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July 1, 2011

Via Hand Delivery
Clerk of the Court
Superior Court of New Jersey
Essex County Courthouse
50 West Market Street, Room 113
Newark, New Jersey 07102

Re: New Jersey Department of Environmental Protection, et al. v. Occidental Chemical Corporation et al.
ESX-L-9868-05 (PASR)

Dear Sir or Madam:

This firm represents Plaintiffs New Jersey Department of Environmental Protection ("NJDEP"), the Commissioner of the NJDEP, and the Administrator of the New Jersey Spill Compensation Fund in the above referenced matter. Enclosed, please find an original and one copy of the following:

1. **Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Against Tierra Solutions, Inc. ("Tierra);**

2. **Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Against Occidental Chemical Corporation ("OCC") and Maxus Energy Corporation ("Maxus");**

3. Plaintiffs' Response to OCC's Counterstatement of Material Facts;

4. Plaintiffs' Response to Maxus's and Tierra's Counterstatement of Material Facts;

5. Certification of William C. Petit in Support of Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Against Occidental and Maxus; and

6. Proof of Service of the above on Defendants and Third-Party Defendants.

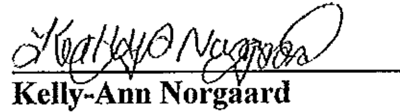
The Motion is returnable July 15, 2011.

Please return one copy of each document marked "filed" to the courier, who has been instructed to wait for same.

Thank you for your attention to this matter.

Very truly yours,

Gordon & Gordon, P.C.



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cc: The Honorable Sebastian P. Lombardi, J.S.C. (via hand delivery)
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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,

Plaintiffs,

v.

OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a/ YPF INTERNATIONAL LTD.) and CLH HOLDINGS,

Defendants.

MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

v.

3M COMPANY, et al.,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
DOCKET NO. ESX-L9868-05 (PASR)

Civil Action

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST TIERRA SOLUTIONS, INC.

On the Brief: Wayne D. Greenstone
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TABLE OF CONTENTS

TABLE OF CONTENTS....i

TABLE OF AUTHORITIES....ii

PRELIMINARY STATEMENT....1

LEGAL ARGUMENT....5

POINT I....5

IT IS SETTLED LAW IN NEW JERSEY THAT AS THE CURRENT OWNER OF THE LISTER SITE PURCHASED WITH ACTUAL KNOWLEDGE OF ITS CONTAMINATION, TIERRA IS STRICTLY LIABLE UNDER THE SPILL ACT AS A PERSON "IN ANY WAY RESPONSIBLE" FOR HAZARDOUS SUBSTANCES DISCHARGED AT THE SITE....5

POINT II....11

TIERRA'S PLAIN LANGUAGE ANALYSIS IS FATALLY FLAWED AND CONTRARY TO THE PLAIN MEANING OF THE SPILL ACT....11

A. The 1993 Amendment....12

B. The 1998 Amendment....13

C. The 2001 Amendment....15

POINT III....20

TIERRA'S RECITATION OF "30 YEARS OF CONSISTENT NEW JERSEY COURT RULINGS" MISCONSTRUES THE GUIDANCE OF THE NEW JERSEY SUPREME COURT IN MARSH V. DEP....20

CONCLUSION....23

TABLE OF AUTHORITIES

CASES

Amerada Hess Corp. v. Director, Div. of Taxation, 107 N.J. 307 18

Atlantic City Municipal Utilities Authority v. Hunt, 210 N.J. Super. 76 (App. Div. 1986) 8, 12

Bd. of Chosen Freeholders of the County of Morris v. State, 159 N.J. 565, 580 (1999) 18

Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995) 11

Bubis v. Kassin, 184 N.J. 612 (2005) 11

Castro v. NYT Television, 370 N.J. Super. 282 (App. Div. 2004) 19

Dep't of Envtl. Prot. v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div. 1985) 6

Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473 (1983) 5

Ge Solid State v. Director, Division of Taxation, 132 N.J. 298 (1993) 18

Housing Authority of City of New Brunswick v. Suydam Investors, L.L.C., 355 N.J. Super. 530 (App. Div. 2002) 21

Interfaith Cmty. Org. v. Honeywell Int'l Inc., 204 F.Supp.2d 804 (D.N.J. 2002), rev'd by, Interfaith Cmty. Org., supra, 215 F. Supp.2d at 508). 8, 9, 21

In re: Kimber Petroleum Corporation, 110 N.J. 69 (1988) 6

Marsh v. DEP, 152 N.J. 137(1997). .... 8, 9, 11, 20, 21, passim

N.J. Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530 (App. Div. 2011). 21

New Jersey Dep't of Environmental Protection v. Exxon Mobil Corp., 393 N.J. Super. 388 (App. Div. 2007) 4, 15

Northern Int'l Remail & Express Co. v. Robbins, 2010 N.J. Super. Unpub. LEXIS 2023 (App. Div. 2010), ... 21

Rumson Estates, Inc. v. Mayor of Fair Haven, 177 N.J. 338, 828 A.2d 317 (2003) 11

S. Orange Vill. v. Hunt, 210 N.J. Super. 407 (App. Div. 1986) 22

State, Dept. of Environmental Protection v. Arky's Auto Sales, 224 N.J. Super. 200 (App. Div. 1988) 8, 21, 23

Tree Realty v. Dep't of Treasury, 205 N.J. Super. 346 (App. Div. 1985) 21

Turner v. First Union Nat'l Bank, 162 N.J. 75, 40 A.2d 1081 (1999) 11

White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294 (App. Div. 2001),......8, 21, 22

STATUTES

N.J.S.A. 58:10-23.11f22..3

N.J.S.A. 58:10-23.11f.a(2)(b)...4

N.J.S.A. 58:10-23.11g.c(1) 1, 2, 6, 10, 13, 14,16

N.J.S.A. 58:10-23.11g.d(5)..3, 14, 16

N.J.S.A 58:10-23.11x...5

N.J.S.A. 58:10-23.11g..2, 3

REGULATIONS

N.J.A.C. 7:1J-2.7(b)..9

LEGISLATIVE HISTORY

P.L.1976, c.141..2

P.L. 1993, c. 139, Sec. 44...14

P.L. 1993, c. 139, Sec. 44, Assembly Policy and Rules Committee Statement to Senate Committee Substitute for Senate, No. 1070, with committee amendments, June 3, 1993, p. 15..7

P.L. 2001 c. 154..16

P.L. 2001, c. 154, Senate Environment Committee Statement to Senate Committee Substitute for Senate, No. 2345, June 11, 2001..17

PRELIMINARY STATEMENT

Tierra Solutions, Inc. ("Tierra") admits the following facts in its response to the Statement of Undisputed Material Facts in Support of Plaintiffs' Motions for Partial Summary Judgment Against Occidental Chemical Corporation, Maxus Energy Corporation, and Tierra Solutions, Inc.:

- Tierra is the current owner of the property at 80 and 120 Lister Avenue (Tierra Response to Undisputed Material Fact ¶52);
- On August 28, 1986, it acquired title to 80 and 120 Lister Avenue in Newark from Diamond Shamrock Chemicals Corporation ("DSCC") (Tierra Response to Undisputed Material Fact ¶51);
- The DSCC plant was a source of dioxin contamination of the Newark area (Tierra Response to Undisputed Material Fact ¶2);
- At the time Tierra acquired the property it "had knowledge of the presence of some hazardous substances on the Lister Site at the time it acquired the property" (Tierra Response to Undisputed Material Fact ¶52);
- By 1986, when Tierra first acquired 80 Lister Avenue and 120 Lister Avenue, Tierra knew that discharges of certain hazardous substances had occurred in the past at the Lister Site and that some previously discharged substances had subsequently migrated and/or were threatening to migrate off-site (Tierra Response to Undisputed Material Fact ¶51).

Based upon these undisputed facts, Tierra is not entitled to invoke the innocent purchaser defense provided by the Legislature in 2001, and is therefore liable pursuant to Section 11g.c of

the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11g.c(1), ("Spill Act" or the "Act") as a person in any way responsible for the hazardous substances that originated from the Lister Site.

Section 11g.c(1) of the Spill Act sets forth a two-pronged approach to Spill Act liability which has been the law in New Jersey since 1979:

> . . . any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). [N.J.S.A. 58:10-23.11g.c(1)(emphasis added).][1]

Tierra purports to rely upon the plain language of the Spill Act and a 30-year history of "consistent New Jersey court rulings" holding that property owners who are not "dischargers" can be liable only for discharges occurring during their ownership. Tierra Brief, p. 1. This constricted view of the scope of Spill Act liability blindly ignores the judicially confirmed breadth of the "in any way responsible" prong of Section 11g.c(1), and the plain meaning of this expansive liability provision as confirmed by multiple, subsequent amendments, which serve to confirm that a current property owner like Tierra, who knowingly purchased the grossly contaminated Lister Site without qualifying for the statutory innocent purchaser defense, is "in any way responsible" for the hazardous substances that were discharged at and from the site. The very same argument raised by Tierra in its opposition to Plaintiffs' motion - that an owner can only be liable if a discharge occurred during the period of ownership - was unequivocally rejected by the New Jersey Supreme Court in Marsh v. Department of Environmental Protection,152 N.J. 137, 147-148 (1997).

[1] A full version of Section 11g of the Spill Act is attached as Appendix A to this brief for the convenience of the Court.

As the purchaser of a contaminated property in 1986, Tierra is strictly, jointly and severally liable for all of Plaintiffs' past and future cleanup and removal costs, unless it can establish that it is eligible to invoke the statutory innocent purchaser defense provided in Section 11g.d(5) of the Spill Act, which includes the following:

> A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that
>
> * * *
>
> (b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property. . .[N.J.S.A. 58:10-23.11g.d(5)].

Knowing that it could not satisfy the requirements to invoke the innocent purchaser defense in Section 11g.d(5), which is the only statutory defense that it could possibly assert, Tierra engages in a tortured analysis of both the Spill Act and cases interpreting its provisions to craft an argument that the Legislature provided a limited defense to Spill Act liability for certain pre-1993[2] purchasers of contaminated property in New Jersey prior to 1993, even though such parties were not exposed to potential liability under the Spill Act. Tierra's argument flies in the face of logic. As the Appellate Division stated in response to similar arguments raised by a Spill Act liable party in connection with N.J.S.A. 58:10-23.11f22, the provision of the Spill Act that provided immunity from liability for natural resource damages for certain persons:

[2]The actual date is September 14, 1993, the effective date of certain provisions of P.L. 1993, c. 139, which among other things changed the name of Environmental Cleanup Responsibility Act to the Industrial Site Recovery Act, which is often referred to as "ISRA". For convenience, this brief will refer to P.L. 1993, c. 139 by its Senate Bill number, "S-1070".

> Obviously, the Legislature would not have had to afford non-polluters such liability protection unless the Legislature found them to be otherwise liable for natural resource damages under the Act . . .[Dep't of Environmental Protection v. Exxon Mobil Corp., 393 N.J. Super. 388, 408 (App. Div. 2007)].

The court made a similar observation with respect to the contribution protection concerning natural resource damage claims, N.J.S.A. 58:10-23.11f.a(2)(b), Id. at 409.

As the current owner of contaminated property acquired prior to 1993 and one who does not qualify for the innocent purchaser defense, Tierra is "in any way responsible" for the hazardous substances discharged at and from the Lister Site, and Plaintiffs' motion for partial summary judgment should be granted.

LEGAL ARGUMENT

POINT I

IT IS SETTLED LAW IN NEW JERSEY THAT AS THE CURRENT OWNER OF THE LISTER SITE PURCHASED WITH ACTUAL KNOWLEDGE OF ITS CONTAMINATION, TIERRA IS STRICTLY LIABLE UNDER THE SPILL ACT AS A PERSON "IN ANY WAY RESPONSIBLE" FOR HAZARDOUS SUBSTANCES DISCHARGED AT THE SITE.

Our New Jersey Supreme Court and our Legislature have addressed this issue and have determined that current owners of contaminated property who took ownership with knowledge of the contamination are liable under the Spill Act for all cleanup and removal costs associated with the hazardous substances discharged at and from the property.

