251].

1. Legislative Purpose

-- To protect the health, safety and welfare of the residents of the Village of Sleepy Hollow (the “Village”), to assure that large industrial properties are evaluated for environmental degradation and that contamination is remediated before a change in use, and to prevent the creation of nuisance, blight, environmental degradation, and the erosion of the tax base in the Village that would occur through the creation of large parcels of abandoned, environmentally contaminated industrial property.

-- Modeled on New Jersey’s ISRA, described above.

2. Subject Parties and Property

-- Applies to any “industrial facility” that is involved in, or has ever been involved in, the generation, use, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or wastes, which occupies more than 25,000 square feet of interior structural space devoted to manufacturing or secondary activities in one or more structures located on a single parcel or contiguous parcels of land, and has within a particular Standard Industrial Classification (“SIC”) major group number within 22-39, 46-49, 51 or 76.

-- Regulated parties include owners or operators of the industrial facility, including lessees having a term of more than 25 years. This does not include governmental entities, or parties holding indicia of ownership either as owner trustee or owner participant under a finance lease or solely to protect a security interest.

-- The obligations of the law are joint and several on the owner and operator of the individual facility.

3. Triggers

-- Triggering events include termination of operations, including cessation of active manufacturing or reduction in the annual production output for one year to less than 10% of the average yearly production output for the 10 year period prior to such reduction.

-- The law is also triggered by a transfer of ownership or operation, including transfer by sale, lease, assignment, gift or other means, or transfer of a controlling interest in a corporation, partnership, joint venture, or other entity, the principal asset of which is an industrial facility. Such a controlling interest transfer may take the form of a stock sale, gift, assignment, corporate reorganization, merger, or consolidation.

4. Process

- Ninety days prior to termination of operations or transfer of ownership at the industrial facility, the owner or operator is to provide notice of such transfer or termination, and is to undertake the following actions:
 - a. Remove and properly dispose of all hazardous substances stored or disposed of at the facility;
 - b. Use the services of competent professional consultants and contractors to perform a thorough environmental investigation of the physical structures, soil and groundwater at the facility, to the satisfaction of Sleepy Hollow’s Environmental Review Board (“ERB”);
 - c. If hazardous substances are detected at the facility in concentrations greater than background levels, then perform further sampling and analysis to determine the extent of contamination; and
 - d. Submit a site assessment to the ERB.
- If the contamination is so great as to be dangerous, unsafe, or a significant threat to health or the environment, then the ERB may direct the owner or operator to take all remedial actions necessary to remove the hazardous substances to background levels, and may also require the demolition, removal, and disposal of the structures at the facility.
- If directed to remediate the facility, the owner or operator is afforded an opportunity to be heard and to present objections.
- The owner or operator has fifteen days to appeal any directive issued by the ERB to the Village Trustees.
- If the owner or operator fails to take such actions as directed by the ERB or Village Trustees, the Village may commence court proceeding to force the owner or operator to conduct remediation or to recover the costs of remediation undertaken by the village.
- If, after five years from the date of termination, unused or abandoned structures remain at the facility, the owner or operator has twelve months to demolish and remove all man-made structures (including foundations), all personal property, and all debris from the property.
- A detailed written report, completed by a competent, qualified consulting firm, certifying completion of the applicable requirements above must be provided to the ERB. The ERB will then decide whether the obligations have or have not been satisfied by the owner or operator. The final certification or final determination of non-compliance is to be the final action for purposes of judicial review.
- The duties imposed by this law continue until the ERB has notified the owner or operator, in writing, of a final certification.

5. Fees

-- A review fee is to be paid to the Village by the owner or operator at the time the 90-day notice is filed with the ERB. The money is to be used by the ERB solely for the purpose of retaining qualified technical and legal consultants to independently review the reports issued by the owner or operator. The fee is based on the square footage of the operational space of the site, as follows:

- | | | |
|----|-------------------------|----------|
| a. | 25,000 – 75,000 sq ft | \$5,000 |
| b. | 75,000 – 250,000 sq ft | \$10,000 |
| c. | 250,000 – 500,000 sq ft | \$25,000 |
| d. | Over 500,000 sq ft | \$50,000 |

-- In addition to the review fee, the owner or operator must also provide a performance bond to the Village, in an amount determined by the ERB, to cover the estimated cost of site characterization and hazardous substance removal and disposal.

6. Exemptions and Variances

Exemptions

-- An exemption is available for the transfer of an industrial facility, prior to termination, to another adequately capitalized manufacturing owner or operator, provided that the ERB determines that:

- a. The transferee intends to produce goods of the same general type, at the production output level of at least 25% of the average output of the transferor during the 10 year period prior to the date of the proposed transfer; and
- b. The transferee has sufficient capitalization, assets, and manufacturing experience to successfully operate in such a manner and at such a level of output.

-- In addition, specific statutory exemptions include:

- a. Any business entity engaged primarily in the production of agricultural commodities;
- b. A cessation of operations for less than two years, where, within three months of the initial cessation of operations, the owner or operator certifies, under oath, to the ERB that the cessation is to be temporary, and commits to satisfy the obligations imposed by this law if operations do not terminate within twenty-four months of the date of initial cessation;
- c. Transfers made solely to confirm or correct any deficiencies in the recorded title;
- d. Transfers made solely to release a contingent or reversionary interest;

- e. Facilities engaged in retail sale of goods with an SIC major group number of 52 to 59;
- f. Transfer of an individual establishment by devise or interstate succession;
- g. Transfer of an industrial establishment where the transferor and transferee members of the same family -- siblings, spouses, children, grandchildren, parents, or grandparents;
- h. Transfer of a beneficiary interest pursuant to the terms of a trust;
- i. Operations engaged in the wholesale distribution of durable goods with an SIC major group number of 50;
- j. Granting or terminating an easement on, or a license to, any portion of an industrial facility;
- k. Construction loans obtained by the owner or operator of an industrial facility;
- l. Termination of a lease of an industrial establishment where the lease is renewed by the same tenant without disruption of operations;
- m. Repurchase of fee title by a lessee from the holder of title acquired from the lessee in a lease finance or sale-leaseback transaction where there is no disruption of operations; and
- n. A facility that falls within an enumerated subgroup or classes of operations within the subgroups in particular SIC major groups.

Variances

- If the owner or operator is unable to obtain permission to enter, sample, or remediate property owned by a third party, as required by the provisions of this law, the owner or operator may apply for a waiver of the obligations with respect that portion of the property.
- The ERB may grant an extension of time for compliance if the site assessment and/or demolition of man-made structures requirements are not economically or technically feasible. The extension is not to exceed a “reasonable period of amortization,” never to exceed ten years, and is to be conditioned as necessary in the interest of the Village and the public.
- The ERB may also waive or modify the obligations of this law if a prospective purchaser adapts the premises for a use other than that which is exempted above, and is consistent with the Village land use plans and the Village Local Waterfront Revitalization Program, which was approved by New York State in 1997.

Special Condition Exemption

- 1996 amendments to the law provide that any person, otherwise subject to the provisions of the law due to permanent closure of a facility during the 1996 calendar year, and who prior to September 1, 1996 entered into a binding written agreement with the Village of Sleepy Hollow that was “substantially equivalent” to the requirements of this law, is to be conditionally exempt from the procedural and substantive requirements of this law. To be substantially equivalent, the binding agreement must have:
- a. Required the owner or operator to perform a complete environmental site assessment;
 - b. Required the owner or operator to remediate, within a reasonable period of time, any environmental contamination discovered at, under or emanating from the industrial facility to the applicable federal or state cleanup standards; and
 - c. Required the owner or operator to demolish the industrial structures, fixtures, and appurtenances on the site, within a period of time consistent with the applicable provisions of the law.

7. Violations and Penalty Provisions

- The Village may seek civil injunctive relief in the Supreme Court of New York to compel the performance of any duty imposed by this law.

- Failure to comply with the provisions of this law subjects the violator to a maximum penalty of \$5,000 for each offense. If the violation is continuing in nature, each day of violation constitutes an additional and separate offense.

K. Ohio Cessation of Regulated Operations Program, Oh. Rev. Code Ann. §3752 et seq.
[Enacted in 1994; effective date amended in 1995; effective July 1, 1996].
Rules: Ohio Admin. Code §3745-352-01 et seq. [Adopted in 1996; amended in 2001 and 2006; amended 2012].

1. Legislative Purpose

- To ensure that necessary and appropriate steps are taken to protect health, safety and the environment due to the temporary or permanent discontinuation of all operations involving the production, use, storage or other handling of hazardous substances.

2. Subject Operations and Subject Parties

- Applies to the permanent or temporary cessation of operations, and transactions or proceedings involving the cessation of operations, at facilities where hazardous substances are produced, used or stored ("regulated operations").
- The Ohio Environmental Protection Agency ("Ohio EPA") interprets the Cessation of Regulated Operations ("CRO") program as applying only to facilities that cease all regulated operations.
- Ohio EPA only interprets the CRO program as being inapplicable to transactions where regulated operations continue uninterrupted.
- Does not apply to: (1) oil or gas production operations; (2) equipment, petroleum, or piping owned or operated by a public utility or other electric light company or subsidiary of such public utility or electric light company; or (3) any tank or underground storage tank system; provided, however, that those facilities are already subject to closure requirements under Ohio law and regulations.

