

VINDICATION OF THE PUBLIC
INTEREST IN A CLEAN ENVIRONMENT:
SUPERIOR AIR PRODUCTS CO. v.
NL INDUSTRIES, INC.

Protecting the environment is a critical societal concern in New Jersey.¹ The Environmental Protection Agency estimates that New Jersey is the source of more hazardous waste than any other state.² In response, the New Jersey legislature passed some of the toughest and most innovative laws in the United States to control pollution.³ Three significant New Jersey legislative efforts are the Environmental Rights

1. Township of Howell v. Waste Disposal, Inc., 207 N.J. Super. 80, 83, 504 A.2d 19, 20 (App. Div. 1986). See also *Urgency of Density, Industrial Problems Led to Strict Laws Said to Have Made New Jersey a Leader in Solving Environmental Problems*, 16 Env't. Rep. (BNA) 1672 (1985) [hereinafter *Urgency*].

The problems facing New Jersey include the highest number of superfund waste sites on the National Priorities List, a crisis in siting solid waste landfills, the threat of chronic and acute health effects from its many chemical plants, receding groundwater levels because of water overuse, and radon emissions that may threaten as many as 1.6 million homes in New Jersey. *Id.* See also *Rollins Env'tl. Servs., Inc. v. Township of Logan*, 199 N.J. Super. 70, 80, 488 A.2d 258, 263 (Law Div. 1984), *rev'd*, 209 N.J. Super. 556, 508 A.2d 271 (App. Div. 1986) (problems include contamination of rivers from nearby landfills, forced closing of private wells, and the endangerment of drinking water supplies).

New Jersey residents are also aware that industries frequently abandon plant sites, leaving others to deal with the cleanup of hazardous waste. Schmidt, *New Jersey's Experience Implementing the Environmental Cleanup Responsibility Act*, 38 RUTGERS L. REV. 729 (1986). As a result of such abandonment, taxpayers have had to fund expensive state and federal cleanup efforts. *Id.*

2. State Dep't of Env'tl. Protection v. Ventron Corp., 94 N.J. 473, 492, 468 A.2d 150, 160 (1983) (citing Zazzali & Grad, *Hazardous Wastes: New Rights and Remedies?*, 13 SETON HALL L. REV. 446, 449 n.12 (1983)).

3. See *Urgency*, *supra* note 1, at 1672. BNA based its conclusion concerning New

Act (ERA),⁴ the Spill Compensation and Contract Act (Spill Act),⁵ and most recently the Environmental Cleanup Responsibility Act (ECRA).⁶ ECRA's impact on New Jersey's previously existing environmental legislation is critical to practitioners in New Jersey and to states considering adopting laws similar to ECRA. In *Superior Air Products Co. v. NL Industries, Inc.*⁷ the court examined the relationship among ERA, the Spill Act, and ECRA and held that a suit under ERA or the Spill Act does not delay an ECRA proceeding and cleanup plan.⁸

Consideration of the ERA and the Spill Act is necessary before focusing on ECRA and its impact on New Jersey's environmental legislation. The New Jersey Department of Environmental Protection (DEP)⁹ is responsible for regulating activity affecting the state's environment.¹⁰ Thus, the DEP enforces the state's pollution laws.¹¹ Further, the DEP has wide latitude in exercising its statutory duties to advocate the public's interest in a clean environment.¹²

By enacting the ERA, the state legislature recognized the public in-

Jersey environmental legislation on interviews of state officials, environmental groups, and industry representatives.

4. N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West 1987 & Supp. 1988).

5. N.J. STAT. ANN. §§ 58:10-23.11 to -23.11Z (West 1982 & Supp. 1988).

6. N.J. STAT. ANN. §§ 13:1K-6 to -35 (West Supp. 1988).

7. 216 N.J. Super. 46, 522 A.2d 1025 (App. Div. 1987).

8. *Id.* at 49-50, 522 A.2d at 1027.

9. The Legislature established the DEP in 1970, mandating that the DEP assume control of a variety of departments which previously operated separately. N.J. STAT. ANN. §§ 13:1D-1 to -8 (West 1979 & Supp. 1988).

10. The DEP is responsible for formulating comprehensive policies to promote environmental protection and to prevent environmental pollution within the state. N.J. STAT. ANN. § 13:1D-9. (West 1979 & Supp. 1988).

11. N.J. STAT. ANN. § 13:1D-9. (West Supp. 1988) Specifically, the DEP may: Enter and inspect any building or place for the purposes of investigating an actual or suspected source of pollution of the environment and ascertaining compliance or noncompliance with any code, rule and regulations of the department. . . .