The original Spill Act as enacted in 1976 limited liability to dischargers of hazardous substances. Some two years after its effective date, and in keeping with growing concern over the effects of historical pollution on the citizens and environment of New Jersey, the Legislature expanded the reach of the liability provision to include persons "in any way responsible" for hazardous substances. The rationale for these changes and the history of the State's effort to combat historical pollution is spelled out in Point I of Plaintiffs' moving brief (pp. 7-10). That rationale has not been challenged by Tierra, and will not be repeated here.

But it is worth noting again in the context of replying to Tierra's version of legislative history, that while the Legislature never defined the term "in any way responsible," it clearly intended the Spill Act "to be 'liberally construed to effect its purposes.'" Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 502 (1983) ("This act, being necessary for the general health, safety, and welfare of the people of this State, shall be liberally construed to effect its purposes." N.J.S.A 58:10-23.11x). The Legislature's directive led the Supreme Court to conclude that "[a] party even remotely responsible for causing contamination will be

deemed a responsible party under the Act." In re Kimber Petroleum Corporation, 110 N.J. 69, 85 (1988); see also Department of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div. 1985).

Any doubt about the applicability of "in any way responsible" prong of the Spill Act liability provision to pre-1993 purchasers is dispelled by the Legislature's own understanding of the reach of that provision to knowing purchasers of contaminated property. Successive Legislatures over an eight-year period enacted three amendments that addressed the Spill Act liability of persons who purchase contaminated property – in 1993, 1998 and 2001.[3] See Point II, infra. In 1993, the first time that it considered the applicability of the liability provision to purchasers of contaminated property, the Legislature enacted an amendment that specifically declared that a property owner purchasing a contaminated site after 1993 who failed to exercise environmental due diligence "shall be considered a person in any way responsible for the discharged hazardous substance pursuant to subsection c. of this section. . ." P.L. 1993, c. 139, Section 44.[4]

This clarification of existing law did not constitute a new basis for liability for post-1993 purchasers, but rather was a Legislative reaffirmation of the expansive reach of the 1979 amendment of Section 11g.c(1), which added the "in any way responsible for any hazardous substance" the liability language. The 1993 amendment expressed the Legislature's intention and understanding of existing law that the knowing purchasers of previously contaminated

[3] Appendix C is a timetable of amendments and key cases for the convenience of the court.

[4] This provision was modified in 1998, via P.L. 1997, c. 278, and replaced with the current version that tracks the language of Section 11g.c(1): "In addition to the persons liable pursuant to this liability subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993."). [N.J.S.A. 58:10-23.11g.d(2)].

property were liable as persons "in any way responsible for any hazardous substance." With respect to persons like Tierra, who acquired contaminated property prior to 1993, the 1993 amendment that provided an innocent purchaser defense only to post-1993 purchasers, but expressly stated that "Nothing in this paragraph (2) shall be construed to alter liability of any person who acquired real property prior to the" 1993 effective date of certain S-1070-related provisions (Id.).

Tierra construes an identical provision in the 1998 amendment as not altering its claimed non-liability status as a pre-1993 purchaser. This doublethink approach to statutory construction is contradicted by one of the Committee reports of the 1993 Amendment which explains the Legislature's view on both pre- and post-1993 acquisitions of contaminated property:

> Those persons who acquire contaminated property after the effective date of the [S-1070] shall not be considered in any way responsible for the discharged hazardous substance if that person can establish by a preponderance of the evidence that the person acquired the property after the discharge, that the person did not know and had no reason to know that any hazardous substance had been discharged by undertaking all appropriate inquiry into the previous ownership and uses of the property, or that the person acquired the property by devise or succession. . .
>
> The substitute does not change the existing "Spill Compensation and Control Act" liability of persons who purchased real property before the effective date of [S-1070]. (emphasis added) [Assembly Policy and Rules Committee Statement To Senate Committee Substitute for Senate, No. 1070, with committee amendments, June 3, 1993, p. 15, attached as Appendix B] .

This statement is a clear expression of the Legislative understanding in 1993 that post-1993 purchasers of contaminated property were liable as persons "in any way responsible," who could only avoid liability by successfully asserting the newly provided defense, and that the liability of pre-1993 purchasers - not immunity from liability - remained unchanged, until a specific defense was crafted for pre-1993 purchasers in 2001.

The Supreme Court in Marsh, supra, addressed head on the very same defense raised by Tierra - the claim that there was no Spill Act liability for pre-1993 purchasers of contaminated property unless additional discharges occurred during their period of ownership. The factual, legal and historical context of the case are significant, in that the Court also addresses the effect of the 1993 amendment upon the Spill Act liability of pre-1993 purchasers.

Some of the confusion in cases that conflict with the broad statutory reach of the "in any way responsible" liability language was spawned by several sentences in Ventron:

> The phrase "in any way responsible" is not defined in the statute. As we have noted previously, however, the Legislature intended the Spill Act to be "liberally construed to effect its purposes." N.J.S.A. 58:10-23.11x. The subsequent acquisition of land on which hazardous substances have been dumped may be insufficient to hold the owner responsible. Ownership or control over the property at the time of the discharge, however, will suffice. [Ventron, supra, 94 N.J. at 502 (emphasis added).]

Some courts, such as those in Atlantic City Municipal Utilities Authority v. Hunt, 210 N.J. Super. 76 (App. Div. 1986), Dept. of Environmental Protection v. Arky's Auto Sales, 224 N.J. Super. 200, 207 (App. Div. 1988), and White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294 (App. Div. 2001), based their decisions on a narrow reading of Ventron, following the "will suffice" ruling cited above, without considering whether the acquisition of contaminated property alone can suffice. After the passage of S-1070, the Supreme Court had another opportunity to speak on this issue, and this time clearly and unambiguously instructed on the existence of such liability. Marsh, supra, involved not only a petitioner's appeal from a denial of her Spill Fund claim for cleanup costs, but also the Appellate Division's invalidation of a DEP Rule that incorporated an environmental due diligence requirement into an innocent purchaser threshold for Spill Fund eligibility. It was necessary for the Supreme Court to determine whether the DEP had the statutory authority to promulgate the Rule, and an exploration of that authority required an interpretation of the scope of the liability section of the Spill Act. The Court

determined that since the 1979 amendment to the Spill Act, a current owner who failed to exercise environmental due diligence when purchasing a contaminated property is a person "in any way responsible" for cleanup and removal costs associated with the hazardous substances that originated at the property.

The Court's analysis of the purposes of the Spill Act and its legislative history provided the basis for the recognition by the Supreme Court of the liability of a pre-1993 purchaser (or recipient) of contaminated property who failed to exercise environmental due diligence. Consideration of this issue came to the Court following the Administrative Law Judge's denial of her claim, after finding that Marsh was in the disqualified category of a person "in any way responsible for the discharge," either because she owned the property while a discharge of gasoline occurred or because she had not exercised due diligence before acquiring the property. Marsh, supra, 152 N.J. 142-43. The Appellate Division affirmed for the first reason, finding that Marsh was a responsible party because storage tanks leaked during the time of her ownership, but invalidated the Department of Environmental Protection Rule that had codified the innocent purchaser defense. Id. at 143-44. While the DEP claimed that the rule which set forth the innocent purchaser defense and which was adopted some nine months before the enactment of S-1070, had merely codified the pre-existing Spill Act liability, the Appellate Division held that the Rule, N.J.A.C. 7:1J-2.7(b), which established a due diligence requirement as a condition of recovery under the Fund, was invalid because it preceded the enactment of the S-1070 amendments. Id. at 143. The Supreme Court granted Marsh's petition for certification and DEP's cross-petition concerning the validity of the regulation. Id. at 144.

Marsh argued that at the time of her acquisition, there was no environmental due diligence requirement, and that no such duty existed prior to the effective date of this

amendment. At 147-48 Affirming Marsh's ineligibility on the basis of discharges during the time of her ownership, the Supreme Court also repudiated the Appellate Division's invalidation of DEP's Rule, and addressed Marsh's arguments directly:

> [S-1070] did not impose a duty on landowners to inquire diligently into the condition of their property. Rather, it established a "new defense" n2 to Spill Act liability for landowners who acquired their property after it had been contaminated and who could prove that they conducted such an investigation. [Marsh, supra, 152 N.J. at 147-148]. [Id.]

In footnote 2, the Supreme Court further explained its view on the liability of a property owner for pre-existing discharges:

> The defense [S-1070] created for innocent landowners was only "new" in terms of explicit statutory expression. We leave for another day the issue of whether a landowner who took title to her property before ISRA's enactment and who at that time had neither actual nor constructive knowledge of pre-existing contamination may be liable under the Spill Act for the cost of cleaning up that pre-existing pollution. [Id.]

By reviewing the Rule in the context of both the 1998 and later 1993 ISRA amendments, the Marsh Court for the first time stated without any doubt that liability based upon the knowing acquisition of contaminated property was included in the liability provisions that have been at the core of the Spill Act since 1979. Id. at 148-49.

At the time of the decision, the Marsh court recognized that there remained an open liability question under the Spill Act – it was not whether a purchaser with actual knowledge, such as Tierra, is liable under the Spill Act, which it always was after the 1979 amendment, but whether an "innocent" purchaser could be deemed "in any way responsible" and therefore liable pursuant to Section 11g.c. Id. at 148. The 2001 amendment to the Spill Act made any further judicial interpretation on that issue unnecessary. Likewise, any ambiguity flowing from the

Ventron language, still cited by the Marsh court, was resolved, since the Supreme Court has recognized that liability by virtue of knowing acquisition is clearly within the statutory bounds.

Tierra admits that it purchased the Lister Site in 1986 with full knowledge that hazardous substances had been discharged at the property. When determining whether a genuine issue of material fact exists, a court is to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). Here, there are no disputed facts. Tierra, as a knowing purchaser of contaminated property, is ineligible for the innocent purchaser defense provided to Spill Act liability, and should be found liable for all past and future cleanup and removal costs.

POINT II

TIERRA'S PLAIN LANGUAGE ANALYSIS IS FATALLY FLAWED AND CONTRARY TO THE PLAIN MEANING OF THE SPILL ACT.

Our Supreme Court recognizes and applies certain basic principles of statutory construction:

> Where statutory language is clear, courts should give it effect unless it is evident that the Legislature did not intend such meaning." Rumson Estates, Inc. v. Mayor of Fair Haven, 177 N.J. 338, 354, 828 A.2d 317 (2003). Moreover, statutory provisions "should be given their literal significance[] unless it is clear from the text and purpose of the statute that such meaning was not intended." Turner v. First Union Nat'l Bank, 162 N.J. 75, 84, 740 A.2d 1081 (1999). [Bubis v. Kassin, 184 N.J. 612, 626 (2005).]

The expansive scope of Section 11g.c and the inclusion of an innocent purchaser defense from such liability demonstrate that purely on a textual level, the statute on its face is clear and

no further interpretation or resort to extrinsic evidence is required. The Legislature has stated its intention that persons who acquire contaminated properties without exercising environmental due diligence are liable for cleanup and removal costs under the Spill Act. A contrary reading, that the current owner is not deemed "in any way responsible," would allow the transfer of a contaminated property with no assurance that a source of private rather than public funds would be available to remediate pre-existing pollution. The literal meaning of "in any way responsible" – including ownership of contaminated property where discharges originated - would be consistent not only with the text and purpose of the Spill Act, but also with the series of related environmental statutes designed to address cleaning up New Jersey's historical pollution, such as the Industrial Site Recovery Act, N.J.S.A. 17:1k-6 to -13. More importantly, such an interpretation is in full accord with the specific serial amendments to the Spill Act and the State's other environmental laws designed to clean up pollution and at the same time preserve the public's limited resources.

A. The 1993 Amendment

In performing its legislative history gymnastics, Tierra only addresses two of the three Spill Act amendments that relate to the Spill Act liability of property owners who acquire contaminated properties. Read together, the amendments are consistent with and reflect the legislative determination that unless such purchasers (whether pre- or post-1993) exercise environmental due diligence, they are strictly liable as persons "in any way responsible" for hazardous substances.