3. Triggers and Process

Temporary Cessation of Operations

- For the temporary discontinuation of operations for thirty days to one year, the owner or operator must notify the Ohio EPA in writing within forty-five days after discontinuation as to the date the operations were discontinued, and must certify that the cessation of operations will not exceed one year.
- The following activities are required by Ohio EPA regulation during the period of temporary cessation:
 - a. Secure the facility against unauthorized entry;
 - b. Post warning signs on and around each operational building and area; and
 - c. Regularly inspect and maintain site security.

- An owner or operator who temporarily discontinues operations for more than one year may submit an application for a waiver to Ohio EPA within forty-five days of the one year anniversary of the discontinuation of operations, in which case the applicant must also submit an interim maintenance and operation plan which sufficiently demonstrates that the operations will be resumed and that neither any unauthorized entry nor any contamination will occur during the interim.
- If Ohio EPA does not grant a waiver, the owner or operator will be subject to the procedures required for owners or operators who permanently cease operations (described below).
- Ohio EPA may revoke a waiver if it determines that an owner or operator has failed to comply with requirements, or may issue an order requiring the owner or operator to take required actions within a reasonable time.
- The following are exempt from temporary discontinuation requirements: (1) owners and operators of permitted coal-mining and reclamation operations; (2) owners and operators of permitted surface mining operations; and (3) owners and operators of temporary facilities located on construction sites that are idle due to weather or scheduling delays and which will be removed upon completion of construction activities.

Permanent Cessation of Regulated Operations

- For the permanent cessation of regulated operations, including instances where waivers have been denied or revoked, the owner or operator must:
 - a. Within thirty days after ceasing all regulated operations at the facility:
 - i. Submit a notice of cessation to Ohio EPA, the local Emergency Planning Committee, and local fire department on the form prescribed by the Ohio EPA;
 - ii. Secure all buildings and structures on the subject facilities from unauthorized entry and post warning signs until Ohio EPA has verified compliance; and
 - iii. Designate a contact person in connection with the reporting facility.
 - b. Within ninety days of cessation, submit to Ohio EPA, the local Emergency Planning Committee, and fire department:
 - i. A copy of the most recent Emergency and Hazardous Chemical Inventory Form, accompanied by a statement indicating whether asbestos materials are present;
 - ii. A current Hazardous Chemical List or Material Safety Data Sheets, if such owner or operator was required to have the data sheets on file with the state environmental response commission;

- iii. A list of every stationary tank, vat or electrical transformer ("vessels") that contain or are contaminated with regulated substances, indicate which vessels are to remain at the facility, as well as the location of each and an identification of regulated substances that are in or contaminating each; and
- c. Within ninety days of cessation:
- i. Drain or remove all regulated substances from each vessel and from all piping that will remain at the facility, and properly transport, transfer, manage, or remove all regulated substances in compliance with applicable state and federal laws;
 - ii. Remove all debris, non-stationary equipment, furniture, containers and moving vehicles that contain or are contaminated with regulated substances from the property and properly transfer the regulated substances in compliance with all applicable state laws; and
 - iii. Certify to Ohio EPA in writing that the actions required under (c.i) and (c.ii) above have been completed in compliance with all applicable laws, on a form prescribed by Ohio EPA.

Abandoned Property

- Within fifteen days after certain facilities (those subject to particular hazardous substance reporting requirements) have been abandoned by the owner to the knowledge of the holder of the first mortgage, that holder must: (1) secure the property against unauthorized entry in the manner prescribed under the section entitled "Permanent Discontinuation of Regulated Operations" above; and (2) submit to Ohio EPA and other appropriate parties a notice of abandonment and of compliance on a form prescribed by Ohio EPA.
- Thirty days before a holder of a mortgage intends to cease maintaining security and warning signs because of a release of the mortgage, Ohio EPA and other appropriate parties must be notified.
- So long as all activities of the mortgage holder are properly undertaken in compliance with applicable laws, in good faith, the mortgage holder will not be liable for cleanup, removal or remediation of regulated substances located on such property, nor will the holder be deemed an owner or operator of the property.
- If the holder of a mortgage fails to undertake the required actions, Ohio EPA may undertake the required actions. The costs incurred by Ohio EPA shall be recoverable as a civil penalty.
- The above provisions also apply to fiduciaries, to the extent that there are sufficient assets in the trust, with the duties to be undertaken within sixty

days after receiving actual notice of the cessation of all regulated operations.

4. Violation and Penalty Provisions

- Reckless violations of CRO provisions, other than those concerning the securing of buildings and authorized entry, could result in a civil penalty of \$10,000 to \$25,000 per day per violation, and/or imprisonment of two to four years.
- Subsequent reckless violations could result in the issuance of fines of up to \$50,000 and/or a prison term of up to two to four years.
- A knowing violation of the provisions concerning the securing of buildings and unauthorized entry constitutes a first degree misdemeanor.
- Ohio EPA could request the Attorney General to initiate either a criminal prosecution or a civil action for injunction against any person in violation of any provision of the Act.

L. Westchester County, New York Private Well-Water Testing Law, §707.01 et seq.
[Enacted in 2007].

1. Legislative Purpose

- To precondition real estate property sales on testing of private potable water wells and written disclosure of test results to buyers.
- To require landlords to sample private potable water wells within 12 months after the effective date of the law, to sample such wells at least once every five years afterward, and to provide written copies of test results to all tenants within five days of receipt.
- To require landlords to provide written copy of latest test results to new tenants of rental unit on such property.
- Modeled on New Jersey's Private Well Testing Act, described above.
- Sellers and lessors are responsible for compliance requirements.

2. Subject Properties

- Properties for which the potable water supply is a private well, unless the potable water supply has five or more service connections and regularly services an average of at least 25 individuals daily for at least 60 days per year.

3. Subject Parties and Transactions

- Applies to sales of real property with subject wells, except for gifts or transfers by operation of law.
- Also applies to leases of subject properties.

4. Conditions on Sale and Lease of Real Property

- A water test must be conducted upon the signing of a contract of sale for a subject property in Westchester County.
- Within ten days of execution of a sale agreement, the seller must provide the buyer with confirmation that the test has been ordered.
- Within five days after receipt of the results from a certified laboratory, the seller must deliver the results to the buyer, and the parties must certify the exchange of information in writing.
- If the test discloses an exceedence of a primary sampling parameter, then: (1) the seller may correct the condition and consummate the transfer; or (2) the seller may cancel the contract and return the deposit, with neither party being liable to the other; or (3) the parties may agree to consummate the transfer on such terms as they may negotiate, with purchaser correcting the condition.

- Subject landlords must test their wells by November 19, 2008 (twelve months from the effective dates of the law), or within a year of leasing if the lease commences after the effective date, and then at least once every year five years thereafter.
- Within five days after receipt of results, landlords must deliver reports to tenants and post results in prominent places at the entry to the premises.
- Copies of the most recent results must also be provided to new tenants.
- Where the property in question is an occupied residence, the owner must immediately supply potable water and promptly correct the condition.
- Where landlord fails to correct an exceedence, tenant has right to remediate condition and undertake further testing, and may set off costs by reduction in rent until cost is covered by rental reduction.

5. Well Sampling Requirements

- Water samples have to be analyzed by a state certified laboratory for at least the following primary parameters: bacteria (total coliform), nitrate, arsenic, lead, vinyl chloride, methyl-tertiary-butyl-ether (MTBE), and all primary organic contaminants included in Part 5 of the New York State Sanitary Code. If a sample tests positive for total coliform bacteria, a test must be performed for either fecal coliform or Escheria Coli. In addition, every water test must be tested for the following secondary parameters: iron, manganese, pH, sodium, and chloride.
- For sales of real property, test results remain valid for one year from sample collection for all parameters except for coliform, to which a six month limit applies. If a contract of sale is entered into within the period of test validity, an additional water test is not required.

6. Certified Laboratory, DEP and County Disclosure Requirements

- A certified laboratory is obligated, within five business days after completion of tests, to submit test results to the Westchester County Department of Health and the person requesting the test, but the laboratory may not release results to parties other than applicable seller, buyer, landlord, or lessee unless authorized by one of those parties or the Department of Health, or by court order.

M. California Cleanup of Santa Susana Field Laboratory Law, Cal. Health & Safety Code § 25359.20 [Enacted 2007 by Senate Bill 990 as Ch. 729].

1. Legislative Purpose

- Site-specific transaction-triggered law concerning the Santa Susana Field Laboratory in Ventura County, CA., a highly contaminated facility due to the development and testing of nuclear reactors, rockets, missiles and munitions.
- Amends the state's Carpenter-Presley-Tanner Hazardous Substance Account Act.