Receive or initiate complaints of pollution of the environment, . . . hold hearings in connection therewith and institute legal proceedings for the prevention of pollution of the environment and abatement of nuisances in connection therewith and shall have the authority to seek and obtain injunctive relief and the recovery of fines and penalties in summary proceedings in the Superior Court.

N.J. STAT. ANN. § 13:1D-9(d),(e) (West Supp. 1987).

12. *Lom-Ran Corp. v. Dep't of Env'tl. Protection*, 163 N.J. Super. 376, 384-85, 394 A.2d 1233, 1237 (App. Div. 1978).

terest in abating and preventing environmental damage.¹³ Although ERA does not itself provide any substantive cause of action, the Act's primary goal is to ensure that all persons interested in protecting the environment have access to the courts.¹⁴ The state, however, retains primary responsibility for enforcing environmental legislation.¹⁵ Under ERA, the role of the courts is to adjudicate the impact of the alleged "conduct on the environment and on interest of the public."¹⁶

13. The legislative findings and determinations read:
that the integrity of the State's environment is continually threatened by pollution, impairment and destruction, that every person has a substantial interest in minimizing this condition, and that it is therefore in the public interest to enable ready access to the courts for the remedy of such abuses.

N.J. STAT. ANN. § 2A:35A-2 (West 1987).

14. The Act in pertinent part reads:

a. Any person may maintain an action in a court of competent jurisdiction against any other person to enforce, or to restrain the violation of, any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment, or destruction of the environment.

b. Except in those instances where the conduct complained of constitutes a violation of a statute, regulation or ordinance which establishes a more specific standard for the control of pollution, impairment or destruction of the environment, any person may maintain an action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment or destruction.

N.J. STAT. ANN. § 2A:35A-4 (West 1987).

The focus of the ERA was to:

overturn the doctrine long established in our law that in order to have sufficient standing to sue for abatement or prevention of a public nuisance, a private person must show special damage peculiar to himself and distinct from that done to the public at large . . . This bill could effectively grant to interested citizens the right to sue polluters without having to prove special injury to the plaintiffs. It would thus remedy what its supporters believe to be an unnecessary and obsolete impediment to enforcement of antipollution laws.

Report on Assembly Bill No. 1245 by the New Jersey Bar Association Committee on State Legislation, April 11, 1974. See also Goldshore, *A Thumbnail Sketch of the Environmental Rights Act*, 70 N.J. STATE BAR J. 18 (Winter 1975) (allowing standing through the elimination of the common law barrier of special damage).

The ERA, however, allows a court to dismiss actions which are "frivolous, harassing or wholly lacking in merit." N.J. STAT. ANN. § 2A:35A-4c (West 1987).

15. *Township of Howell v. Waste Disposal, Inc.*, 207 N.J. Super. 80, 93, 504 A.2d 19, 25 (App. Div. 1986). To insure the state's primary right to enforce environmental laws, ERA provides that any action instituted pursuant to its authority requires notice to the DEP. N.J. STAT. ANN. § 2A:35A-11. Thus, ERA only grants a private person standing to enforce an environmental protection statute as an alternative to inaction by the government which retains primary prosecutorial responsibility. *Superior Air Prod. Co. v. NL Indust., Inc.*, 216 N.J. Super. 46, 58, 522 A.2d 1025, 1032.

16. N.J. STAT. ANN. § 2A:35A-7b (West 1987).

The Act also allows courts to remit an action to administrative or investigative proceedings to determine the legality of defendant's conduct.¹⁷

New Jersey's Spill Act expressly prohibits the discharge of hazardous substances¹⁸ and provides for cleanup and removal of spills.¹⁹ The Act grants the DEP discretion to perform the cleanup itself or to direct the responsible party to do so.²⁰ Further, the Spill Act establishes the New Jersey Compensation Spill Fund which pays for all cleanup and removal costs and for all direct and indirect damages resulting from a spill.²¹ The Spill Fund recovers its costs by holding responsible parties strictly liable for cleanup and removal costs.²²

In *Township of Howell v. Waste Disposal, Inc.*,²³ the Superior Court of New Jersey discussed the relationship between ERA and the Spill Act. In *Howell*, the township brought an action against Waste Disposal, Inc. under ERA after DEP had commenced Spill Act proceed-

17. ERA § 8 reads in pertinent part:

If administrative or other proceedings are required or available to determine the legality of the defendant's conduct, the court shall remit the parties to such proceedings, except where immediate and irreparable damage will probably result.

N.J. STAT. ANN. § 2A:35A-8 (West 1987). See *infra* notes 47-53 and accompanying text for a discussion of remitting an ECRA action to the DEP for investigative proceedings.