The first of the three amendments to the Spill Act that focused upon the liability of a property owner who acquired a contaminated property was S-1070 in 1993, which substantially reformed the Environmental Cleanup Responsibility Act, renamed it the Industrial Site

Remediation Act, and amended the Spill Act to include for the first time an innocent purchaser defense to Spill Act liability, applicable only to acquisitions occurring after the effective date of certain S-1070 provisions.

Tierra spends considerable space discussing the 1998 and 2001 amendments, developing a theory that the 1998 amendment created for the first time a new category of Spill Act-liable persons who previously were not liable for cleanup and removal costs associated with discharges of hazardous substances unless a new discharge occurred on their watch subsequent to acquiring ownership - post-1993 purchasers of previously contaminated property. According to Tierra, these purchasers were suddenly made liable for the first time as persons in any way responsible. At the same time, the Act also provided a new "innocent purchaser" defense for those same post-1993 purchasers who could meet certain criteria, including the performance of an environmental investigation prior to acquisition.

That Tierra relies upon the disparate legislative treatment of pre- and post-1993 acquisitions, and a supposed statutory structure that rigidly split "liability" and "defenses" provisions into two separate, segmented subsections, Section 11g.c and Section 11g.d, to cobble its theory that since no similar liability provision for pre-1993 acquisitions was ever enacted by the Legislature, Tierra could not face liability for mere ownership of the grossly contaminated Lister Site. This structural analysis falls apart when one examines the text of the 1993 amendment that Tierra inexplicably ignores. That amendment included both a statement of liability and a defense in the same subsection

B. The 1998 Amendment

The 1998 amendment seems to have satisfied Tierra's interest in categorical structure. In the world according to Tierra, following the 1998 amendment, there were only three categories

of persons who faced Spill Act liability under the Section 11g.c liability provision: (1) dischargers or persons in any way responsible for a hazardous substance; (2) persons who assume ownership of a hazardous substance from a vessel; or (3) a party who acquires contaminated property after S-1070's effective date. Because it does not fall into any of these three categories, Tierra argues that it cannot face Spill Act liability, unless a discharge occurred during its period of ownership.[5] According to Tierra, because no such liability existed prior to adoption of this 1998 amendment which post-dated its acquisition of the Lister Site, it could not face Spill Act liability for the discharges that originated at the Lister Site prior to its acquisition.

An examination of the statutory language and associated legislative history reveals major flaws in Tierra's statutory plain language analysis. Tierra wrongly asserts under its theory that until 1998, no Spill Act liability attached to the purchaser of a contaminated property, and then only to post-1993 acquisitions, yet it fails to mention anywhere in its opposition that the first and perhaps most telling of the three amendments that deal with innocent purchasers, the 1993 amendment of S-1070, which underscored the Legislature's view that a post-1993 purchaser who fails to exercise environmental due diligence "<u>shall be considered a person in any way responsible for the discharged hazardous substance pursuant to subsection c. of this section. . .</u>" P.L. 1993, c. 139, Section 44 (emphasis added).[6] This provision was codified at <u>N.J.S.A.</u> 58:10-23.11g.d(5) and modified in 1998. The clarification by the Legislature that a knowing purchaser was a person in any way responsible did not constitute an enlargement of the scope of liable persons, but rather a Legislative expression that the 1979 amendment of Section 11g.c(1), which added persons "in any way responsible" for hazardous substances to the scope of liable persons, was intended to include purchasers of previously contaminated property.

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[5] The Plaintiffs continue to assert a claim based upon Tierra discharges, as set forth in their opposition to the Tierra motion to dismiss on the pleadings, but is not moving at this time on that basis in this motion.
[6]This provision was modified in 1998.

With respect to persons like Tierra who acquired contaminated property prior to 1993, the 1993 amendment expressly provided that "[n]othing in this paragraph (2) shall be construed to alter [the] liability of any person who acquired real property prior to the" 1993 effective date of certain S-1070 provisions. Id.

Tierra incorrectly states that there was no Spill Act liability for post-1993 property owners until it was created by the 1998 amendment, completely ignoring the Marsh analysis that such liability had been encompassed by the Spill Act since 1979. Tierra also avoids the text of the 1993 enactment with accompanying legislative committee reports that demonstrate the Legislature's understanding of the Spill Act that the "in any way responsible" language covered purchasers who failed to exercise environmental due diligence (this term is generally used by public officials and the regulated community to describe those Spill Act and regulatory requirements that refer to environmental investigations performed prior to the purchase of a property). Tierra also failed to note that the purpose of the 1993 amendment was to provide a new defense that did not previously exist to liability. Furthermore, Tierra also ignores the provision in the 1998 legislation that tracks language from the 1993 amendment, that the provisions concerning post-1993 transactions do not alter the liability of pre-1993 purchasers.

C. The 2001 Amendment

Tierra posits that if OCC and the Plaintiffs are correct, the 2001 amendment to the Spill Act was a silent amendment to the liability provision of the Spill Act by implication. Tierra Brief, p. 16. But as Marsh recognizes, and the serial amendments of the Spill Act address, the liability of a property owner who knowingly purchased contaminated property is an important element in achieving the goals of the Spill Act. As the Appellate Division noted with respect to a different Spill Act provision at issue in ExxonMobil, supra, the Legislature would have had no

need to extend protection against Spill Act liability to property owners who knowingly purchased contaminated properties unless the Legislature recognized that such purchasers would otherwise be liable under the Spill Act.

Tierra claims that the 2001 amendment that deals with the addition of an innocent purchaser defense for pre-1993 purchasers "is not truly a Spill Act amendment, but addresses environmental claims of all types . . ." Tierra Brief, p. 19. A reading of that section, however, clearly indicates that the first potential liability it seeks to afford protection from is that imposed by subsection c, N.J.S.A. 58:10-23.11g.c, the liability provision applicable to persons "in any way responsible":

> (5) A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply. . .(emphasis added) [N.J.S.A. 58:10-23.11g.d(5)].

If no such liability existed, what purpose would be served by providing protection from Spill Act cleanup and removal costs to an innocent purchaser on the one hand and denying to one who purchased a contaminated property with knowledge of its condition?

In further support of its flawed statutory analysis, Tierra has offered the court a purported draft of a Senate committee proposal to add a new express liability provision to Section 11g.c of the Spill Act, which would have provided a separate liability provision for a pre-1993 purchaser, parallel to the liability section for a post-1993 purchaser. In its initial bill form, P.L. 2001 c. 154 was limited to extending the statute if limitations for certain State environmental actions. On

June 11, 2001, the Senate Environment Committee issued a statement to a substitute bill, which contained the innocent purchaser defense:

> The substitute would provide a new defense to liability for persons who purchased contaminated property prior to September 14, 1993. If it can be established by a preponderance of the evidence that (1) a person acquired the property after the discharge of the hazardous substance, (2) at the time the person acquired the property he did not know and had no reason to know that any hazardous substance had been discharged at the property, or the person acquired the real property by devise or succession, (3) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger, or to the person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs, and (4) the person gave notice of the discharge to the Department of Environmental Protection upon actual discovery of the discharge, then the person is not liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to the Spill Act or pursuant to civil common law. To establish that a person had no reason to know that any hazardous substance had been discharged, the person must have undertaken at the time of acquisition, all appropriate inquiry on the previous ownership and uses of the property based upon generally accepted good and customary standards. The substitute is intended to provide a defense to liability for only those persons who purchased contaminated property before September 14, 1993 and, after appropriate inquiry, did not know and had no reason to know that the property was contaminated. The substitute is not intended to change any liability that otherwise exists for persons who acquired contaminated property before September 14, 1993. [Senate Environment Committee Statement to Senate Committee Substitute for Senate, No. 2345, June 11, 2001 (emphasis added).]

While the new defense was added, no new liability provision was reported out of the Committee. But that is of no import. The amendment was not intended to change existing liability for pre-1993 purchasers. Indeed, in light of the existence of such liability, there was no need to add another liability provision. Furthermore, since it was not reported out of the Committee as part of an amended bill, it is not known whether the Senate Environment

Committee saw the proposal, considered it, or acted to accept or reject it. No meaning can be gleaned from its absence from the bill reported out of the committee three days after the date on the document.

Furthermore, Tierra has presented no evidence of deliberate legislative inaction with respect to the purported draft proposed amendment. Generally, even when there is some documentation of official legislative action, such evidence is considered weak evidence capable of multiple interpretations unless it quite clearly evidences legislative intent. "'Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute.'" Amerada Hess Corp. v. Director, Div. of Taxation, 107 N.J. 307 (1987), GE Solid State v. Director, Division of Taxation, 132 N.J. 298, 313 (1993).

Drawing any inference from a draft proposal that was never introduced as part of a bill, referred by the full chamber after being sponsored and introduced to a Committee for consideration, then voted out of a Committee or rejected by a Committee as indicated in a report, is less than a weak reed. Tierra cites several cases to justify its reliance upon the draft proposal to support its speculation about legislative intent. Each of these cases, however, involves extensive and documented legislative activity. In one case cited by Tierra, Brief, pp. 18-19, Bd. of Chosen Freeholders of the County of Morris v. State, 159 N.J. 565, 580 (1999), the full legislature had adopted the recommendation of a commission on the funding of judicial capital costs, but then omitted the word "capital" from the list of judicial costs to be assumed by the State. The process included hearings and development of a ballot question. Id. at 570-71. The Court ruled that the "Legislature's exclusion of the word 'capital' from the list of enumerated judicial costs to be assumed by the State, however, can be understood only as a rejection of the

capital costs recommendation in the Commission's report." Id. at 580. No such active and deliberative legislative process occurred here.

Likewise, Castro v. NYT Television, 370 N.J. Super. 282 (App. Div. 2004) involved a patient's bill of rights issue, in which a provision in the original legislation that would have provided for a private right of action was deleted by the Assembly Health and Human Resources Committee, which inserted in its place an administrative complaint system and the authority of the State to issue fines for violations. The Committee Statement accompanying these amendments stated the purpose of the deletion. Id. at 292. The proposed provision authorizing the Department to impose fines was subsequently deleted by a floor amendment, and the bill was then passed by both houses of the Legislature and signed into law by Governor Kean on August 14, 1989. Id. at 292. As the court explained:

> The Legislative history demonstrates that the Legislature made a deliberate decision to withhold authorization for patients to bring private actions for alleged violations of the Hospital Patients Bill of Rights Act. There is no reason for us to speculate whether the Legislature eliminated the provision that would have authorized such actions because it concluded that the Department of Health's broad regulatory authority over hospitals would be sufficient to assure compliance with the Act or whether this change was simply a prerequisite to securing the votes needed to pass legislation that had failed of enactment in three prior legislative sessions.
> [Id., at292-293]

Tierra's effort to bootstrap its analysis on such a flimsy reed should carry no weight in this court. The plain meaning of the liability provision, and the recognition by the Legislature and the Supreme Court that a knowing purchaser of contaminated property is a person "in any way responsible" for hazardous substances discharged at the property, leave no doubt as to Tierra's liability in this matter for all of Plaintiffs' cleanup and removal costs.

POINT III

TIERRA'S RECITATION OF "30 YEARS OF CONSISTENT NEW JERSEY COURT RULINGS" MISCONSTRUES THE GUIDANCE OF THE NEW JERSEY SUPREME COURT IN MARSH.

There is little doubt that the efforts of the State of New Jersey to address its historic industrial pollution has been an evolving challenge, evidenced by the simple fact that the Spill Act has been amended some 40 times since its original enactment in 1976. The significant expansion of the potential class of persons who could become liable for cleanup and removal costs in 1979 to persons in any way responsible for any hazardous substances, and the Legislature's decision not to provide a definition for that term, has led to numerous cases attempting to define its parameters. Tierra claims that the prevailing rule established first in Ventron, and subsequently followed, is that a discharge must occur during a party's ownership in order to find that party liable for the discharge. Tierra Brief, p. 11. The Plaintiffs agree that ownership during the time of discharge is one basis for imposing Spill Act liability, but the Spill Act also imposes liability on those "in any way responsible" for the hazardous substance, not just the discharge. The breadth and extent of that liability is yet to be fully delineated.