2. Subject Parties and Transactions

- No one may sell, lease, sublease or otherwise transfer land that is presently occupied, or was formerly occupied, by the Santa Susana Field Laboratory unless that party first certifies that the land has undergone complete remediation pursuant to the stringent risk-based standards set forth in the law.

3. Legislative Development

- In the Governor's signing message on October 4, 2007, he noted that the Boeing Company – owner of the site – had entered into a Letter of Intent with the state to remediate the site and then transfer it at no cost to the state for park, recreational or open-space use.
- The Letter of Intent is described as requiring cleanup to residential standards, and an agreement to restrict future use as described above, with explicit prohibition against use for residential, agricultural, commercial or industrial purposes.

N. Delaware Transfer or Closure of Chemical or Hazardous Substance Establishments Law, Del. Code tit. 7, §9201 et seq. [Enacted in 2008; effective upon promulgation of regulations.]

1. Legislative Purpose

- To require that, as a condition to transferring properties or operations, or terminating operations, involving the use or generation of substantial amounts of hazardous substance or wastes, environmental investigations must be undertaken and financial assurances must be established in an amount sufficient to assure that the subject property will be stabilized and secured.

2. Subject Parties and Properties

- Applies to properties, and operations at such properties, where facilities are or were required to report one million pounds or more of chemicals listed under the state's Emergency Planning and Community Right to Know Act, or where a facility was or has been designated as a large quantity generator under Delaware law.
- Definitions of subject transfers and exceptions to applicability are similar to New Jersey ISRA definition, detailed above.

3. Triggers

- Triggered by changes in ownership, including stock sales or mergers and consolidations, as well as terminations of operations or bankruptcy filings by the property owner or operator. Includes transfers of the controlling interests of the establishments.
- Statutorily exempted transactions include:
 - a. The conveyance or extinguishment of an easement;
 - b. The conveyance of an establishment through a foreclosure or the conveyance of a deed in lieu of foreclosure to a lender;
 - c. The conveyance of a security interest;
 - d. A change in ownership approved by the Register of Wills;
 - e. A devolution of title to a surviving joint tenant, or to a trustee, executor, or administrator under the terms of a testamentary trust or will, or by intestate succession;
 - f. A corporate reorganization not substantially affecting the control, ownership or operation of the establishment;
 - g. The issuance of stock or other securities of an entity which owns or operates the establishment;
 - h. The conveyance of an interest in an establishment where the transferor is the sibling, spouse, child, parent, grandparent, the

child of a sibling, or the sibling of a parent, or a spouse of any of the foregoing, of the transferee;

- i. The conveyance of an Establishment to a trustee of an inter vivos trust created by the transferor solely for the benefit of one or more of the following: the sibling, spouse, child, parent, grandchild, the child of a sibling, or the sibling of a parent, or a spouse of any of the foregoing, of the transferor;
- j. The conversion of a general or limited partnership to a limited liability company;
- k. The transfer of general partnership property held in the names of all of the general partners to another general partnership which includes as general partners immediately after the transfer substantially all of the same persons that were general partners immediately prior to the transfer;
- l. The transfer of general partnership property held in the names of all of the general partners to a limited liability company which includes as members immediately after the transfer substantially all of the same persons that were general partners immediately prior to the transfer; or
- m. The transfer of stock, securities or other ownership interest of an entity that owns or operates the establishment to a person who is an affiliate, that directly or indirectly through one or more intermediaries controls, or is controlled by, or under the common control with the transferee.

4. Process

- Prior to transfer of the real property where such operations did occur or are occurring, or change of ownership in the operator of the site, the transferor or transferee must conduct an environmental investigation such as would be sufficient to meet the state's "all appropriate inquiry rule" including a Phase I Environmental Site Assessment and, if necessary, a Phase II, and provide the information to the Delaware Department of Natural Resources and Environmental Control ("DNREC").
- As to termination of operations or filing for bankruptcy, no later than the date of termination or bankruptcy filing, the owner or operator must file a notice with DNREC which specifies an employee of the establishment who will be responsible for supplying information to DNREC.
- No later than 90 days after termination of operations or bankruptcy filing, the owner or operator must:
 - a. Submit to DNREC a list of all chemical and hazardous substances at the establishment, where they are located, and how they are stored;

- b. Submit a plan to DNREC for emptying, draining, removal, use, sale, recycling, or disposal of all chemicals and hazardous substances;
 - c. Post warning signs with contact information around the perimeter of any parcels with soil contamination that poses a potential risk;
 - d. Submit a certification to DNREC regarding whether the chemicals and hazardous substances have been removed from the site; and
 - e. Take proper measures to secure and stabilize the site.
- The DNREC has 30 days after the receipt of the required submittals to conduct an inspection of the subject site to determine compliance.
- Within 60 days of transfer of an establishment, the owner or operator must submit evidence of financial assurance to DNREC in an amount sufficient to stabilize and secure the site upon termination of operations.

5. Violations and Penalty Provisions

- Failure to comply with the provisions of the law subjects the violator to a civil action by the state, and to an action in the state's Chancery Court to enjoin the transfer or to compel the establishment of a financial assurance.

Note: Pursuant to Del. Code tit. 7, §9203(c), provisions of this statute do not become effective until the Secretary of DNREC promulgates regulations implementing the provisions of this law.

- O. Washington Disclosure Law, Wash. Rev. Code §64.06 (Senate Bill 6749) [Enacted 2010].**
1. Legislative purpose
 - To ensure that prior to transfer of ownership of subject real property, transferors have disclosed to transferees knowledge of certain property conditions, including water rights, wetlands or floodlands, hazardous substances of concern, and soil or groundwater contamination.
 2. Subject Parties and Property
 - Subject parties are transferors of commercial real property. (Pre-existing disclosure law applied to residential transfers, and while law still applies to those transfers to a limited extent, these materials and thus this summary focuses on the law's applicability to commercial real estate.)
 - Subject property is commercial real estate.
 3. Disclosure Obligation Triggers
 - Disclosure requirements are triggered by any commercial real estate transaction except for:
 - a. Foreclosure or deed in lieu of foreclosure;
 - b. Gift or other transfer to parent, spouse, domestic partners, or child of transferor or child of any parent, spouse, or domestic partner of transferor;
 - c. Transfer between spouses or domestic partners during dissolution of marriage or domestic partnership;
 - d. Transfer where buyer previously had ownership interest within two years of new transfer, including prior interest as partner, limited partner or shareholder of ownership entity, or where interest was leasehold or transfer was tax-deferred exchange.
 - e. Transfer of less than fee simple, except that transfer of vendee's interest under real estate contract is subject;
 - f. Transfer by estate of decedent or trustee in bankruptcy; and
 - g. Transfer where transferee has expressly waived receipt of disclosure, except that transferee cannot waive environmental disclosures where any of the questions in the disclosure form would be answered "yes."
 4. Process and Disclosure Form
 - Within five business days after contract signing (or longer if agreed), transferor must provide transferee with a completed disclosure, in form prescribed by statute, describing known property conditions including

water rights, wetlands or floodlands, hazardous substances of concern, and soil or groundwater contamination.

- Unless otherwise agreed in writing, transferee then has three business days to rescind agreement.
- If after the date of disclosure and before closing, transferor learns of additional information or adverse changes from sources other than the transferee or its agents, transferor must either supplement the disclosure, or take corrective action concerning the condition so that the original disclosure is again accurate, by no later than three business days prior to closing.
- Unless the corrective action is undertaken and completed prior to the closing date, transferee can either approve and accept an amendment or rescind the agreement within three business days.
- If the closing date is to occur within the three business day rescission period, then the closing date is extended until expiration of the period.
- Transferee has no right of rescission if transferor corrects condition so as to restore accuracy of original disclosure at least three business days prior to the closing date.
- Disclosure statement is not considered part of any written agreement between the parties, and is not to be construed as a warranty.
- If any acts, occurrences or agreements arise or become known following closing of title, transferor has no obligation to amend disclosure, and transferee has no right to rescind the transaction.

5. Violation and Penalty Provisions

- Disclosure law explicitly provides that it does not create any new rights or remedies for a transferee other than the right of rescission on the basis and within the time limits provided by the law.
- Law also states that it does not extinguish or impair any rights or remedies that buyer of real estate would otherwise have by common law, statute or contract.
- Law further specifies that transferor is not liable for any error, inaccuracy or omission in the disclosure if it had no actual knowledge of the error, inaccuracy or omission.

II. Repealed Transaction-Triggered Environmental Laws

A. **IRPTA: Illinois Responsible Property Transfer Act of 1988, Chapter 765, Ill. Comp. Stat. §§90/1 – 90/7** [Enacted in 1988; amended in 1989, 1990, 1991, 1992, and 1998. Repealed on August 9, 2001 by P.A. 92-0299].

1. Legislative Purpose

- To ensure that parties involved in certain real estate transactions are made aware of existing environmental liabilities associated with ownership of such properties as well as the past use and environmental status of the properties.
- To ensure that the people of Illinois are protected by a mechanism that provides that parties to a real estate transaction are advised of the environmental status of the property and are thereby encouraged to act responsibly in fulfilling the purpose and intent of existing environmental laws.
- The law constituted compromise legislation. The original proposal, entitled the "Illinois Environmental Cleanup Responsibility Act", mirrored New Jersey's initial ECRA legislation.
- The legislation applies to subject transactions after January 1, 1990 and before August 9, 2001, the effective date of the repeal.