18. N.J. STAT. ANN. § 58:10-23.11c (West 1982).

19. The Spill Act reads in pertinent part:

a. Whenever any hazardous substance is discharged, the department may, in its discretion act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge The department may monitor the discharger's compliance with any such directive. Any discharger who fails to comply with such a directive shall be liable to the department in an amount equal to three times the cost of such removal, and shall be subject to the revocation or suspension of any license or permit he holds authorizing him to operate a hazardous or solid waste disposal facility.

N.J. STAT. ANN. § 58:10-23.11f(a) (West Supp. 1988).

20. Superior Air Prod. Co. v. NL Indus., 216 N.J. Super. 46, 60, 522 A.2d 1025, 1033 (App. Div. 1987).

21. N.J. STAT. ANN. § 58:10-23.11g (West 1982). The spill fund relies on a front-end tax to cover initial costs of hazardous waste cleanup. Note, *Superfund and the Preemption of State Hazardous Waste Cleanup: Exxon Corporation v. Hunt*, 31 WASH. U.J. URB. & CONTEMP. L. 243, 244 (1987). The front-end tax is levied against major petroleum and chemical facilities on the transfer of hazardous substances and petroleum products. N.J. STAT. ANN. § 58:10-23.11h (West 1982 & Supp. 1988).

22. N.J. STAT. ANN. § 58:10-23.11g(c) (West 1982). Acts of God, war, and sabotage are defenses to the imposed strict liability. N.J. STAT. ANN. § 58:20-23.11g(d) (West 1982).

23. 207 N.J. Super. 80, 504 A.2d 19 (App. Div. 1986).

ings.²⁴ Later, the DEP intervened as a plaintiff in the township's ERA action.²⁵ The court addressed whether the DEP's intervention preempted the township's right to maintain a private suit under ERA.²⁶ The court held that the DEP's preemptive authority is a factually dependent question.²⁷ According to the court in *Howell*, commencement of DEP proceedings preempts private rights under ERA unless the DEP's enforcement actions prove insufficient to vindicate the public interest.²⁸ Thus, a private party can maintain an action under ERA if a court finds DEP enforcement inadequate.²⁹

Within this legislative scheme, the New Jersey Legislature sought to further reduce the risks associated with hazardous substances and waste by enacting ECRA.³⁰ The Act requires, as a precondition to a

24. *Id.* at 84-86, 504 A.2d at 21-22.

25. *Id.* at 87, 504 A.2d at 22.

26. *Id.* at 94-95, 504 A.2d at 26.

27. *Id.* at 97, 504 A.2d at 27. The court noted that environmental legislation entrusts the DEP with the authority to determine initially the appropriate course of action against persons who damage the environment. *Id.* at 95, 504 A.2d at 27. This authority is most effective where the DEP has freedom to use its expertise to determine the best course of action to remedy the problem. *Id.*

28. *Id.* at 96, 504 A.2d at 27. DEP action is insufficient when it is asserted that DEP failed in its mission, neglected to take action essential to fulfill an obvious legislative purpose, or failed to adequately consider local or individual interests. *Id.* Therefore, a private party can continue an action under the ERA where the DEP neglected to act in the best interest of the citizenry or acted arbitrarily, capriciously, or unreasonably. *Id.*

The court apparently balanced two competing interests. First, the court noted that in a given situation DEP may fail to seek the full relief available under the appropriate legislation. *Id.* Under such circumstances, ERA clearly grants private persons the right to seek relief. *Id.* Secondly, the court expressed concern that unrestricted allowance of multiple enforcement actions might prove counterproductive to legitimate DEP action. *Id.* The court harmonized the competing interests, concluding that primary prosecutorial authority rests with the DEP, while a private right to sue exists if the DEP action is insufficient. *Id.*

29. *Id.* at 99, 504 A.2d at 29. See also *Superior Air Prod. Co. v. NL Indus.*, 216 N.J. Super. 46, 61, 522 A.2d 1025, 1033 (App. Div. 1987) (discussing *Howell*).

ERA does not, however, provide a private party with a right to compel a state's discretionary action. In *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chem. Co.*, 216 N.J. Super. 166, 175, 523 A.2d 250, 255 (App. Div. 1987) the court found that *Howell* did not support the argument that the ERA enables a court to compel an executive agency to perform a discretionary function. Rather, the court cited *Howell* and concluded that the ERA simply broadened the rights of a citizen to pursue an action directly against the pollution. *Id.* The court held that a judicial order compelling an executive agency to take discretionary action would violate the state's separation of powers. *Id.*

30. The legislature expressed its motive in its findings which state:

sale, closure, or transfer of operations,³¹ that owners and operators of industrial establishments³² provide the DEP with either a cleanup plan³³ or a negative declaration³⁴ indicating that the site contains no

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

N.J. STAT. ANN. § 13:1K-7 (West Supp. 1988).