Marsh, supra, is the first Supreme Court case after the 1993 enactment of S-1070 to consider the issue of whether a person with knowledge of pre-existing contamination is liable under the Spill Act for cleanup and removal costs associated with the hazardous substances on a site. The 1993 amendment to the Spill Act, ignored by Tierra, was a component of this effort to remediate New Jersey, encourage redevelopment, and to have the cost shifted from the public to the industries and property owners associated with the contamination.

In this context, the Marsh Court recognized that the reach of "in any way responsible," informed by the Legislature's express declaration of ownership liability within the broad definition of "in any way responsible," includes knowing acquisition of contaminated property. . If the White Oak court had an opportunity to consider the 2001 amendment in the same manner as it viewed the earlier amendments for post-1993 acquisitions, a different result would have been expected, just as the federal district court in Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 215 F. Supp. 2d 482 (D.N.J. 2002), which had relied on White Oak in granting summary judgment to a pre-S-1070 landowner who had not conducted environmental due diligence, reconsidered its ruling once the 2001 Amendment was brought to its attention. Interfaith Cmty. Org. v. Honeywell Int'l Inc., 204 F.Supp. 2d 804, 815 (D.N.J. 2002), rev'd by, Interfaith Cmty. Org., supra, 215 F. Supp.2d at 508. This may also have altered the course of the cases cited by Tierra in its opposition brief that followed White Oak.

Furthermore, many of the cases cited by Tierra are inapposite to the issue before this court - the liability of a current owner who knowingly acquired a previously contaminated property. Department of Environmental Protection v. Dimant, 418 N.J. Super. 530 (App. Div. 2011). involved the liability not of a current owner but of its tenant dry cleaner - the owner had already settled the third-party claim brought by the tenant. In Tree Realty v. Dep't of Treasury, 205 N.J. Super. 346 (App. Div. 1985), relied upon by Arky's, supra, - another pre-S1070 opinion - the current owner paid for the cleanup of its tenant's discharges and was seeking reimbursement from the Spill Fund. Id. at 347. Since the discharges occurred during its ownership, denial of the claim was affirmed by the court. Id. at 348. The court in Arky's focused on the absence of evidence of discharges during the period of ownership as the basis for dismissing claims against the individual owners of the property during a limited time frame.

Arky's, supra, 224 N.J. Super. at 207-208. The Atlantic City Municipal Utilities Authority v. Hunt decision was addressing the timing of discharges to determine whether the Spill Fund could pay for damages caused by pre-Spill Act discharges, an issue that was also the focus of S. Orange Vill. v. Hunt, 210 N.J. Super. 407 (App. Div. 1986), cited therein. Atlantic City Municipal Utilities Authority v. Hunt, supra, 210 N.J. Super. at 78. In Northern Int'l Remail & Express Co. v. Robbins, 2010 N.J. Super. Unpub. LEXIS 2023 (App. Div. 2010), the subsequent property owner sued the seller and prior tenant for costs of remediation which it had incurred, and the court, relying upon White Oak, declined to hold a prior owner liable under the Spill Act because there was no evidence of discharges during the period of that person's ownership. Northern International, 2010 N.J. Super. Unpub. LEXIS 2023 at *14. Finally, Housing Authority of City of New Brunswick v. Suydam Investors, L.L.C., 355 N.J. Super. 530 (App. Div. 2002), was a condemnation case considering the impact of contamination on valuation. The court specifically noted that the trial of a condemnation action does not require a determination of liability for the contamination, the sole issue being market value. Id. at 550-51.

Tierra's claim of 30 years of consistent court rulings is undermined by its extremely narrow focus on cases examining only discharge liability, and its refusal to acknowledge the significance of Marsh, the one post-S-1070 Supreme Court ruling that discusses the issue pending before this court. Inapposite decisions and contrary rulings that predated Marsh, and subsequent cases that rely upon those decisions, must surrender to the unified voice of the Legislature and the Supreme Court. The judicial and legislative branches have determined that a person who knowingly purchases a contaminated property is a person "in any way responsible for any hazardous substance" originating at the property, and is therefore liable for all costs

associated with the cleanup and removal of those substances, no matter when they were discharged or where they may have migrated, including the Passaic River.

CONCLUSION

There are no factual issues in dispute with respect to Plaintiffs' pending motion. Tierra admits that it purchased the Lister Site in 1986 from the Diamond Shamrock Chemicals Corporation, with knowledge that some hazardous substances were present on the property, that the Diamond Shamrock plant was a source of dioxin contamination of the Newark area, and that the State had already asserted that alleged discharges of certain hazardous substances had occurred in the past at the Lister Site and that some previously discharged substances had subsequently migrated and/or were threatening to migrate off-site. This knowledge precludes Tierra from asserting the statutory innocent purchaser defense that would otherwise be available to pre-1993 purchasers of contaminated property. Without this defense, Tierra is a person "in any way responsible for any hazardous substance" originating at the Lister Site and therefore liable under the Spill Act for all of Plaintiffs' cleanup and removal costs.

Plaintiffs respectfully request that this court grant their motion for partial summary judgment, and enter a liability judgment against Tierra for all past and future cleanup and removal costs associated with the discharges of hazardous substances that originated at the Lister Site, with damages to be determined in a Track 8 trial pursuant to the Trial Plan set forth in Case Management Order XVII.

Respectfully submitted,

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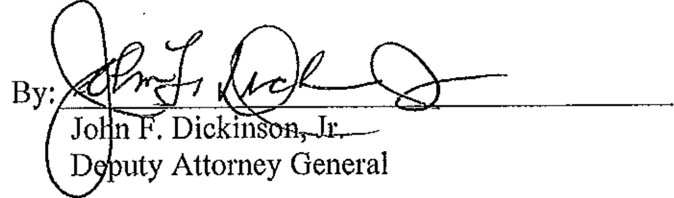
By: 
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APPENDIX A

LexisNexis (TM) New Jersey Annotated Statutes

*** THIS SECTION IS CURRENT THROUGH NEW JERSEY 214TH LEGISLATURE ***
2ND ANNUAL SESSION (P.L. 2011 CHAPTER 77 AND JR 6)
STATE CONSTITUTION CURRENT THROUGH THE NOVEMBER, 2010 ELECTION
ANNOTATIONS CURRENT THROUGH JUNE 21, 2011. .

TITLE 58. WATERS AND WATER SUPPLY
CHAPTER 10. WATER POLLUTION
ARTICLE 6A. DISCHARGE INTO WATERS

GO TO THE NEW JERSEY ANNOTATED STATUTES ARCHIVE DIRECTORY

N.J. Stat. § 58:10-23.11g (2011)

§ 58:10-23.11g. Liability for cleanup and removal costs

a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:

(1) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(3) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds 10% of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(4) Loss of tax revenue by the State or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(5) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this act.

b. The damages which may be recovered by the fund, without regard to fault, subject to the defenses enumerated in subsection d. of this section against the owner or operator of a major facility or vessel, shall not exceed $ 50,000,000.00 for each major facility or $ 1,200 per gross ton for each vessel, except that such maximum limitation shall not apply and the owner or operator shall be liable, jointly and severally, for the full amount of such damages if it can be shown that such discharge was the result of (1) gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge, or (2) a gross or willful violation of applicable safety, construction or operating standards or regulations. Damages which may be recovered from, or by, any other person shall be limited to those authorized by common or statutory law.

c. (1) Except as provided in section 2 of P.L.2005, c.43 (*C.58:10-23.11g12*), any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and several-

ly, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 *(C.58:10-23.11f)*.

(2) In addition to the persons liable pursuant to this subsection, in the case of a discharge of a hazardous substance from a vessel into the waters of the State, the owner or operator of a refinery, storage, transfer, or pipeline facility to which the vessel was en route to deliver the hazardous substance who, by contract, agreement, or otherwise, was scheduled to assume ownership of the discharged hazardous substance, and any other person who was so scheduled to assume ownership of the discharged hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs if the owner or operator of the vessel did not have the evidence of financial responsibility required pursuant to section 2 of P.L.1991, c.58 *(C.58:10-23.11g2)*.

Where a person is liable for cleanup and removal costs as provided in this paragraph, any expenditures made by the administrator for that cleanup and removal shall constitute a debt of that person to the fund. The debt shall constitute a lien on all property owned by that person when a notice of lien identifying the nature of the discharge and the amount of the cleanup, removal and related costs expended from the fund is duly filed with the clerk of the Superior Court. The clerk shall promptly enter upon the civil judgment or order docket the name and address of the liable person and the amount of the lien as set forth in the notice of lien. Upon entry by the clerk, the lien, to the amount committed by the administrator for cleanup and removal, shall attach to the revenues and all real and personal property of the liable person, whether or not that person is insolvent.

For the purpose of determining priority of this lien over all other claims or liens which are or have been filed against the property of an owner or operator of a refinery, storage, transfer, or pipeline facility, the lien on the facility to which the discharged hazardous substance was en route shall have priority over all other claims or liens which are or have been filed against the property. The notice of lien filed pursuant to this paragraph which affects any property of a person liable pursuant to this paragraph other than the property of an owner or operator of a refinery, storage, transfer, or pipeline facility to which the discharged hazardous substance was en route, shall have priority from the day of the filing of the notice of the lien over all claims and liens filed against the property, but shall not affect any valid lien, right, or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien pursuant to this paragraph.

To the extent that a person liable pursuant to this paragraph is not otherwise liable pursuant to paragraph (1) of this subsection, or under any other provision of law or under common law, that person may bring an action for indemnification for costs paid pursuant to this paragraph against any other person who is strictly liable pursuant to paragraph (1) of this subsection.

Nothing in this paragraph shall be construed to extend or negate the right of any person to bring an action for contribution that may exist under P.L.1976, c.141, or any other act or under common law.

(3) In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 *(C.58:10-23.11f)*. Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993.

d. (1) In addition to those defenses provided in this subsection, an act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act.

(2) A person, including an owner or operator of a major facility, who owns real property acquired on or after September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply, or if applicable, subparagraphs (a) through (e) apply:

(a) the person acquired the real property after the discharge of that hazardous substance at the real property;

(b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L.1976, c.141, or (iii) the person complies with the provisions of subparagraph (e) of paragraph (2) of this subsection;

(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (2), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property. For the purposes of this paragraph (2), all appropriate inquiry shall mean the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary, as defined in section 23 of P.L.1993, c.139 (*C.58:10B-1*), and performed in accordance with rules and regulations promulgated by the department defining these terms.

Nothing in this paragraph (2) shall be construed to alter liability of any person who acquired real property prior to September 14, 1993; and

(e) For the purposes of this subparagraph the person must have (i) acquired the property subsequent to a hazardous substance being discharged on the site and which discharge was discovered at the time of acquisition as a result of the appropriate inquiry, as defined in this paragraph (2), (ii) performed, following the effective date of P.L.1997, c.278, a remediation of the site or discharge consistent with the provisions of section 35 of P.L.1993, c.139 (*C.58:10B-12*), or, relied upon a valid final remediation document for a remediation performed prior to acquisition, or obtained approval of a remedial action workplan by the department after the effective date of P.L.1997, c.278 and continued to comply with the conditions of that workplan, and (iii) established and maintained all engineering and institutional controls as may be required pursuant to sections 35 and 36 of P.L.1993, c.139. A person who complies with the provisions of this subparagraph by actually performing a remediation of the site or discharge as set forth in (ii) above shall be issued, upon application, a no further action letter by the department or a response action outcome by a licensed site remediation professional, as applicable. A person who complies with the provisions of this subparagraph either by receipt of a final remediation document following the effective date of P.L.1997, c.278, or by relying on a previously issued final remediation document shall not be liable for any further remediation including any changes in a remediation standard or for the subsequent discovery of a hazardous substance, at the site, or emanating from the site, if the remediation was for the entire site, and the hazardous substance was discharged prior to the person acquiring the property. Notwithstanding any other provisions of this subparagraph, a person who complies with the provisions of this subparagraph only by virtue of the existence of a previously issued final remediation document shall receive no liability protections for any discharge which occurred during the time period between the issuance of the final remediation document and the property acquisition. Compliance with the provisions of this subparagraph (e) shall not relieve any person of any liability for a discharge that is off the site of the property covered by the final remediation document, for a discharge that occurs at that property after the person acquires the property, for any actions that person negligently takes that aggravates or contributes to a discharge of a hazardous substance, for failure to comply in the future with laws and regulations, or if that person fails to maintain the institutional or engineering controls on the property or to otherwise comply with the provisions of the final remediation document.