2. Repeal

- The repeal legislation originated in the House in March 2001, arrived in the Senate in April 2001 and was passed by both houses without opposition on May 16, 2001 in the General Assembly. It was sent to the Governor on June 14, 2001 and signed into law August 9, 2001, effective that date.
- Repeal legislation provides that actions that accrued under IRPTA prior to August 9, 2001 "may" be maintained in accordance with the pre-repeal provisions of IRPTA.

3. Subject Parties and Transactions

- Subject parties are "transferors" of "an interest in real property".
- Subject transfers are the following conveyances of interests in subject real property:
 - a. Deed or other instrument of conveyance;
 - b. Lease of real property the term of which, considering all options that may be exercised, exceeds 40 years;
 - c. Assignment of more than 25% of the beneficial interest in an Illinois land trust; or

- d. Mortgage, trust deed or collateral assignment of a beneficial interest in an Illinois land trust.

-- Specific statutory exemptions:

- a. **Deeds, trust documents, mortgages, trust deeds or collateral assignments of a beneficial interest in an Illinois land trust which, without additional consideration, confirm, correct, modify or supplement a deed or trust document previously recorded;**

- b. Deeds or other instruments of transfer, conveyance, merger, or consolidation pursuant to which part or all of an Illinois land trustee's land trust business is transferred, conveyed, merged, or consolidated with another land trustee under the state's Corporate Fiduciary Act;

- c. Tax deeds;

- d. Deeds or trust documents of release of property which are security for a debt or other obligation;

- e. Deeds of partition;

- f. Conveyances resulting from foreclosure of a mortgages, trust deeds, or other liens on otherwise subject real property;

- g. Uniform Commercial Code sales or other foreclosures of collateral assignments of a beneficial interest in an Illinois land trust;

- h. Advances by a lender secured by a previously recorded mortgage, trust deed, or a collateral assignment of a beneficial interest in an Illinois land trust including, without limitation, such advances under line of credit loans and construction loans;

- i. Modifications, supplements and amendments to existing mortgages, trust deeds, and collateral assignments of beneficial interests in Illinois land trusts which without additional consideration do not involve the advancement of additional funds by the lender;

- j. Easements; and

- k. Conveyances of an interest in minerals, oil or gas.

-- Subject real property:

- a. **Defined as any "specific and identifiable parcel of land", together with improvements, which has not already been subject to bonding or other financial assurances and thereafter released following compliance with other state**

environmental laws and which meets one of the following conditions:

- i. Contains one or more facilities subject to the reporting requirements under §312 of the federal Emergency Planning and Community Right-to-Know Act of 1986; or
 - ii. Is the site of underground storage tanks subject to the notification requirements of the federal underground storage tank law (42 U.S.C. §6991).
- b. "Specific and identifiable parcel of land" is defined as a portion of real property which contains facilities which can be identified by:
- i. The address provided on reporting forms used under §312 of the federal Emergency Planning and Community Right-to-Know Act of 1986; or
 - ii. Boundary lines provided on the property's applicable Illinois Environmental Protection Agency ("IEPA") permit applications.
- c. If only a portion of the real property is transferred, IRPTA applies only to the portion being conveyed.
- d. Single family residences, multi-unit residences, residential condominiums and other residential properties were specifically exempted from the law in 1990 unless such properties contain underground storage tanks subject to the notification requirements of federal underground storage tank law.
- "Transferee" is defined as a buyer, trustee under a trust deed, owner of a beneficial interest in an Illinois land trust, mortgagee, grantee or tenant of real property, or an assignee of a greater than 25% interest in an Illinois land trust.

4. IRPTA Process

- For subject transfers after January 1, 1990 and before August 9, 2001, the transferor must, within 30 days after execution of a contract for the transfer, and at any date no later than 30 days prior to the transfer, deliver a "disclosure document" to:
 - a. The transferee; and
 - b. The lender advancing any funds to be secured by an interest in the property or collateral assignment of beneficial interest in an Illinois land trust holding title to real property.
- If the transfer involves multiple transactions (for example: deed and mortgage, sale and leaseback), the execution of a single disclosure document by the primary transferor to each transferee and lender involved will satisfy the disclosure requirements.
- The "disclosure document" must be in a form, and contain the information, required by IRPTA, including:
 - a. Notification of potential liabilities for ownership of real property;
 - b. Description of operations at the property which have involved the generation, manufacture, processing, transportation, treatment, storage or handling of hazardous substances and wastes and petroleum products;
 - c. Existence at the property of any operational or non-operational landfills, surface impoundments, waste piles, underground and above ground storage tanks, injection wells, septic systems, transfer stations and other storage and treatment areas;
 - d. Site plans;
 - e. Storage, use and discharge permits;
 - f. Filings with EPA and IEPA;
 - g. History of any releases or discharges of hazardous substances and wastes or petroleum products;
 - h. History of any cleanups and sampling events at the property; and
 - i. History of prior ownership and operations of and at the property.
- Parties to the transfer may waive the 30-day time periods imposed by IRPTA, but the disclosure document must still be delivered to all required parties on or before the date of the transfer.

- If the disclosure document reveals any environmental defects previously unknown to the parties to the transfer, or if the transferor fails to meet the time requirements of the law and has not obtained a time waiver from the other parties, then any of the parties to the transfer (including, by definition, the lender) may at their own discretion, within 10 days after demand for or receipt of the disclosure document, void any obligation to accept a transfer or finance a transfer which has yet to be closed or finalized.

Note: Voiding the obligation to accept or finance a transfer will not release a party from the obligation to pay or reimburse a lender for fees, costs and expenses.

- Within 30 days after the date of any subject transfer or upon recording of the instrument of conveyance, whichever occurs first, the disclosure document must be:
 - a. Recorded in the office of the recorder of the county in which the property is located; and
 - b. Filed with the IEPA.
- Responsibility for recording and filing of the disclosure document is placed jointly upon transferor and transferee. However, failure by any party to comply with IRPTA will not affect any lien or the priority of any mortgage, trust deed or collateral assignment of a beneficial interest in an Illinois land trust.
- Pursuant to the 1998 amendment to IRPTA, set forth in Public Act 90-655, the disclosure provision relating to owner/operator liability under Illinois law was broadened to refer specifically to pesticides as well as hazardous substances.

5. Violation and Penalty Provisions

- Failure to comply with the disclosure requirements of IRPTA renders a party liable for civil penalties of up to \$1,000 per day, per violation.
- Any party or transferor who knowingly makes any false statement, representation or certification in the disclosure document is liable for civil penalties of up to \$10,000 per day, per violation.
- Any person who fails to record a disclosure document is jointly and severally liable for civil penalties of up to \$10,000.
- Any person who suffers damage by reason of a violation of IRPTA may bring an action for monetary damages, in which event the court may award reasonable attorneys' fees and costs to the prevailing party. However, no action may be taken against a transferee for failure to record a disclosure document if the transferor is in violation of the disclosure document requirements of the law.

6. Status of Regulations

- Through the life of IRPTA, IEPA maintained its position that promulgation of regulations was not necessary to implement the law.

B. Hawaii Environmental Disclosure Law, Haw. Rev. Stat. §§343D-1 to –11 [Enacted in 1982. Repealed on June 14, 2001 by Act 247, 2001 Haw. Sess. Laws].

1. Legislative Purpose

-- Required that subject parties who own voting securities of a Hawaii corporation file an environmental disclosure statement prior to purchasing additional voting securities or assets of that corporation.

2. Repeal

-- Law had been passed in 1982 to alert public of major corporate changes that could affect state's environment, land use, jobs and economy, particularly in agricultural sector.

-- However, after eighteen years there had been only twelve filings under the law, and only one in the last ten years.

-- Thus, finding more effective mechanisms in place to inform the public of potential changes that could affect environment, land use and the like, legislature repealed the Environmental Disclosure Law with no opposition.

3. Subject Parties and Transactions

-- Any person, including a corporation, partnership or other entity, who beneficially owned 10% or more of any class of voting securities of a Hawaii corporation, could not purchase more than an additional 5% of any such security or 5% or more of the assets of such corporation during any twelve month period without first filing an environmental disclosure statement with the Hawaii Office of Environmental Quality Control ("state agency").

-- Exempt transactions:

a. Purchases of any voting securities or assets by a person already owning fifty percent or more of such securities or assets; and

b. Purchases of voting securities or assets of a corporation having less than 100 shareholders of record.

4. Trigger

-- Transaction could not be completed until the disclosure statement was filed, the requisite waiting period expired, any required hearings were conducted and any corrections of the disclosure statement were completed.

5. Disclosure Act Process

-- The subject party was required to file a disclosure statement with the state agency.