See also Note, *New Jersey's Environmental Cleanup Responsibility Act: An Innovative Approach to Environmental Regulation*, 90 DICK. L. REV. 159, 183-86 (1985) (discussing the legislative history of ECRA).

31. N.J. STAT. ANN. § 13:1K-9 (West Supp. 1988). The Act defines closing, terminating, or transferring operations as:

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

N.J. STAT. ANN. § 13:1K-8(b) (West Supp. 1986). Commentators have criticized this definition, describing it as "cryptically drafted." See Note, *The Environmental Cleanup Responsibility Act (ECRA): New Accountability for Industrial Landowners in New Jersey*, 8 SETON HALL LEGIS. J. 331, 344-58 (1985) (discussing problems with ECRA's definition of selling, closing, or transferring). See also Schmidt, *supra* note 1, at 743-46 (discussing ECRA's definition of selling, closing, or transferring operations).

32. The Act defines "industrial establishment" as:

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

N.J. STAT. ANN. § 13:1K-8(f) (West Supp. 1988). See also Note, *supra* note 31, at 341-44 (1985) (an in-depth analysis of the Act's definition of industrial establishment); Schmidt, *supra* note 1, at 739-41 (discussing SIC code application and related problems).

33. The Act defines "Cleanup Plan" as:

a plan for the cleanup of industrial establishments, approved by the department, which may include a description of the locations, types and quantities of hazardous

hazardous substances. ECRA's provisions, therefore, are self-executing when a closure, transfer, or sale of operations occurs. Further, ECRA does not limit, restrict, or prohibit the DEP from directing cleanup efforts under any other statute, rule, or regulation.³⁵

Failure to comply with any provision of the Act allows the transferee to void the sale or transfer.³⁶ In addition, the DEP has authority to void the transfer or sale if the owner or operator fails to submit a negative declaration or cleanup plan.³⁷ The transferee may recover damages from the transferor if the sale or transfer is voided.³⁸ The owner or operator is strictly liable under ECRA for all cleanup costs and damages resulting from the failure to implement the cleanup plan.³⁹ Finally, the Act imposes fines up to 25,000 dollars a day for each offense.⁴⁰

In *Superior Air Products Co. v. NL Industries, Inc.*,⁴¹ the Superior Court of New Jersey determined the relationship between ERA, the Spill Act, and ECRA.⁴² NL Industries sold land contaminated with hazardous waste to Superior.⁴³ Superior learned of the contamination

substances and wastes that will remain on the premises; a description of the types and locations of storage vessels, surface impoundments, or secured landfills containing hazardous substances and wastes; recommendations regarding the most practicable method of cleanup; and a cost estimate of the cleanup plan.

N.J. STAT. ANN. § 13:1K-8(a) (West Supp. 1988). See also Note, *supra* note 32, at 364-65 (discussing ECRA's cleanup provisions).

34. The Act defines "negative declaration" as:

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

N.J. STAT. ANN. § 13:1K-8(g) (West Supp. 1988). See also Note, *supra* note 31, at 363-64 (analysis of ECRA's negative declaration provision).

35. N.J. STAT. ANN. § 13:1K-11(c) (West Supp. 1986).

36. N.J. STAT. ANN. § 13:1K-13(a) (West Supp. 1986).

37. N.J. STAT. ANN. § 13:1K-13(b) (West Supp. 1986).

38. N.J. STAT. ANN. § 13:1K-13(a) (West Supp. 1986).

39. *Id.*

40. N.J. STAT. ANN. § 13:1K-13(c) (West Supp. 1986). For a discussion of suggested improvements on ECRA's enforcement provisions, see Schmidt, *supra* note 1, at 748-49.

41. 216 N.J. Super. 46, 511 A.2d 1025 (App. Div. 1987).

42. *Id.* at 49, 522 A.2d at 1027.