(3) Notwithstanding the provisions of paragraph (2) of this subsection to the contrary, if a person who owns real property obtains actual knowledge of a discharge of a hazardous substance at the real property during the period of that person's ownership and subsequently transfers ownership of the property to another person without disclosing that knowledge, the transferor shall be strictly liable for the cleanup and removal costs of the discharge and no defense under this subsection shall be available to that person.

(4) Any federal, State, or local governmental entity which acquires ownership of real property through bankruptcy, tax delinquency, abandonment, escheat, eminent domain, condemnation or any circumstance in which the governmental entity involuntarily acquires title by virtue of its function as sovereign, or where the governmental entity acquires the property by any means for the purpose of promoting the redevelopment of that property, shall not be liable, pursuant to subsection c. of this section or pursuant to common law, to the State or to any other person for any discharge which oc-

curred or began prior to that ownership. This paragraph shall not provide any liability protection to any federal, State or local governmental entity which has caused or contributed to the discharge of a hazardous substance. This paragraph shall not provide any liability protection to any federal, State, or local government entity that acquires ownership of real property by condemnation or eminent domain where the real property is being remediated in a timely manner at the time of the condemnation or eminent domain action.

(5) A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply:

(a) the person acquired the real property after the discharge of that hazardous substance at the real property;

(b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L.1976, c.141;

(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (5), the person must have undertaken, at the time of acquisition, all appropriate inquiry on the previous ownership and uses of the property based upon generally accepted good and customary standards.

Nothing in this paragraph (5) shall be construed to alter liability of any person who acquired real property on or after September 14, 1993.

e. Neither the fund nor the Sanitary Landfill Contingency Fund established pursuant to P.L.1981, c.306 (*C.13:1E-100* et seq.) shall be liable for any damages incurred by any person who is relieved from liability pursuant to subsection d. or f. of this section for a remediation that involves the use of engineering controls but the fund and the Sanitary Landfill Contingency Fund shall be liable for any remediation that involves only the use of institutional controls if after a valid final remediation document has been issued the department orders additional remediation except that the fund and the Sanitary Landfill Contingency Fund shall not be liable for any additional remediation that is required to remove an institutional control.

f. Notwithstanding any other provision of this section, a person, who owns real property acquired on or after the effective date of P.L.1997, c.278 (*C.58:10B-1.1* et al.), shall not be liable for any cleanup and removal costs or damages, under this section or pursuant to any other statutory or civil common law, to any person, other than the State and the federal government, harmed by any hazardous substance discharged on that property prior to acquisition, and any migration off that property related to that discharge, provided all the conditions of this subsection are met:

(1) the person acquired the real property after the discharge of that hazardous substance at the real property;

(2) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for a discharge pursuant to this section;

(3) the person gave notice of the discharge to the department upon actual discovery of that discharge;

(4) (a) within 30 days after acquisition of the property, the person commenced a remediation of the discharge, including any migration, pursuant to a department oversight document executed prior to acquisition, or (b) for property acquired after the date of enactment of P.L.2009, c.60 (*C.58:10C-1* et al.), the person provides written notice of the acquisition to the department prior to or on the date of acquisition and the person remediates the property pursuant to the provisions of section 30 of P.L.2009, c.60 (*C.58:10B-1.3*), and (c) the department is satisfied that remediation was completed in a timely and appropriate fashion; and

(5) Within ten days after acquisition of the property, or within 30 days after the expiration of the period or periods allowed for the right of redemption pursuant to tax foreclosure law, the person agrees in writing to provide access to the State for remediation and related activities, as determined by the State.

The provisions of this subsection shall not relieve any person of any liability:

(1) for a discharge that occurs at that property after the person acquired the property;

(2) for any actions that person negligently takes that aggravates or contributes to the harm inflicted upon any person;

(3) if that person fails to maintain the institutional or engineering controls on the property or to otherwise comply with the provisions of a final remediation document or a remedial action workplan and a person is harmed thereby;

(4) for any liability to clean up and remove, pursuant to the department's regulations and directions, any hazardous substances that may have been discharged on the property or that may have migrated therefrom; and

(5) for that person's failure to comply in the future with laws and regulations.

g. Nothing in the amendatory provisions to this section adopted pursuant to P.L.1997, c.278 shall be construed to remove any defense to liability that a person may have had pursuant to subsection e. of this section that existed prior to the effective date of P.L.1997, c.278.

h. Nothing in this section shall limit the requirements of any person to comply with P.L.1983, c.330 (*C.13:1K-6* et al.).

HISTORY: L. 1976, c. 141, § 8; amended 1979, c. 346, § 5; 1991, c. 58, § 1; 1991, c. 85, § 4; 1993, c. 139, § 44; 1996, c. 62, § 56; 1997, c. 278, § 20, eff. Jan. 6, 1998; 2001, c. 154, § 2, eff. July 13, 2001; 2003, c. 224, § 1, eff. Jan. 9, 2004; 2005, c. 43, § 1, eff. Mar. 21, 2005; 2005, c. 238, § 1, eff. Feb. 28, 2006; 2009, c. 60, § 38, eff. Nov. 3, 2009.

NOTES:

Amendment Note:

2009 amendment, by Chapter 60, in d.(2)(e), substituted "final remediation document" for "no further action letter from the department" in the first sentence, added "or a response action outcome by a licensed site remediation professional, as applicable" to the second sentence, and substituted "final remediation document" for "no further action letter from the department" in the third sentence following "receipt of a" and for "no further action letter" throughout the rest of d.(2)(e); in e., substituted "final remediation document" for "no further action letter"; in f., in the first subdivision (4), inserted "or (b) for property acquired after the date of enactment of P.L.2009, c.60 (*C.58:10C-1* et al.), the person provides written notice of the acquisition to the department prior to or on the date of acquisition and the person remediates the property pursuant to the provisions of section 30 of P.L.2009, c.60 (*C.58:10B-1.3*)", and designated former provisions as (a) and (c); and in subdivision (3) of the last paragraph of f., substituted "final remediation document" for "no further action letter."

OLS Corrections:

Pursuant to *R.S.1:3-1*, the Office of Legislative Services, through its Legislative Counsel and with the concurrence of the Attorney General, corrected technical errors in L. 2009, c. 60, § 38.

Effective Dates:

Section 2 of L. 2005, c. 238 provides: "This act shall take effect 120 days after enactment." Chapter 238, L. 2005, was approved on October 31, 2005.

Section 56 of L. 2009, c. 60 provides: "Sections 1 through 32 and section 50 of this act shall take effect immediately, and the remainder of this act shall take effect 180 days after the date of enactment." Chapter 60, L. 2009, was approved on May 7, 2009.

LexisNexis (R) Notes:

APPENDIX B

ASSEMBLY POLICY AND RULES COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 1070

with committee amendments

STATE OF NEW JERSEY

DATED: JUNE 3, 1993

The Assembly Policy and Rules Committee favorably reports the Senate Committee Substitute for Senate Bill No. 1070 with committee amendments.

The Senate Committee Substitute for Senate Bill No. 1070 revises the "Environmental Cleanup Responsibility Act," P.L. 1983, c.330 (C.13:1K-6 et seq.) (ECRA), provides financial assistance to certain private parties who are unable to afford the cleanup of contaminated property and to local governments for the cleanup of contaminated property. The substitute also directs the Department of Environmental Protection and Energy (DEPE) to adopt remediation standards for contaminated sites.

The primary objective of the substitute, as amended by the committee, is to reform the site remediation process in order to promote faster cleanups of contaminated property while at the same time furthering the State's economic well-being and development by improving the State's business climate. To achieve these objectives, the amended version of the substitute is designed to eliminate, to the greatest extent possible, the unnecessary time-consuming procedures and bewildering maze of regulations that created much uncertainty and unpredictability for the business community under the current ECRA program by (1) streamlining the remediation process and procedures for owners or operators of industrial establishments; (2) easing the financial burden by providing financial assistance to eligible parties; and (3) establishing administrative predictability by codifying summary procedures and providing specific legislative direction to the department.

REMEDIATION AND THE REMEDIATION PROCESS

Sections 1 through 22 of the substitute amend and supplement the "Environmental Cleanup Responsibility Act," P.L. 1983, c.330 (C.13:1K-6 et seq.).

In section 1, the short title of the act is changed from the "Environmental Cleanup Responsibility Act" to the "Industrial Site Recovery Act" (ISRA). Although the title of the act is changed, the basic purpose of the law remains intact: any business within certain Standard Industrial Classification Code numbers that generates, uses, transports, manufactures, refines, treats, stores, handles, or disposes of hazardous substances or hazardous wastes is subject to ISRA requirements upon a closing of operations or a transfer of ownership or operations.

Section 2 amends the Legislative findings and declarations to fully affirm the Legislature's intent to protect the public health, safety and environment of the State, while at the same time eliminating any unnecessary financial burden of remediating contaminated sites; that these objectives can be achieved by streamlining the regulatory process by establishing summary administrative procedures for industrial establishments that have previously undergone an environmental review, and by reducing oversight of those industrial establishments where less extensive regulatory review can assure the same degree of protection to the public health, safety and environment; and that the new procedures established by this substitute are designed to guard against redundancy from the regulatory process and to minimize governmental involvement in certain business transactions.

Section 3 revises the definition section of the law. New terms are incorporated to reflect the stages of the remediation process under ISRA. The new terms include "preliminary assessment," "site investigation," "remedial investigation," "remedial action," and "remedial action workplan." Although these terms are used in federal remediation law, the substitute is clear that the requirements for each phase of an ISRA remediation are not to be identical to federal law. To add more specificity and clarity about the transactions which trigger ISRA requirements, the substitute replaces the existing "closing, terminating, or transferring operations" term with two new ones: "closing operations" and "transferring ownership and operations."

Several new exclusions are set forth in section 3, most notably, the transfer of real property pursuant to the "Eminent Domain Act of 1971," P.L. 1971, c.361 (C.20:3-1 et seq.). Many of the transactions specifically excluded under the substitute were already listed as excluded ones under the DEPE's regulations. They have been incorporated in the substitute to provide clarity and certainty for the regulated community. In line with that objective, it is important to recognize that the new definition of "indirect owner" is not intended to require the remediation of an industrial establishment by a bank that holds a mortgage or other security interest in the industrial establishment, simply because that bank merged or consolidated with another entity.

<u>Substantive committee amendments to Section 3</u>: The committee adopted several clarifying amendments to section 3.

1. "Closing operations" The committee amended the definition of "closing operations" to provide some specificity to the five year time frame to be used for determining whether an establishment had experienced a 90 percent reduction in the value of its total product output by adding "as measured on a constant, annual date-specific basis." The choice of the date is to be up to the owner or operator, but it must be constant throughout the five year period

The committee also amended the definition to authorize the department to approve a waiver from the cessation of operations paragraph if an owner or operator applied for one and evidenced a good faith effort to maintain and expand product output, the number of employees, or operations.

Finally, the committee included the termination of a lease, unless there is no disruption in operations, as an event constituting a closing. As delivered to the committee, the termination of a lease was included under a transferring of ownership or operations.

2. "Change in ownership does not include" The committee amended this definition to clarify and limit lender liability. Under these amendments, a lender is not liable for any execution, delivery, filing or recording of any mortgage, security interest, collateral assignment or other lien on real or personal property, or for any transfer of personal property under a valid security agreement, collateral assignment or lien, including seizure or replevin for the purpose of implementing the secured party's rights if the personal property is collateral.

3. "Negative declaration" The committee amended this definition to include any "other person assuming responsibility for the remediation under paragraph (3) of subsection b. of section 4 of P.L. 1983, c.330 (C.13:1K-9). As delivered to the committee, the substitute provided that only the owner or operator could submit a negative declaration to the department.

4. "Preliminary assessment" The committee substituted "latent" for "potential." In addition, the committee specified that, in general, the historic information subject to evaluation is from 1900 to the present. However, the amendment does permit the department to require additional information relating to ownership and use of a site prior to 1900 if such information is available through diligent inquiry of public records.