-- The disclosure statement included:

- a. A complete description of the person, its organization, capitalization and operations including a breakdown of sales for each line of business activity according to the applicable SIC number;
 - b. Copies of the person's audited financial statements for the past five years;
 - c. A complete history of the person's prior compliance or non-compliance with all applicable environmental laws and regulations including those promulgated by federal, state or municipal governments;
 - d. A description of all judicial and administrative proceedings during the preceding five years to which the person was a party and which involved any issue concerning any environmental law or regulation; and
 - e. A complete statement of all intentions by the person to influence the issuer of the voting security of the target corporation or any of its affiliates to take action in the next five years that might require the filing of an Environmental Impact Statement.
- After filing the environmental disclosure statement, the subject party had to wait fifteen days after delivery, or longer if the state agency so determines, before completing the transaction, in order that the disclosure statement be reviewed.
 - If the state agency believed the disclosure statement was incomplete, inadequate or misleading, it could extend the waiting period an additional forty-five days, schedule a public hearing and require that the subject party produce further documentation.

6. Violations and Penalty Provisions

- If any subject party to file a disclosure statement, or refused to participate in a hearing or to produce relevant documents, the state agency could recommend to the Attorney General that action be taken to prohibit that person from completing the transaction within the following year.
- Such a prohibition would not preclude a person from seeking additional securities or assets pursuant to a subsequent filing.
- If the state agency believed that any person had engaged in or intended to engage in a violation of the law, the agency could refer the matter to the Attorney General, who could commence an action to temporarily or permanently enjoin the purchase, to enforce compliance with the law and to impose a civil penalty of up to \$100,000.
- Any person, including the target company or its shareholders, aggrieved as a result of a violation of the law, could file suit to enjoin any act or

practice that constituted a violation of the law and could obtain such relief as the court deemed appropriate.

- The court was specifically empowered to rescind the transaction, impose a civil penalty of up to \$100,000, award attorney's fees and grant any other available relief.

Note: If an environmental offender fully revealed its non-compliance history, there was no basis under the law to prevent the intended transaction or to penalize the offender.

III. Proposed Transaction-Triggered Environmental Laws

Note: References below to ECRA refer to New Jersey's original 1983 legislation, which was supplanted by the 1993 Industrial Site Recovery Act ("ISRA").

A. Alaska

1. Bill: H.B. 34 -- Environmental Assessment and Cleanup Responsibility Act.
2. Sponsor: Representative Niilo Koponen
3. Nature of Proposed Law:

-- **Virtually mirrors New Jersey ECRA.**

-- Definitions of subject parties and properties are nearly identical to New Jersey ECRA. Triggers follow those defined in New Jersey ECRA.

-- Submission and evaluation process tracks New Jersey ECRA, and the bill contains the same enforcement hammers, including voiding provision, \$25,000 per day penalties and personal liability of officers and managers who knowingly direct violations.

4. Status:

-- Introduced in 1991 session and referred to House Committees on Labor and Commerce, Resources and Finance.

-- Not reported from these committees before end of session and became null and void.

-- There are no plans to reintroduce the bill.

B. California

(a) **Environmental Cleanup Responsibility Act**

1. Bill: A.B. 3670 -- Environmental Cleanup Responsibility Act.
2. Sponsor: Assemblyman Tom Hayden
3. Nature of Proposed Law:

-- Modeled closely on New Jersey ECRA without the enforcement hammers.

-- Definition of subject industrial establishments and transactions tracks New Jersey ECRA scheme.

-- Requires that prior to the closing of a subject transaction, the owner or operator must submit to the state agency either a declaration that the premises is in compliance with law and that no cleanup is necessary, or a

cleanup plan to decontaminate the property. If cleanup is required, a copy of an agency-approved cleanup plan must be provided to all parties to the transaction prior to the transfer.

- Financial assurances must be provided to cover anticipated cleanup costs.
- Provides that an owner or operator may refuse to undertake a cleanup plan if decontamination standards cannot be met unless the buildings at the site are destroyed.
- Permits counties and cities to implement the law on a local level by way of ordinance or resolution.
- Permits landlords to contractually shift ECRA obligations to tenants.

4. Status:

- Introduced in 1985-1986 session. Did not pass.
- Thereafter sent to Assembly Toxics Committee. Was not moved upon. Encountered substantial opposition.

(b) **Hazardous Substance Disclosure Proposal**

1. Bill: A.B. 2582 - A bill to add §1940.7.6 to the Civil Code.

2. Sponsor: Assemblywoman Sally Lieber

3. Nature of Proposed Law:

- Would have required the owner of residential dwelling units to furnish written notice to prospective tenants concerning actual knowledge of the presence of potentially hazardous substances, materials, or products at the property.
- Written notice would have included location of the substances and the existence of any available records in the possession of the landlord. Notice would not have been required if the potentially hazardous substances had been remediated through removal.
- Had the landlord failed to provide the tenant with written notice prior to the execution of the rental agreement, the tenant would have had the right to terminate the agreement by providing the landlord with written notice at least three days before terminating the tenancy. Landlords who failed to provide written notice pursuant to this section would have been liable for actual damages and could have faced civil penalties of up to \$5,000 per offense for knowing and willful violations.

4. Status:

- Introduced on February 20, 2004, A.B. 2582 died on the inactive file on November 30, 2004.

C. **Delaware**

(a) **Environmental Assessment and Responsibility Act**

1. **Bill:** H.B. 709 -- Environmental Assessment and Responsibility Act.

2. **Sponsor:** Representative Mack, et al.

3. **Nature of Proposed Law:**

-- Combination of: (a) CERCLA-like strict liability cleanup law, and (b) milder variation of the 1988 Delaware ECRA offshoot proposal (see 1988 or 1989 editions of Course Materials for discussion of 1988 proposal).

-- Triggering events track ECRA's "change in ownership" definition; subject property is any real estate or facility subject to SARA Title III Right-to-Know reporting obligations.

-- Would require that at least two weeks prior to closing of a subject transaction, the state agency be provided with either:

a. A negative declaration, verified by a certified environmental auditor, that no spills or discharges have occurred, or

b. A positive declaration, verified by a certified environmental auditor, that a release has or may have occurred, together with:

i. An agreement between seller and buyer allocating responsibility for undertaking cleanup on a timetable acceptable to the state; and

ii. Evidence that the person or persons accepting responsibility for cleanup have the financial resources to complete the work.

-- Notification would be deemed acceptable unless state agency notified transferor to the contrary within ten days of receipt of documentation.

-- Sets forth standards to be followed for site evaluations and procedure for certification of environmental auditors.

-- Would provide for avoidance of transactions and substantial fines and punitive damages in the event of noncompliance.

4. **Status**

-- Alternative CERCLA-like legislation, silent as to any transaction-triggered responsibilities, but providing for an innocent purchaser defense to a state cleanup demand, passed the Delaware legislature and was signed into law on July 10, 1990 as the Hazardous Substance Cleanup Act.

-- Thus, H.B. 709 was not reported out of House Hazardous Waste Committee by end of 1990 session, and became void.

- The Delaware Department of Natural Resources and Environmental Control subsequently drafted revisions to H.B. 709, but no sponsor stepped forward. The matter is currently inactive.

(b) Transfer or Closure of Chemical and Hazardous Substance Establishments

1. Bill: S.B. 168 – Transfer or Closure of Chemical and Hazardous Substance Establishments

2. Sponsor: Senator McBride

3. Nature of Proposed Law:

- Applies to properties, and operations at such properties, where facilities are or were required to report one million pounds or more of chemicals listed under the state’s Emergency Planning and Community Right to Know law, or where a facility was or has been designated as a large quantity generator under Delaware law.
- Triggered either by termination of operations or bankruptcy filings by the property owner or operator, or by transfer of the property or operations.

4. Status:
 - Introduced in the Senate on June 26, 2007 and referred to the Natural Resources and Environmental Control Committee.
 - S.B. 168 was substituted in the Senate by Senate Substitute 1 on March 19, 2008. The bill was subsequently signed into law on May 15, 2008 as Chapter 220 (See “Current Transaction-Triggered Environmental Laws” above for a detailed discussion of the provisions of the law.)

D. Illinois

1. Bill: H.B. 4177 – Illinois Groundwater Protection Act Amendment
2. Sponsor: Representative Bellock
3. Nature of Proposed Law:
 - Would have required that before property is sold where there is a potable water well, the owner must sample the water for contaminants.
 - Would have required that if water did not meet state groundwater quality standards, seller would have to notify the state and the buyer.
4. Status:
 - Introduced in January 2002; referred to Rules Committee in February 2002; withdrawn prior to vote.

E. Maryland

1. Bill: S.B. 471 -- Environmental Cleanup Responsibility Act -- Industrial Establishments.
2. Sponsor: Senator Lapides
3. Nature of Proposed Law:
 - Modeled on New Jersey ECRA, but with an emphasis on closure of operations rather than transactions.
 - Subject properties defined by reference to use of hazardous substances and wastes, and not by SIC reference, though provision is made for regulatory exemptions of particular SIC subgroups.
 - Triggers are similar to the New Jersey ECRA definition as to closure and cessation of operations, but do not include specific reference to sales and transfers.
 - While the proposal required submissions of certification and cleanup plans similar to those required under New Jersey ECRA, there was no language in the proposal conditioning closings of transactions upon receipt of agency approvals.

