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Tougher Regulations on Environmental Cleanup

Many states continue to strengthen environmental cleanup regulations. Recent amendments to New Jersey's Environmental Cleanup Responsibility Act (ECRA) will sharply expand the law's application, forecasts Larry Schnapf, an attorney in the environmental practice group at New York's Lord, Day & Lord, Barrett Smith. Enacted in 1983, the ECRA mandates inspection and cleanup, if necessary, of certain industrial facilities prior to their sale, transfer or closing. Lenders may be held liable for cleanups if they foreclose and sell property subject to the law.

According to Mr. Schnapf, industrial facilities are exempt from ECRA compliance until a proposed property transfer or closing occurs, whereupon the owner or operator must notify the state's Department of Environmental Protection, and submit a cleanup plan, or file a negative declaration stating that no on-site discharge of hazardous substances has occurred.

The most substantial change in the law, says Mr. Schnapf, involves the definition of "ownership." Previously, a company would have to seek ECRA approval only upon transfer of a majority of its stock (or the stock of a parent corporation which owned the facility). Under the new regulations, the transfer of a minority interest will trigger an ECRA review if that is the controlling interest. "Thus," Mr. Schnapf underlines, "a chief executive officer holding less than 10% of the stock could single-handedly trigger ECRA approval by selling his shares."

The issue of controlling interest should also be of concern to lenders, this attorney cautions, because if "lenders repossess inventory or receivables of a company that have been assigned as collateral for a loan, and the value exceeds 50% of the company's assets, an ECRA transaction could be triggered." The same holds true, he adds, for securities pledged by the company as loan collateral. It is Mr. Schnapf's advice that lenders make sure that the pledge agreement does not give them the right to vote the shares. "If the shares represent the controlling interest of the company," he notes, "it can be interpreted as an ECRA transaction."