Section 4 of the bill revises the ISRA process. An owner or operator who closes operations or transfers ownership or operations is required to provide notice to the department. In the case of a closing, the notice is to be given no more than five days after the closing, or the public release of the decision to close, whichever comes first. In the case of a transfer of ownership or operations, the notice is to be given within five days of the agreement to transfer. Upon the closing or prior to the transfer, as the case may be, the approval of a negative declaration, remedial action workplan or remediation agreement and the establishment of a remediation funding source is required.

The owner or operator of the industrial establishment is required to remediate the site. For all remediations, the preliminary assessment, site investigation, and remedial investigation may be performed without the prior approval of each phase of the remediation by the department. However, a remedial action workplan that involves the remediation of surface water or groundwater must be approved by the department prior to its implementation.

The amended version of the bill authorizes an owner or operator to implement a remedial action workplan for a soil remediation without waiting for the department's approval of that workplan if the remedial action can be completed within five years of its commencement and if the soil remediation meets the established minimum residential or nonresidential use soil remediation standards. In determining whether to use nonresidential use soil remediation standards, the owner or operator is to be guided by six

criteria set forth in subsection i. of section 4 of the substitute. Any owner or operator proposing to implement a remedial action which cannot be completed within five year of its commencement or which does not meet the established minimum residential or nonresidential standards must receive department approval before implementing that remedial action.

If the results of any phase of a remediation have not been submitted to the department, all documents must be submitted at the completion of the remediation for the department's review and approval. If remediation activities were not in compliance with the applicable rules and regulations, if all necessary documents were not submitted or were deficient or inaccurate, or if discharged hazardous substances or hazardous wastes remain at the site or have migrated offsite in violation of the applicable cleanup standards, the department may order additional remediation.

Subsection e. of section 4 authorizes an owner or operator to enter into a remediation agreement with the department if the transfer of ownership or operations is to occur prior to the approval or a remedial action workplan of a negative declaration. The 1983 law did not provide for a transaction to proceed while a lengthy remediation occurred. To address such situations, the department used administrative consent orders to allow transfers to proceed if the remedial action workplan could not be developed before the transfer took place. In the substitute, the remediation agreement replaces the administrative consent order.

Substantive committee amendments to section 4:

1. The committee adopted an amendment to paragraph (2) of subsection b. to authorize owners or operators to transmit certain documents relating to an executed sale, transfer or option by overnight delivery or personal service, in addition to certified mail.

2. The committee adopted amendments to subsections h., i. and j. to clarify the authority of owners and operators to implement certain soil remediation actions without prior departmental approval. An owner or operator's decision to use nonresidential rather than residential standards is to be based upon six criteria. The department is to promulgate regulations within 18 months of the effective date of the substitute's enactment. In the interim, the criteria are to be used by owners or operators in making their determinations. During this interim period, the department is to impose reasonable standards and requirements upon owners and operators deciding to use nonresidential use soil standards. The amendments specify that the department may not impose any requirement under criterion (5) that would require an owner or operator to implement a residential use soil remediation standard unless the cost difference between implementing the residential standard and nonresidential standard is a de minimis amount. For that purpose, the committee determined that de minimis means a cost difference not exceeding 10 percent of the cost of implementing the nonresidential standard. The amendments also specify that at any time after the effective date of the bill, an owner or operator may request the department to provide a determination as to whether a proposed remedial action is consistent with the six criteria. The department is to provide its determination within 30 calendar days.

Section 8 of the substitute requires the department to review and approve, approve with conditions, or disapprove a submission of a phase of the remediation within the review schedules established pursuant to section 2 of P.L. 1991, c.423 (C.13:1D-106).

Section 9 of the substitute establishes a de minimis quantity exemption to ISRA by authorizing the owner or operator of an industrial establishment, upon written notice to the department, to transfer ownership or operations or close operations without complying with the provisions of ISRA. As received by the committee, the substitute provided an owner or operator did not have to comply with the provisions of ISRA if the total quantity of hazardous substances and hazardous wastes did not exceed 55 gallons or 500 pounds at any one time during the owner or operator's period of ownership or operations.

Substantive committee amendments to section 9:

1. The Committee amended section 9 to expand the de minimis quantity exemption by adding a specific reference to hydraulic and lubricating oil. Under the amendment, any owner or operator who did not have, in the aggregate, more than 220 gallons of hydraulic or lubricating oil at any one time during his period of ownership or operation could transfer ownership or operations or close operations without complying with the provisions of ISRA.

Section 11 of the substitute requires the department to approve a deferral of the preparation, approval and implementation of a remedial action workplan for the industrial establishment if it would be subject to substantially the same use by the transferee. To qualify for a deferral, the transferor would be required to perform the investigatory stages of the remediation, submit a cost estimate, and a certification that the transferee has the financial ability to perform the remediation.

Substantive committee amendments to section 11:

1. The committee deleted language from subsection b. which it considered redundant and unnecessary.

2. The committee added language to the section to clarify the phrase "substantially the same use." Under the amendment, any industrial establishment which retains the same three digit Group Number, as designated in the Standard Industrial Classifications Manual prepared by the federal Office of Management and Budget in the Executive Office of the President of the United States, would meet the qualification as one subject to "substantially the same use." The committee amendment also permits applicants to petition the department for a finding that an industrial establishment is subject to "substantially the same use" based upon its retention of the same two digit Major Group Number.

Section 12 would remove the department's authority to void a transaction. A transferee's authority to void a transaction would be limited to when the transferor fails to perform a remediation. The transferor is given an opportunity to correct the violation prior to a transaction being voided.

Sections 13 through 19 establish new summary procedures for compliance. These sections will greatly privatize and simplify the ISRA process for the applicant where a site, or a part of a site, has previously undergone a remediation.

Section 13 lifts the requirement to obtain approval of a remedial action workplan, a negative declaration, or a remediation agreement upon the closing, or prior to the transfer, of an industrial establishment that has previously undergone a full site remediation upon the certification of the owner or operator that there has been no discharge subsequent to the last remediation, or that any subsequent discharge was remediated in accordance with the department's procedures.

Substantive committee amendment to section 13:

1. The committee amended the section to include remediations undertaken pursuant to the federal "Resource Conservation and Recovery Act," 42 U.S.C. §6901 et seq. or the "Comprehensive Environmental Response, Compensation, and Liability Act," 42 U.S.C. §9601 et seq.

Under section 14, if a full site remediation has already been performed, but a subsequent discharge has occurred, only the subsequently contaminated portion of the site must be cleaned up.

Substantive committee amendment to section 14:

1. The committee amended the section to include remediations undertaken pursuant to the federal "Resource Conservation and Recovery Act," 42 U.S.C. §6901 et seq. or the "Comprehensive Environmental Response, Compensation, and Liability Act," 42 U.S.C. §9601 et seq.

Section 15 of the substitute authorizes an owner or operator to apply for an area of concern waiver that would relieve him from remediating any portion of his site that has previously been remediated as long as he certifies that there has been no new discharge at that area.

Section 16 authorizes an owner or operator to transfer ownership or operations or close operations if the site is undergoing an ISRA review or any other full site remediation if there have been no discharges during his period of ownership, a remediation funding source is established, and the transferee has been notified that the site is the subject of a remediation.

Substantive committee amendment to section 16:

1. The committee amended the section to include remediations undertaken pursuant to the federal "Resource Conservation and Recovery Act," 42 U.S.C. §6901 et seq. or the "Comprehensive Environmental Response, Compensation, and Liability Act," 42 U.S.C. §9601 et seq.

Section 17 provides that if the only potentially contaminated area at a site is an underground storage tank, then the owner or operator does not need to further comply with the requirements of ISRA.

Section 18 authorizes an owner or operator of an industrial establishment to perform a remediation without departmental oversight as long as there are not more than two areas of concern and the remedial action can be completed within six months.

Section 19 of the substitute establishes a procedure for obtaining a certificate of limited conveyance. As received by the committee, this section authorizes the transfer of up to one third of the value of an industrial establishment without requiring the remediation of the entire industrial establishment. Only that

portion conveyed would be required to be remediated.

Substantive committee amendments to section 19:

1. The committee amended the section to expand the scope of limited conveyances. Under the amendment, an owner can transfer more than one third of an industrial site without having to remediate the entire site; provided that the amount paid for the additional portions of transferred real property be used exclusively for the purposes of remediating the transferred portion; and further provided, that any amounts unexpended for that remediation be held in trust to provide for the subsequent remediation of the remainder of the industrial establishment. The unexpended amounts are to be held in a remediation trust fund established in accordance with the provisions of subsection c. of section 25 of this substitute.

Section 20 would require landlords and tenants to cooperate in the provision of information pertaining to the remediation of a site, would require that copies of submissions be provided to the other party, and would require the department, if there is a failure of the landlord or the tenant to comply with ISRA, to first require compliance with ISRA by the person responsible pursuant to the provisions of the lease, if the lease is clear on allocating this responsibility. If the lease is unclear, or upon the continuing failure of either party to comply, the department may use all available authority to compel compliance by the landlord and the tenant.

Section 21 provides amnesty from civil penalties to any person who violated the provisions of P.L. 1983, c.330 (C.13:1K-6 et seq.) and who, within one year of the effective date of this substitute, enters into an administrative consent order or memorandum of agreement with the department to clean up the industrial establishment.

Section 22 requires the department to perform an audit of the covered industrial establishments and to identify any industries that do not pose a risk to the public health, safety or the environment. All identified industries will be exempt from ISRA after having gone through one full site remediation.

The substitute also codifies a recent State Supreme Court decision, In Re Adoption of N.J.A.C.7:26B, by stating affirmatively that contamination that has migrated or is migrating from an industrial establishment, must be remediated as part of an ISRA remediation.

REMEDIATION FUNDING PROVISIONS

This substitute would reduce the costs of remediation by changing the current financial assurance requirements. Current law requires that financial assurance be maintained as a separate fund to assure that in case of default, funds would be available to pay for the cleanup. The financial assurance fund could not be used to pay the cleanup costs. The substitute would require that a remediation funding source be established in the amount of the cost of the cleanup, and that the funding source would be used to pay the cleanup costs.

Specifically, sections 25 through 34 would (1) impose upon those

persons compelled to perform a remediation pursuant to ISRA, or any other State law, the requirement to establish a remediation funding source; (2) impose a 1% annual surcharge upon the declining balance of the cost of remediation; and (3) establish a fund for loans and grants for private parties and local governments to provide financing for the remediation of contaminated property. The loan and grant fund, administered by the New Jersey Economic Development Authority, will be credited with $45 million from the "Hazardous Discharge Bond Act of 1986," P.L.1986, c.116, and the revenues from the 1% surcharge imposed pursuant to section 33 of the bill. Section 45 of the bill creates the Remediation Guarantee Fund in the Department of Environmental Protection and Energy, to be credited with $5 million from the "Hazardous Discharge Bond Act of 1986," P.L.1986, c.116. The Remediation Guarantee Fund shall be used by the department to remediate property which a person who is required to establish a remediation funding source has failed to remediate.

Substantive committee amendments to section 25:

1. The committee amended subsection b. to permit the establishment and maintenance of an environmental insurance policy, issued by an entity licensed by the Department of Insurance to transact business in the State of New Jersey, to fund remediation expenses to serve as evidence of a remediation funding source. The committee also incorporated, as new subsection d., the guidelines for the handling and control of such environmental insurance policies.

The substitute requires that a remediation funding source must be established by any person required to perform a remediation pursuant to ISRA, any person who has been issued a directive by the department to perform a remediation, any person who has entered into an administrative consent order with the department to perform a remediation, or any person who has been ordered by a court to perform a remediation. (Persons who perform a remediation voluntarily are not required to maintain a remediation funding source.) The amount of the remediation funding source must be equal to or greater than the cost estimate of the implementation of the remediation. If the cost estimate increases, the remediation funding source amount must be adjusted accordingly. A remediation funding source can be established by creating a remediation trust fund, a line of credit, or a self-guarantee, or any combination thereof.

Section 33 of the bill imposes a 1% annual surcharge on the amount of the remediation funding source that is required to be maintained. The surcharge is not imposed on the amount of a remediation funding source met by a self-guarantee, the amount of a remediation funding source met by a loan or a grant from the Hazardous Discharge Site Remediation Fund, or any funds provided by any person performing a voluntary remediation.