- Provided for \$25,000 per day fines for violations of the law and liability of officers and managers who purposely violate the law, as under New Jersey ECRA.

4. Status:

- S.B. 471 passed the Senate, and after second reading on February 28, 1986, proceeded to the House Judiciary Committee.
- The bill died in House Judiciary Committee.
- There are no plans to reintroduce the bill.

F. Massachusetts

1. Bill: H.B. 2750 -- Section 6 of An Act Clarifying the Innocent Owner Defense and Further Providing for Timely and Effective Cleanup of Oil and Hazardous Materials.

2. Sponsor: Representative David P. Magnani

3. Nature of Proposed Law:

- ECRA-inspired proposal with a number of innovations.
- Legislation divides property into two classes:
 - a. Class I includes all real property which, based on use from 1880 to the present, is "likely to contain oil or hazardous materials in amounts or concentrations sufficient to require a response action to protect the public health, safety, or welfare or the environment, including petrochemical industries, primary metal industries and gas stations".
 - b. Class II includes all other property, except those properties which have functioned as one to four-family residences throughout the ownership of the current and immediate prior owners. Such residences are exempt from both classes.
- Several of the specifically covered industries are named according to SIC designations, and the implementing agency is directed to use SIC subgroups in determining a particular subject industry.
- Class I real property could not be transferred until a site history and audit report is filed with the state environmental agency and the agency has reviewed and acted on the report. If the audit showed no contamination, the agency would be bound either to accept or reject the report within forty-five days. If the agency were not satisfied, the property could not be transferred until the agency approved a cleanup plan and the plan approval was recorded in the Registry of Deeds.
- The response plan would have to include a provision that the person responsible for the response action would reimburse the agency for all

costs, including fringe benefits and costs incurred by the agency in reviewing, overseeing and insuring completion of the actions. The agency could also require, as a condition of approval of the plan, that either the seller or buyer post evidence of financial responsibility.

- Once a response plan is approved and a copy recorded in the Registry of Deeds, the property could then be transferred. The proposal deems that the transferee would be liable to complete the plan.
- Prior to approval of a response plan, transactions could be completed only if:
 - a. A cleanup plan including a cost estimate is filed;
 - b. The transferee provides financial security sufficient to cover either the estimated cleanup cost or the fair market value of the property (at the agency's discretion);
 - c. The transferee assumes liability; and
 - d. The transferee is not already targeted as unacceptable under other sections of the law.
- Class I and Class II owners could apply for clearance at any time, even absent a trigger. If contamination is found, the property could not be transferred until a cleanup plan is approved. Once the agency certified compliance or certified completion of a cleanup, either class of property would be eligible for state-funded environmental security insurance. The agency would have to act on the transferee's application within ninety days if the property proved clean.
- The owner, upon payment of a premium and upon proving that the property complies with requirements of the law, would be protected against any liability for costs incurred by the agency in responding to environmental problems at the site.
- Legislation would also require that the state agency specify threshold amounts of hazardous substances by regulation.
- Definition of "transfer of real property" includes closure or abandonment of a facility, merger or acquisition of the owner or operator of the premises and bankruptcy.

4. Status:

- Bill was originally considered during 1987 session of House of Representatives as H.B. 2130, a multi-faceted law including the ECRA-inspired Section 6. The Committee on Natural Resources reported the bill favorably, but because it was not voted upon by the end of the session, it became null.
- Proposal was reintroduced in the 1988 session as H.B. 2750. It was attached to Senate Bill 924. Bill died in Senate Ways and Means Committee.

- H.B. 2750 was not refiled by Magnani. H.B. 3855, which was filed during the 1989 session and died, failed to incorporate the provision of the former Section 6, but retained an innocent purchaser defense. It, too, died.

G. Michigan

(a) School Construction Precondition Proposal

1. Bill: S.B. 273 -- A bill to amend the Natural Resources and Environmental Protection Act.

2. Sponsor: Senator Samuel Thomas, III

3. Nature of Proposed Law:

- Would require that prior to beginning construction of a school, the owner or operator would have to conduct an environmental assessment to determine whether there are hazardous substances there in excess of state criteria for unrestricted residential use.

- Would not allow construction or operation of a school at a property that was or is the site of hazardous substances of such levels, unless requisite corrective actions were first undertaken under state oversight, and subject to public notice and hearings.

- Where corrective actions meet limited residential use criteria rather than unrestricted use criteria, monitoring of site conditions would also be imposed as a precondition to allowing construction and operation of a school.

4. Status:

- Referred to Senate Committee on Natural Resources and Environmental affairs in May 2003, where it died. Similar bill, S.B. 555, was introduced on June 2, 2005. It also died in the Committee on Natural Resources and Environmental Affairs.

(b) Well Law Proposal

1. Bill: H.B. 4654 -- A bill to amend Act No. 368 of the Public Acts of 1978.

2. Sponsor: Representative Mary Brown

3. Nature of Proposed Law:

- Would apply to sellers of real property on which there exists a well which supplied drinking water for human consumption.

- Provides that prior to the sale of real property, the seller must have the well tested for all substances for which there is a maximum contaminant level under the state Public Health Service Act and must provide a written report of the test results to the buyer. Seller would also have to

provide a copy of the results to the local health department and the state environmental agency within thirty days after testing.

- If the well has already been tested for all required substances within one year prior to sale, no further sampling is necessary as long as a complete report of the recent results is provided to the buyer prior to closing.
- Failure of a seller to comply would render the seller liable to the purchaser for:
 - a. The costs of the required tests; and
 - b. The costs, if necessary, of bringing the well water within acceptable contaminant levels.

4. Status:

- Prior bill H.B. 5501 (1988) died in the House Committee on Public Health. It was nearly identical to the current bill.
- H.B. 4654 passed the House but died on December 30, 1990 in the Senate Natural Resources and Environmental Affairs Committee.
- There are no plans to reintroduce the bill.

(c) Tank Law Proposal

1. Bill: H.B. 5329 -- A bill to amend Act No. 423 of the Public Acts of 1984.

2. Sponsor: Representative Kirk Profit

3. Nature of Proposed Law:

- Would apply to sellers of real property where underground storage tank systems are located.
- Would require that prior to sale of subject real property the seller would have to conduct an environmental assessment in a commercially reasonable manner to determine whether the property contains any contamination as a result of the underground storage tank system.
- Owner of property would have to deliver a report of the environmental assessment to a prospective purchaser prior to sale of the property.
- Would allow that if an environmental assessment had been performed on the subject property within one year prior to sale, and if the owner had no knowledge of any contamination occurring between the time of the assessment and the sale, then the prior environmental assessment would be sufficient to meet the requirements of the law so long as the reports were delivered to the prospective purchaser prior to sale of the property.
- The bill contains no right to void the transaction and contains no violation and penalty provisions.

4. Status:
 - The bill died on December 30, 1990 in the House Committee on Conservation, Recreation and Environment and has not been reintroduced.

(d) On-site Disposal System Proposal

1. Bill: S.B. 71 - A bill to amend the Natural Resources and Environmental Protection Act.
2. Sponsor: Senators Patricia L. Birkholz and Mike Goschka
3. Nature of Proposed Law:
 - Would provide that property containing an on-site disposal system may not be transferred before the system has been inspected by the county and a copy of the inspection report is provided to the prospective purchaser.
 - The bill defines on-site disposal system as "a natural or mechanical devised used to collect, treat, and discharge or reclaim wastewater from 1 or more dwelling units without the use of community-wide sewers or a centralized treatment facility."
 - The inspection of the on-site disposal system is meant to determine whether the system is in compliance with county ordinances, whether the system is functioning as designed, and whether the tank must be emptied.
4. Status:
 - Referred to Senate Committee on Natural Resources and Environmental Affairs on January 25, 2005 where it died.

H. New Hampshire

1. Bill: H.B. 324 -- Environmental Cleanup Responsibility Act.
2. Sponsor: Representative Chambers
3. Nature of Proposed Law:
 - Virtually mirrors New Jersey ECRA.
 - Definitions of subject parties and properties are nearly identical to New Jersey ECRA.
 - Submission and evaluation process tracks New Jersey ECRA, and the bill contains the same enforcement hammers, including voiding provisions, \$25,000 per day penalties and personal liability of officers and managers who knowingly direct violations.

4. Status:
 - The 1986 proposal was referred to the House Environment and Agriculture Committee. It was not moved during the 1986 session and was placed in interim study by the Development, Recreation and Environment Committee. There were no hearings and there was no report by the Senate.
 - The bill has not been refiled.