43. *Id.* at 48, 522 A.2d at 1026.

when it attempted to resell the property.⁴⁴ Superior filed suit against NL Industries and the DEP under ERA for enforcement of the Spill Act.⁴⁵ The DEP counterclaimed seeking Superior's compliance with ECRA.⁴⁶ The trial court remanded the action to DEP pursuant to section 8 of ERA⁴⁷ to determine responsibility for the cleanup.⁴⁸ The trial court required DEP to consider both the Spill Act and the ECRA action in one administrative investigation.⁴⁹ On appeal the superior court held that it was improper to remit the ECRA proceeding to the DEP under section 8 of the ERA.⁵⁰

After reviewing ERA, the Spill Act, and ECRA, the court concluded that the legislature intended ECRA to prevent the delay inherent in litigating liability for contamination.⁵¹ The court found that responsibility for contamination is irrelevant to an ECRA proceeding.⁵² Thus, the remittance of the ECRA proceeding to DEP conflicted with ECRA's goal of preventing cleanup delays.⁵³

The court also determined under what circumstances an appropriate party may sue to enforce rights under ERA, the Spill Act, and

44. *Id.* at 48-49, 522 A.2d at 1026.

45. *Id.* at 49, 522 A.2d at 1026.

46. *Id.*

47. *See supra* note 17 and accompanying text for a discussion of the court's authority to remand an action to DEP under ERA § 8.

48. 216 N.J. Super. at 49, 522 A.2d at 1026. The trial court found that ERA § 8 mandated the remand. *Id.* at 51, 511 A.2d at 1027. The trial court also stayed further proceedings pending the outcome of the administrative investigation. *Id.*

49. *Id.* at 55, 522 A.2d at 1029.

50. *Id.* at 55-56, 511 A.2d at 1030. The court reasoned that the ECRA proceeding vindicates the public interest because ECRA is self-executing, thereby assuring cleanup. *Id.* at 64, 522 A.2d at 1035. There is no reason, therefore, to compel the DEP to expend resources investigating the responsible party. *Id.*

51. *Id.* at 63, 522 A.2d at 1035. The court noted that the state legislature enacted ECRA largely in response to the case of State Dep't of Env'tl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983). 216 N.J. Super. at 62, 522 A.2d at 1034. The Ventron litigation was expensive and lasted more than seven years. *Id.* Lengthy litigation, where contamination poses an immediate threat to the environment, concerned the New Jersey legislature. *Id.* *See Note, supra* note 31, at 331-32 (discussing the relationship between the passage of ECRA and *Ventron*).

52. 216 N.J. Super. at 65, 522 A.2d at 1035. The court reasoned that ECRA imposes a self-executing duty to remediate and that noncompliance renders a violator strictly liable for costs. *Id.* at 64, 522 A.2d at 1035.

53. *Id.* at 65, 522 A.2d at 1035.

ECRA.⁵⁴ The transfer of land triggers ECRA.⁵⁵ Thus, the transferor must comply with ECRA's provisions regardless of who is responsible for the contamination.⁵⁶ The current owner or operator may, however, pursue common law actions to assess liability against the generators of the hazardous wastes.⁵⁷ If, on the other hand, a contaminated site is not closed, transferred, or sold, then ECRA will not apply and the DEP may commence proceedings under the Spill Act.⁵⁸ Should the DEP proceedings prove insufficient, a private party may file an action under ERA to obtain relief.⁵⁹

ECRA's impact on existing environmental legislation advances the public interest in prompt, orderly cleanup of hazardous substances. ECRA is self-executing, thus assuring cleanup without time-consuming litigation to determine responsibility.⁶⁰ Furthermore, private parties finance ECRA cleanups, thereby diminishing the taxpayer's burden to fund cleanup efforts. ECRA also prevents abandoned hazardous waste sites from becoming environmental threats. Additionally, ECRA encourages voluntary efforts to minimize pollution in order to facilitate ECRA clearance for future transactions.⁶¹ In the final analysis, ECRA's primary benefit is its vindication of the public interest in securing an environment free from threatening hazardous waste.

*Mark F. Brady**

54. In construing the three acts, the court sought to harmonize the laws, giving effect to all of their provisions. *Id.* at 63-64, 522 A.2d at 1035.

55. *Id.* at 64, 522 A.2d at 1035.

56. *Id.* For a discussion of the duties ECRA imposes, see *supra* notes 30-40 and accompanying text.

57. *Id.* at 65, 522 A.2d at 1035. See Note, *supra* note 30, at 163-70 (discussing common law environmental tort recovery).

58. 216 N.J. Super. at 64, 522 A.2d at 1035.

59. *Id.* The court reached this conclusion in *Howell*. For a discussion of *Howell*, see *supra* notes 23-29 and accompanying text.

60. See *supra* note 51 discussing ECRA's purpose of eliminating delays in cleanup. See also Note, *supra* note 31, at 335. Mortgage lenders will also aid indirectly in ECRA's enforcement because of their apprehension of voidable sales of property.

61. Schmidt, *supra* note 1, at 753.

* J.D. 1988, Washington University.