When a remediation funding source cannot be established for all or a part of the cost of a remediation, a loan from the Hazardous Discharge Site Remediation Fund, created pursuant to section 26, may be obtained. Monies in the loan and grant fund, called the Hazardous Discharge Site Remediation Fund, would be allocated as follows:

15% for loans to private parties for remediations in urban aid municipalities;

10% for loans and grants to municipal government entities;

15% for loans to private parties or municipal government entities for the remediation of discharges that pose an imminent threat to a drinking water source, human health, or a significant ecological area;

10% for loans to private parties who voluntarily undertake a remediation;

20% for grants to innocent persons who purchased property before December 31, 1983 and did not cause the discharge;

10% to be allocated in any of the above categories.

Loans and grants may be issued for up to 100% of the costs of a remediation except that no loan to any applicant in a calender year may exceed $1 million and that innocent person grants may be used for 50% of the remediation cost. Loans and grants to any one municipal government entity may not exceed $2 million in any calender year.

The Economic Development Authority is authorized to charge an application fee, and may use up to 2% of the moneys issued as loans and grants from the remediation fund for administrative expenses.

Section 45 establishes a Remediation Guarantee Fund that shall be used by the Department of Environmental Protection and Energy to remediate property on which a person who is required to establish a remediation funding source has failed to conduct a remediation.

<u>Substantive committee amendments to the sections dealing with Remediation Funding:</u>

1. The committee amended a number of these sections to permit, with the approval of the Department of Insurance, the sale and use of environmental insurance. These environmental insurance policies would be used to fund remediations. The amendments provide certain guidelines for these insurance policies.

2. The committee, at the request of the Economic Development Authority, adopted amendments which substituted "financial assistance" for "loans." The authority, which is responsible for overseeing the remediation fund, contended that the change to "financial assistance" would give it greater flexibility and enable it to maximize the effective utilization of the available funds. The committee adopted several other amendments to further those objectives.

REMEDIATION STANDARDS

Section 35 directs the department to adopt minimum remediation standards for soil, groundwater, and surface water quality necessary for the remediation of real property. Until the remediation standards for the protection of public health and safety are adopted, the department will continue to apply standards on a case-by-case basis.

Section 37 of the bill establishes the Environment Advisory Task Force which, within two years, would be required to make recommendations to the department on the feasibility,

development, and application of remediation standards protective of the environment. Until the Task Force makes recommendations, the department may apply remediation standards protective of the environment on a case-by-case basis in accordance with the guidelines and regulations adopted pursuant to the federal "Comprehensive Environmental Response, Compensation and Liability Act of 1980."

The substitute requires the department to adopt residential and nonresidential standards for soil remediation, and authorizes the adoption of differential standards for surface water and groundwater that take into account the current, planned or potential use of the water.

Substantive committee amendment to subsection c. of section 35:

1. The committee adopted an amendment to provide that the differential remediation standards for surface water or groundwater be in accordance with the "Clean Water Act," 33 U.S.C. §1251 et seq. and the "Water Pollution Control Act," P.L. 1977, c.74 (C.58:10A-1 et seq.).

Subsection d. of section 35 requires, for all soil remediation standards developed by the department for residential and nonresidential uses, that the health risk for human carcinogens as categorized by the U.S. Environmental Protection Agency be based on an additional cancer risk of one in one million, and, for noncarcinogens, will limit the Hazard Index for any given effect to a value not exceeding one.

The substitute directs the department to adopt differential soil remediation standards. The soil standards adopted must be protective of the groundwater. A set of residential use soil remediation standards would be adopted that are protective of the public health and safety, and that will allow the unrestricted use of the property for residential purposes without exceeding the health risk levels established in the bill. The nonresidential soil remediation standards would be set at levels that take into account the lower exposure to contamination on property that is not used for residential purposes and that meet the health risk level established in the bill. Whenever property is not remediated to the residential standard, the use of the property must be restricted and access to the property must be restricted in a manner compatible with the allowable uses of the property.

Subsection f. of section 35 authorizes a person performing a remediation to submit to the department a request to use an alternative soil remediation standard. The use of a site-specific soil remediation standard must be based upon site specific factors that include physical site characteristics or a site-specific risk assessment. If the person requesting the use of site-specific remediation standards demonstrates that the alternative standards are protective of the public health and safety and the environment, the department would approve the use of the alternative standard. The department may require the use of an alternative remediation standard for a contaminant for a specific site, if the use of the established remediation standard on that site is not protective of the public health and safety or the environment.

Subsection g. of section 35 sets forth the factors to be used in

determining the appropriate remedial action to meet the applicable remediation standard. The factors and policy guidelines that must be weighed when performing a remediation, and that the department would review in approving a remediation, include: permanent remedies are preferred over nonpermanent remedies; contamination may be left on the site at levels that exceed the established remediation standards if the use of engineering and institutional controls is required; property on which there is soil that has not been remediated to the residential standard, or property on which the soil, groundwater or surface water has been remediated to meet the health risk levels by the use of engineering and institutional controls, may be used for residential purposes if all areas of the property at which a person may come into contact with soil are remediated to the residential use soil remediation standards and it is demonstrated that for all other areas on the property, engineering and institutional controls can be implemented and maintained to meet the established health risk levels; remediation would not be required beyond the surrounding ambient conditions; remediation of contamination coming onto the site from property owned by another person shall not be required; and groundwater that is contaminated is not required to be remediated to a level lower than the level that is migrating onto the property from another person's property. As received by the committee, the substitute would have required the person remediating to compare the effectiveness of each alternative in protecting the public health, safety and the environment: the implementability of each alternative: the time to implement each alternative; the cost of each alternative; and the technological efficacy of each alternative.

<u>Substantive committee amendments to subsection g. of section 35:</u>

1. The committee adopted amendments which would delete the requirements that a person remediating compare the effectiveness of each alternative; the implementability of each alternative; the time to implement each alternative; the cost of each alternative; and the technological efficacy of each alternative. The amendments direct the person performing a remediation to consider: (a) the technical performance, effectiveness and reliability of the proposed remedial action, with the department considering the ability of the owner or operator to implement the proposed remedial action within a reasonable time frame; (b) in the case of a proposed remedial action that will not meet the established minimum residential use soil remediation standards, the reasonableness of the cost of the proposed nonpermanent remedy, based upon department regulations; and (c) a requirement that the department shall not unreasonably disapprove the use of the established nonresidential soil remediation standard.

Since a large number of urban and wetland areas in New Jersey have been filled with various contaminated materials, and the removal and/or treatment of these materials is not feasible or practicable in most circumstances, subsection h. of section 35 provides that there is a rebuttable presumption that the department shall not require removal and treatment of certain materials defined as historic fill material in order to comply with the remediation requirements established pursuant to this substitute.

Subsection h. further requires the department to adopt regulations that establish a procedure through which a person may demonstrate and identify engineering or institutional controls to contain or stabilize contamination caused by historic fill materials. The sole intended purpose of subsection h. of section 35 is to provide an opportunity for filled areas to undergo economic development that would otherwise not be possible if removal or treatment were required to remediate these areas.

Nothing in subsection h. is intended to: (a) be construed to require or prevent removal or treatment of any material that is specifically excluded from the definition of historic fill material; (b) be used to support or establish any presumption, inference or argument that any material that is specifically excluded from the definition of historical fill material should be treated or removed to comply with any remediation or clean up standard or requirement; or (c) in any way restrict the rights of any person to employ engineering or institutional controls to address, in accordance with this act, contamination related to any material that is specifically excluded from the definition of historic fill material. For sites contaminated by materials that do not qualify as historic fill material, remediation standards and requirements for such sites established under this act are not affected in any manner by the provisions of subsection h. of section 35.

The substitute also requires the department to develop recommendations for remedial actions in large areas of historic industrial contamination.

The substitute provides finality for a person performing a remediation. First, the department may only change a remediation standard if a new standard is necessary to maintain the health risk levels established in subsection d. of section 35 or to protect the environment. After a remedial action workplan has been approved by the department, the department may require a change to that workplan to compel a remediation to a standard that has changed or may compel further remediation, if the change in the standard is by an order of magnitude. (For example, a change from 100 parts per million to 10 parts per million is an order or magnitude change.) If the department makes a change in a standard that is less than an order of magnitude, the department would have no authority to order additional remediation after a remedial action workplan is approved. Further, subsection e. of section 36 provides that upon the adoption of a regulation that changes a remediation standard, only a person who is liable to clean up the contamination pursuant to the "Spill Compensation and Control Act," is liable for the additional remediation costs for any necessary additional remediation.

Subsection k. of section 35 provides that all remediation standards and remedial actions that involve real property in the Pinelands area shall be consistent with the provisions of the "Pinelands Protection Act" (P.L. 1979, c.111; C.13:18A-1 et seq.) and all regulations adopted pursuant thereto, and with section 502 of the National Parks and Recreation Act of 1978.

<u>Substantive committee amendments to section 35:</u>

1. The committee added a subsection m. to section 35. This new subsection clarifies that nothing in the bill shall be construed

to restrict or in any way diminish the public participation which is otherwise authorized under the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11).

Section 36 requires that when real property is remediated to the nonresidential soil remediation standard or when engineering or institutional controls are used in lieu of remediating a site to the established remediation standard for soil, groundwater or surface water, that the department shall require: the use of the necessary controls; the maintenance of the controls; a restriction on the use of the property that prevents exposure; and the filing of a deed notice with the county recording officer that informs prospective holders of an interest in the property that contamination exists at the property that may restrict certain uses or access to portions of the property, that describes the controls that exist and must be maintained, and that includes the written consent of the owner of the property. The department shall require that a notice that includes the above information be transmitted to the governing body of the municipality in which the property is located, that signs where access is limited be posted, and a list of restrictions be kept on the site for inspection by governmental officials. This section also includes a procedure for removing any restrictions that are no longer required. The substitute provides penalties for any owner, lessee or other person operating a business on the property for failure to maintain the controls as required by the department.

Substantive committee amendment to section 36:

1. The committee amended subsection a. of section 36 to add a new paragraph. The new paragraph (6) requires that before commencing a remedial action, the person implementing that remedial action must notify the affected municipality or municipalities. The notice is to include the date when the remediation is to commence; the name, address, and business telephone number of the person implementing the remedial action or his designated representative; and a brief description of the remedial action.

Section 37 creates the Environment Advisory Task Force. The Task Force is charged with the responsibility to make recommendations on the feasibility or manner in which remediation standards protective of the environment may be adopted and implemented. The Environment Advisory Task Force is to consist of 16 members who shall be the Commissioner of Environmental Protection and Energy or his designee, a representative of the National Academy of Sciences, selected by the Academy, a representative of the Environment and Occupational Health Sciences Institute, selected by the Institute, one representative each from the industrial development, legal, consulting, and public interest environmental interests to be appointed by the Governor with the advice and consent of the Senate, and eight members who have relevant scientific backgrounds. Four of the eight members with scientific backgrounds shall be employed by industry. The Senate President and the Speaker of the General Assembly each will appoint two of the industry members. The other four members are to be appointed by the Governor with the advice and consent of the Senate. The recommendations of the Task Force are to be made within two years. The department may not adopt soil remediation

standards protective of the environment until the recommendations are made.

Section 38 requires the department to develop a guidance document, to be published in the New Jersey Register, that describes the remedial action alternatives that should be considered by a person performing a soil remediation.

Section 39 provides amnesty from civil penalties for persons who violated P.L.1976, c.141 and P.L.1977, c.74 if the person is not involved in an enforcement action and, within one year of the effective date, enters into a memorandum of agreement or an administrative consent order to clean up the discharge.

Section 40 provides a cause of action for persons to obtain access to property not owned by that person to conduct remediation activities on that site. A person seeking access must first attempt to reach an agreement with the property owner concerning access to the property, and if agreement cannot be reached, an action may be brought in Superior Court, and the court may order that access to the property be given to the person who is performing the remediation. The court may require the person performing the remediation to pay costs associated with any disruption in operations or costs to return the property to its original condition. Further, the court may require the person performing the remediation to indemnify the property owner for any damages, penalties or liabilities resulting from his entry onto the property or resulting from the remediation.