I. New York

(a) Septic System Inspection Law

1. Bill: A. 3076
2. Sponsors: Assemblymen Dinowitz, Colton and Diaz
3. Nature of Proposed Law:
 - Would require that where a property within a watershed area is served by a septic system, the owner would have to obtain a septic system inspection, to determine compliance with such state and municipal regulations, prior to sale or transfer of such property.
 - The owner would have to submit the inspection report to the state.
 - Costs for the inspection and any necessary upgrades would be paid by the state out of funds designated for protection of watershed areas.
4. Status:
 - Introduced February 3, 2003, but died in the Senate Environmental Conservation Committee.

(b) Property Owners Protection Act

1. Bill: A. 418 -- Property Owners Protection Act ("POPA").
2. Sponsors: Assemblymen John, Gantt, Pretlow, Vitaliano, et al.
3. Nature of Proposed Law:
 - Earlier New York proposals, starting with a 1986 Governor's Program Bill and continuing through 1988, closely followed the New Jersey text, passed the Assembly each session but met strong opposition in the Senate and died.
 - In May 1989 a substantially revamped bill was introduced, looking more to the Connecticut model than New Jersey's ECRA and imposing substantial due diligence obligations on transferors, which were virtually identical obligations to CERCLA's detailed due inquiry requirements for buyers seeking innocent purchaser protection. (See 42 U.S.C. §9601 (35)(B) and the 1989 edition of Course Materials for detailed discussion

of A. 8041 and its innovations.) That law also passed the Assembly but was defeated in the Senate.

- In March 1990, a new bill, A. 9676-C, constituting a variation on the 1989 theme, was introduced in the Assembly. (See 1990 edition of Course Materials for detailed discussion.) The bill died in the Assembly Rules Committee.
- In March 1991, the Assembly and the Senate introduced identical bills, A. 7504 and S. 4810, constituting a further variation on the earlier proposals. (See 1991 edition of Course Materials for detailed discussion.)
- In March 1992, yet another revised bill, A. 7504A, was introduced, replacing the CERCLA due diligence standard with a less specific obligation for a transferor to conduct a "good faith" inquiry into the property's history. The bill passed the Assembly but died in the Senate. The earlier proposals A. 7504 and S. 4810 died at the same time.
- A. 7504A was reintroduced in the 1993-1994 session as A. 5262 and S. 1935. The bill passed the Assembly on April 12, 1994 but died in the Senate Environmental Conservation Committee.
- A. 5262 was reintroduced in the 1995-1996 session as A. 418. No companion senate bill was introduced. A. 418 passed the Assembly on April 25, 1995 and was referred to the Senate Environmental Conservation Committee on April 26, 1995. The Assembly and the Senate recessed on June 30, 1995. A. 418 was reintroduced in January, 1996. A. 418 passed the Assembly on February 14, 1996 and was referred to the Senate Environmental Conservation Committee on the same day. It is unlikely that the bill will be passed during this legislative session.
- Pursuant to the bill, subject transfers would include the transfer of a controlling interest in non-residential real property or the acquisition of a controlling interest in any entity with an interest in such property, by any method other than those specifically exempted.
- Specific exemptions would include: (a) corporate reorganization not substantially affecting ownership; (b) death or adjudicated incompetence of the owner; (c) devise, bequest or inheritance; (d) default or foreclosure, by purchase at a foreclosure sale, or by transfer in lieu of foreclosure; (e) acquisition of subject property by a government entity through escheat or any other involuntary transfer or acquisition; (f) exercise of eminent domain authority by purchase or condemnation; (g) lease, sublease or assignment, unless: (i) the term, including all options, exceeds forty-nine years, (ii) substantial capital improvements may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the non-residential real property; (h) creation, modification, extension, transfer, release or satisfaction of a mortgage; (i) granting of an easement; or (j) granting of a license.

- Law would provide that no subject transfer could be completed until the transferor provided to the transferee, within a reasonable time prior to the closing, a "declaration of disclosure" stating that at the time of execution, either:
 - a. There were no hazardous substance or petroleum releases at the site and there was no threat of such release; or
 - b. There was such a release or threat of release, in which case the transferor would also be bound to fully disclose all available information regarding the presence, condition or effects of the release or threat of release.

Note: Prior versions of the bill would have required that where there had been a release or threat of release, either the transferor would have to confirm proper remediation or the parties would have to expressly allocate cleanup obligations. Prior versions would also have required that all remedial work be done pursuant to a work plan signed by a qualified engineering, hydrogeological or environmental expert with prior experience and training in remedial activities.

- Prior to executing a declaration of disclosure, the transferor would have to conduct a "good faith inquiry" into its own business practices and records, as well as into all "known or reasonably ascertainable" information about the use or environmental condition of the property, including such information as is available from public records.

- The declaration of disclosure would have to include, at a minimum:
 - a. The name and address of the transferor;
 - b. The date of transfer;
 - c. The address and location of the property;
 - d. If applicable, the location and identity of hazardous substances or petroleum products which have been identified;
 - e. A listing of available public records relating to the use or environmental condition of the property, if any;
 - f. The names and addresses of the licensed engineer or other environmental or hydrogeological consultants who may have information relating to the subject property, if any;
 - g. Identification of other information known to the transferor regarding any release or threat of release in, on, at or migrating from the subject property; and
 - h. A statement that the transferor is aware that any false statements in the declaration would be punishable pursuant to state penal law.

- Declarations of disclosure would have to be filed by the transferee with the recording officer in the county in which the property is located within thirty days of the transfer.
- Failure of the transferor to file a complete and true declaration of disclosure would render the transferor liable to the transferee for reasonable expenses in detecting and remediating a release or threat of release which would have been identified had the transferor properly completed and delivered the declaration.
- Transferee's right to seek damages would terminate six years from the closing date of the transfer of title.
- Bill specifically provides that failure to provide adequate declaration would not affect marketability of title or allow a party to avoid its contractual obligations.
- Unlike the 1986-1988 ECRA-like proposals in New York, the current bill does not impose pre-transfer state oversight or empower the transferee or the state to void transactions for non-compliance.

4. Status:

- The Assembly passed A. 418 in 1996. However, it was not voted out of the Senate Environmental Conservation Committee and did not pass the 1996 legislative session. A. 418 was not reintroduced during the 1997 legislative session. Further reintroduction is not expected.

(c) **Real Property Transfer Right-to-Know Act**

1. Bill: S. 1100 -- Real Property Transfer Right-to-Know Act.

2. Sponsors: Senators Daly, Cook, Holland, et al.

3. Nature of Proposed Law:

- Would apply to transfers of real property where there is a facility: (a) subject to the federal Emergency Planning and Community Right-to-Know Act of 1986 ("SARA Title III"); (b) subject to permitting, licensing and registration requirements that apply to petroleum and chemical bulk storage tanks, hazardous waste facilities and industrial wastewater discharges; (c) subject to licensing of petroleum storage tanks under the state navigation laws; or (d) which constitutes an inactive hazardous waste site.
- Subject transfers would include any conveyance of title or interest in subject property, including a leasehold interest or mortgage, or transfer of a controlling interest in a corporation which owns subject property.
- Would require that thirty days prior to a subject transfer, the transferor provide the transferee with a disclosure document, in affidavit form, containing:

- a. Copies of any emergency and hazardous chemical inventory forms for the facility prepared pursuant to SARA Title III;
 - b. Copies of any notices prepared for the facility pursuant to SARA Title III;
 - c. Identification of any abnormal losses or gains of petroleum reported to the state environmental agency pursuant to law;
 - d. Identification of any releases, discharges, or spills reported to the state environmental agency pursuant to law;
 - e. Identification of any releases of a reportable quantity of a hazardous substance reported to the state environmental agency pursuant to law;
 - f. A copy of any disclosure document prepared by a prior party;
 - g. Identification of any discharges into navigable waters as reported pursuant to state navigation law; and
 - h. A statement as to whether the property is on the state inactive hazardous waste disposal site list.
- In the alternative, where a transferor has not reported any release, discharge or spill, or prepared any report, form or notice mentioned above, the transferor need only provide the transferee with a "negative declaration" affidavit stating that no such reports, forms or notices were required under law.
 - Parties to a transfer would be entitled to waive the requirements of the law in writing.
 - Failure to provide a true and complete disclosure form or negative declaration would render the transferor liable to the transferee for the reasonable cost of detecting and correcting a problem which would have been identified had the transferor properly delivered the disclosure document.
 - Would provide that any action under the law would have to be commenced within six years from the closing date of the transfer.
 - Would provide that failure of a transferor to provide a complete disclosure document would not affect marketability of title.

4. Status:

- The bill was originally introduced in the 1991-1992 legislative session, but died in the Senate Environmental Conservation Committee when the session ended. The 1993-1994 version, identical to the original bill, also died. The bill has not been reintroduced.

(d) Petroleum Discharge Proposal

1. Bill: A. 7410 -- Amendment to Navigation Law.
2. Sponsors: Assemblymen Bianchi, Hill, Pillittere and Vitaliano
3. Nature of Proposed Law:
 - Variation on Illinois legislation and on the New York Right-to-Know proposal discussed above, but only as to petroleum products and not as to other hazardous substances.
 - Would apply to transfers of non-residential real property where petroleum has been stored or discharged, and to residential real property where discharges have occurred.
 - Subject transfers would include conveyance of title in subject property, including transfer of a controlling interest in an entity holding title to such property.
 - As to non-residential property, would require that at least thirty days prior to transfer, the transferor that knows or has reason to know that either: (a) a petroleum discharge has occurred, or (b) petroleum is or has been stored on subject property; must provide transferee with written notice of that information.
 - As to residential property, obligation would only extend to knowledge, or reason to know, of discharge.
 - Failure to notify would give rise to transferee's right to seek rescission, which right would extend for three years from discovery of discharge.
 - Knowing failure would also render transferor liable for cleanup costs and related damages where discharge was not disclosed or where discharge following transfer could have been avoided by requisite notice prior to transfer.
 - Knowing failure would further render transferor liable for penalty of up to \$25,000 for first violation, and up to \$50,000 for subsequent violations.
 - Would render owner subsequent to the discharger strictly liable for cleanup unless the subsequent owner could establish the elements of the CERCLA innocent purchaser defense.
4. Status:
 - The bill was introduced in the 1991-1992 legislative session. It was reported from the Assembly Committee on Environmental Conservation in April 1992, but lost on the third reading in the Assembly. The bill has not been reintroduced.

J. Pennsylvania

(a) Environmental Cleanup Responsibility Act

1. Bills: H.B. 1574 -- Amendment to the Solid Waste Management Act (1985).
 H.B. 2613 -- Environmental Cleanup Responsibility Act (1988).
 H.B. 2227 -- Environmental Cleanup Responsibility Act (1990).

2. Sponsors: H.B. 1574: Assemblyman Cordisco
 H.B. 2613: Assemblyman George, et al.
 H.B. 2227: Assemblyman George, et al.

3. Nature of Proposed Laws:
 - Closely followed New Jersey ECRA, including triggers, subject parties and voiding provisions.

4. Status:
 - All bills died in Committee.

(b) Abandoned Industrial Land Redevelopment Bill

1. Bill: S.B. 972 -- Sections 305 and 502 of An Act Providing for the Voluntary Cleanup of Industrial Sites and Further Defining the Cleanup Liability of New Industries.
2. Sponsors: Senators Brightbill, Musto, Stewart, Shaffer, Belan, et al.

3. Nature of Proposed Law:
 - Act would have applied to persons who intended to acquire and redevelop contaminated industrial sites where there was no financially viable responsible person to clean up the contamination.
 - Prospective purchaser would have been required to conduct a baseline study, pursuant to a Department of Environmental Resources (the "Department") workplan, to delineate the extent of contamination and to specify the redevelopment project.
 - Once the Department approved the adequacy of the report, the prospective purchaser or owner could have entered into an agreement outlining existing cleanup liabilities.
 - Once the Department approved the adequacy of the study, the prospective purchaser would not have been responsible for identified, pre-existing contamination unless it posed a direct or imminent threat to the public health or the environment. However, the purchaser could have been compelled to record the restriction on the use of the property.
 - Exemption from cleanup liability could have been freely transferred to a third party.

4. Status:
 - The bill was modified and reintroduced in 1995 as S.B. 1, which was signed into law as Act 2 on May 19, 1995, effective July 18, 1995. However, the trigger was removed and Act 2 is now implemented voluntarily. (See section "VII. Pennsylvania Brownfields Programs" below for more details on the provisions of this Act.)

(c) Abandoned Industrial Site Redevelopment Act

1. Bill: H.B. 1899 -- Abandoned Industrial Site Redevelopment Act.
2. Sponsors: Assemblyman George, et al.

3. Nature of Proposed Law:

- Closely followed S.B. 972 above, with an additional focus on providing safe harbors for economic redevelopment agencies, and creating of a fund for required cleanup of contaminated properties by innocent owners.
- Would have limited parties eligible for exemption from cleanup liability to those who had "never been a responsible party for the release of a regulated or hazardous substance."
- Would have restricted the free transferability of the liability exemption, required a thirty-day public review and comment period, and required the Department to consult with the Department of Commerce on the adequacy of employment opportunities to be created or retained as a result of the proposed transfer.
- Would have added enforcement hammers for failure to comply with the Act, by authorizing the Department to employ the civil and criminal penalties of the Pennsylvania Solid Waste Management Act and by providing an additional sanction of a penalty of \$50,000 per offense, or a prison term of one year per offense, upon conviction for willful fraud.

4. Status:

- The bill was modified and consolidated with a modified version of S.B. 972 above and reintroduced in 1995 as S.B. 1, which was signed into law as Act 2 on May 19, 1995, effective July 18, 1995. However, the trigger was removed and Act 2 is now implemented voluntarily. (See section "VII. Pennsylvania Brownfields Programs" below for more details on the provisions of this Act.)

(d) Illegal Drug Sites Proposal

1. Bill: H.B. 1794 - Cleanup of Illegal Drug Sites Act
2. Sponsor: Assemblyman James Casorio, et al.

3. Nature of Proposed Law:

- Would provide that properties designated as illegal drug manufacturing sites cannot be transferred, sold, leased, or rented until it is determined that the property is fit for use, or unless the seller makes full written disclosure to the prospective purchaser or tenant.
- The disclosure must state that the property has been designated as an illegal drug manufacturing site and that it may not be fit for use.
- Determination of fitness for use includes investigation of potential contamination by toxic chemicals, and, if necessary, corrective actions.
- A contract to sell or lease that violates the provisions of this bill would be voidable at the option of the buyer or lessee. In addition, any person who knowingly sells or leases property in violation of this law would be committing a first degree misdemeanor.

4. Status:

- H.B. 1794 was referred to the Assembly Committee on Judiciary on June 27, 2005 where it died.

K. Rhode Island

1. Bill: H.B. 5989 - Rhode Island Cesspool Phase-Out Act of 2005

2. Sponsor: Representative Bruce Long and Laurence Ehrhardt

3. Nature of Proposed Law:

- Would require that all cesspools be inspected at, or within three years before, the transfer of title to the property that uses the cesspool.
- The bill defines cesspool as "any buried chamber... constructed prior to April 9, 1968, which receives discharges of sanitary sewage from a building for the purposes of collecting solids and discharging liquids to the surrounding soil.
- If weather conditions interfere such that inspection cannot be performed at the time of transfer, the inspection must be completed no later than six months after the transfer. The seller may take advantage of this extension only if written notification of the inspection requirement is supplied to the buyer at the time of transfer.
- A copy of the inspection report must be provided to the buyer.

4. Status:

- Introduced on March 1, 2005, H.B. 5989 was scheduled for hearing on March 31, 2005. Bill died in the Committee on Environmental and Natural Resources.

L. Utah

1. Bill: H.B. 320 -- Hazardous Substances Disclosure Regarding Real Estate.
2. Sponsor: Representative Gale E. Voight
3. Nature of Proposed Law:
 - Would apply to owners of real property who know or have reason to know that hazardous substances are located on their property and that such substances present or may present an imminent and substantial danger to public health or the environment.
 - Would require that the owner of such property offered for sale or transfer disclose the information to the buyer or the buyer's agent.
 - Failure of the owner to disclose the information to the buyer would constitute grounds for the buyer to rescind the transaction.
4. Status:
 - When introduced in the 1991 session as H.B. 329, the bill passed the House but died in the Senate.
 - H.B. 320 died in the House Rules Committee when the 1992 session ended.
 - Bill has not been reintroduced.

M. Vermont

1. Bill: H.B. 381 -- Environmental Cleanup Responsibility Act (1989).
2. Sponsor: Representative Alice Emmons
3. Nature of Proposed Law:
 - Would require that prior to transfer of subject property, transferor would have to undertake a site assessment and either: (a) submit to the state environmental agency a consultant's certification that contamination does not exist at levels unacceptable to the state, or if contamination is found, (b) receive property transfer approval from the state agency.
 - Subject property would be any real property which has been used at any time since July 18, 1980 for the generation, treatment, storage, transportation or disposal of hazardous wastes. Properties of small quantity generators would be exempt.
 - Site assessment would have to be undertaken by a consultant certified by the state environmental agency, and would have to follow specific procedures for file and record reviews, interviews, sampling and site mapping. A detailed report would have to be submitted to the state.
 - Where contamination is found, the state agency would not issue a transfer approval until it receives: (a) an acceptable remediation action

plan, (b) an agreement between seller and buyer that either one, or the other, or both, agree to promptly carry out the cleanup, and (c) evidence that the party accepting responsibility for the cleanup has the means necessary to complete the work.

- Bill prescribes a detailed program for certification and decertification of environmental consultants by the state.
- Filing fees are prescribed.
- Violation of the law would permit the state to immediately commence an action for a variety of remedies and injunctive relief, including mandatory cleanup, voiding of the transaction, punitive damages and civil penalties of up to \$10,000 per day, per violation.

4. Status:

- Introduced in 1989-1990 session.
- Despite strong banking community support, the bill was not reported out of the House Natural Resources and Energy Committee and became null and void on May 16, 1990.
- Bill has not been reintroduced.