<u>Substantive committee amendments to section 40:</u>

1. The committee adopted extensive clarifying amendments to this section.

Section 41 provides a process through which departmental decisions may be disputed. Any person conducting a remediation may request review of a decision by the next highest level of management, until the commissioner or his designee has issued a decision. Each successive level of review and the decision thereon must be made within seven days of a request for review.

<u>Substantive committee amendments to section 41:</u>

1. The committee adopted an amendment which would require the department to include a expedited review procedure under which the commissioner or his designee would be required to issue a decision within 21 calendar days of the date on which the request for that review was received.

Section 42 requires the Division of Consumer Affairs in the Department of Law and Public Safety, in consultation with the Department of Environmental Protection and Energy, to prepare informational materials containing criteria that may be used in the selection of a consultant who is to perform a remediation of contaminated property.

<u>Substantive committee amendments to section 42:</u>

1. The committee amended this section to require the Division of Consumer Affairs to include information relating to the availability of remediation liability insurance.

Section 43 authorizes a person to perform an emergency cleanup to prevent the spread of contamination without having to wait for departmental approval. The department could not require additional remediation unless further remediation is required to

bring the area into compliance with the applicable remediation standards.

Section 44 amends the "Spill Compensation and Control Act" by providing a defense to liability for persons who acquire property after the effective date of this bill, on which there has been a discharge. Those persons who acquire contaminated property after the effective date of the act shall not be considered in any way responsible for the discharged hazardous substance if that person can establish by a preponderance of the evidence that the person acquired the property after the discharge, that the person did not know and had no reason to know that any hazardous substance had been discharged by undertaking all appropriate inquiry into the previous ownership and uses of the property, or that the person acquired the property by devise or succession. If a person acquires contaminated property by devise or succession, any other funds or property received by that person from the deceased property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance shall be made available to satisfy the requirements of P.L.1976, c.141. In order to use this defense to liability, the person also must establish that he did not discharge the hazardous substance, and is not in any way responsible for a hazardous substance, and that the person gave notice of the discharge to the department upon actual discovery of the discharge.

The substitute does not change the existing "Spill Compensation and Control Act" liability of persons who purchased real property before the effective date of this bill. This section would also provide that the defense would not be available to any person who owns real property, or obtains actual knowledge of a discharge and subsequently transfers ownership of that property to another person without disclosing that knowledge. Moreover, such a person would be strictly liable for the discharge. This section would also provide that a government entity which acquires contaminated property by virtue of its function as a sovereign, would not be liable for a discharge that occurred or began prior to the period of ownership as long as the government entity did not cause or contribute to the discharge.

The committee also amended the substitute to include four new sections.

The first new section amends section 7 of P.L. 1993, c.112 (C.13:1K-11.1). The provisions of P.L. 1993, c.112 prescribed the limits of lender liability as they relate to the ECRA program. The committee amended that statute to transfer the language describing the types of transactions that are excluded and incorporate them within the operative section of the statute (section 3 of P.L. 1983, c.330; C.13:1K-8) as paragraphs (10) and (11) of the list of transactions which do not constitute a "change in ownership" that would trigger the remediation requirements of the law.

The second new section establishes a special Environmental Risk Assessment and Risk Management Study Commission. This 10 member commission is charged with two responsibilities. The first is to examine and assess the scientific basis for selecting the risk management standard of one in one million for the ISRA program and to consider and assess alternative scientific standards that

could be used. The second is to examine and assess methodologies of risk assessment and their efficacy and applicability for the purposes of establishing remediation standards for the ISRA program. The commission's report, along with any recommendations on risk management standards, is to be submitted to the Governor and Legislature within 6 months. The report, along with any recommendations on risk assessment methodologies, is to be delivered to the Governor and Legislature within a year. The Commissioner of Environmental Protection and Energy, or his designee, is to serve on the commission as a non-voting member. Eight of the members are to have advanced degrees and relevant experience in any of the following disciplines: (1) environmental medicine, health, or epidemiology; (2) environmental toxicology; (3) soil science, geology, or hydrogeology; and (4) environmental engineering with experience in site remediation. The Governor is to appoint one representative from each of those disciplines. The Senate President is to appoint two, but both of those appointees may not be from the same discipline. The Speaker of the General Assembly is also to appoint two. Like the Senate President, both of the Speaker's appointments may not be from the same discipline. A ninth member, who is to be a recognized expert in the field of risk assessment as it applies to contaminated sites or to the remediation of such sites, is to be jointly appointed by the Governor, the Senate President, and the Speaker. The chairman is to be jointly appointed by the Governor, the Senate President, and the Speaker from among the appointed members. To ensure that the commission is aware of, and recognizes, the public's interest in these issues, the bill requires the members to hold at least one public hearing prior to commencing its deliberations and at least one other public hearing after it has made public its findings and recommendations, but before formally submitting them to the Governor and the Legislature.

The third new section directs the Commissioner of Environmental Protection and Energy, in consultation with the Attorney General, to prepare a comprehensive report on the effectiveness and fairness of the imposition of strict, joint and several liability on persons who have discharged, or are in any way responsible for, a hazardous substance discharge pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.).

The fourth new section directs the Commissioner of Environmental Protection and Energy to issue a report to the Governor and the Legislature. In the report, the commissioner is to provide an evaluation, recommendations, and a plan of action for developing and implementing a certification program for person engaging in the remediation of contaminated sites. The commissioner is to issue the report within six months of the enactment of the bill.

STATEMENT OF LEGISLATIVE INTENT

The legislative intent of this bill, as amended, is to:

- Streamline the ISRA process by eliminating redundant and unnecessary regulatory requirements; privatizing the process as much as possible where qualified private professionals are available; providing for expedited compliance processes under certain conditions and reducing DEPE involvement in the process to the greatest extent possible.

- Eliminate feasibility studies as defined pursuant to the federal "Comprehensive Environmental Response, Compensation and Liability Act," 42 U.S.C. 9601 et seq.

- Provide for differential standards for residential and nonresidential (also referred to as industrial) remediations and permanent (also referred to as residential) and nonpermanent remedies. The decision to choose the remediation option is left with the property owner in selected situations, based on criteria in Sections 4 and 35.

- Guarantee that the option to defer the preparation, approval and implementation of a remedial action workplan for the industrial establishment is a right enjoyed by the owner or operator, which cannot be denied upon submission of a complete and accurate application pursuant to the requirements of Section 11.

- Require the DEPE to revise its "Technical Standards Manual," proposed for promulgation on July 1, 1993, to more clearly reflect the provisions of this bill and its legislative intent.

- Provide for conveyance of portions of the industrial establishment pursuant to the criteria in Section 19 so long as the proposed property transfer does not trigger a full ISRA process.

- Require the DEPE, until regulations are adopted authorized by this act, to act reasonably in the interim period when reviewing applications and petitions and in all other interactions with the public.

- Allow cleanups that do not remediate property to pristine levels, provided that appropriate and DEPE approved engineering or institutional controls are implemented.

- Require the DEPE to conduct an audit of covered industrial establishments as defined in Section 3 to determine which, if any industries, can be exempted from ISRA.

- Require owners or operators who are subject to a remediation, other than a voluntary clean up, to establish a single funding mechanism that provides both a financial guarantee and funding source for remediation.

- Provide, to the greatest extent possible, finality to compliance with ISRA.

- Ensure that all remediation standards and remedial actions in the Pinelands area are consistent with the "Pinelands Protection Act" and all regulations adopted pursuant thereto and with section 502 of the National Parks and Recreation Act of 1978.

- Clarify that landowner liability and defense provisions provided in Section 44 do not apply to parties provided immunity under P.L. 1993, c.112.

- Provide that under Section 35 subsection b., the DEPE is to utilize the federal Environmental Protection Agency's guidance and regulations pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act" 42 U.S.C. 9601 et seq. in developing minimum remediation standards; but the DEPE may deviate from that guidance if it is scientifically justified, either by the department or by an applicant with approval by the department, and otherwise authorized by this act.

- Provide that remediation approved by the federal Environmental Protection Agency pursuant to the federal "Resource Conservation and Recovery Act," 42 U.S.C. 6901 et seq. or the "Comprehensive Environmental Response, Compensation, and Liability Act" 42 U.S.C. 9601 et seq. shall serve as an approved remediation under the ISRA.

- Clarify that the cancer risk management level of one-in-one million is principally a policy decision and the Environmental Risk Assessment and Risk Management Commission shall revisit this decision and make recommendations, by using the scientific evidence available, on an appropriate risk management level and the methodologies to be used in reaching this risk level.

- Indicate that the applicability of strict joint and several liability needs careful review by the DEPE and the Attorney General's Office and requires the timely submission of recommendations on possible modifications that improve the effectiveness and fairness of the current liability system.

- In recognition of this determination, until action is taken to modify strict joint and several liability pursuant to Section 48, the DEPE shall consider the inequity in the system and shall be reasonable in assessing liability when applying joint and several liability.

- Clarify that variances for remediation standards, including engineering and institutional controls such as alternative drinking water supplies or drinking water treatment systems in place of groundwater or surface water remediation, are not specifically identified in this act, because these variances can be developed for groundwater and surface water in accordance with the "Clean Water Act" and the "Water Pollution Control Act."

APPENDIX C

				Chapter	Bill Number		
Year	**Date**	**Statute**	**Case**		**Assy**	**Senate**	**Significance**
1976	1/6/1977	Spill Act		141	A1903	S1409	"discharger" strictly liable for all C&R costs
1979	1/23/1980	Spill Act amendment		346	A3542		person "in any way responsible" added to discharger for C&R stict liability
1983	7/21/1983		Ventron				
1983	9/2/1983	ECRA		330	A1231		Owner of property or operator of facility associated with hazardous substances rquired to perform environmental investigation and remediation prior to sale
1986	8/28/1986	TIERRA ACQUISITION OF LISTER SITE					
1993	9/16/1993	ISRA		139		S1070	**ADDED AN INNOCENT PURCHASER DEFENSE FOR NON-DISCHARGER WHO ACQUIRED POST-ISRA; RETAINED LIABILITY FOR PRE-ISRA PURCHASERS**
1996	1/25/1996		Marsh (App Div)				
1997	12/18/1997		Marsh (Supreme Ct)				
1997	1/6/1988	Brownfields		278		S39	**ADDED CLARIFICATION OF SPILL ACT LIABILITY FOR POST-ISRA PURCHASERS**
2001	7/6/2001		White Oak Funding				
2001	7/13/2001	Spill Act Amendment		154	A3328	S2345	**ADDED INNOCENT PURCHASER DEFENSE FOR PRE-ISRA ACQUISITIONS**

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L-9868-05 (PASR)
v.	:	CIVIL ACTION
OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATOINAL, S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS, Defendants.	:	CERTIFICATION OF SERVICE

I, Kelly-Ann Norgaard, do hereby certify as follows:

1. A true and correct copy of Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Against Tierra Solutions, Inc., Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Against Occidental Chemical Corporation ("OCC") and Maxus Energy Corporation ("Maxus"), Plaintiffs' Response to OCC's Counterstatement of Facts, Plaintiffs' Response to Maxus's and Tierra's Counterstatement of Facts, and Certification of William C. Petit in Support of Plaintiff's Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Against Occidental and Maxus, was filed with the Clerk of the Court, Essex County Courthouse, 50 West Market Street, Newark, New Jersey, 07102, and served electronically on all parties which have consented to electronic service by posting on https://cvg.ctsummation.com, on July 1, 2011. The following counsel of record was served on July 1, 2011 via first class, regular mail:

John P. McGovern, Esq.
Assistant City Attorney
City of Orange Township
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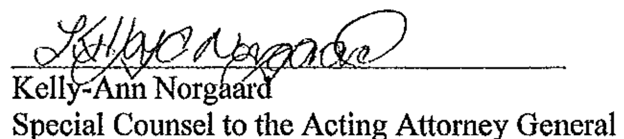
Orange, NJ 07050

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willingly false, I am subject to punishment.

GORDON & GORDON, P.C.
Attorneys for Plaintiffs



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Special Counsel to the Acting Attorney General

Dated: July 1, 2011