

**MEMORANDUM**CLIENT-MATTER NUMBER  
999450-0165

**TO:** Bruce A. Keyes  
Mark A. Thimke

**FROM:** Louis J. Thorson

**DATE:** June 11, 2008

**RE:** Inspection Requirements for Plant Closings

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**Environmental Notifications Upon Plant Closure In Other States***A. New Jersey's Industrial Site Recovery Act (ISRA)*

Under ISRA, any person who owns or operates an “industrial establishment”<sup>1</sup> must notify the New Jersey Department of Environmental Protection (“department”) in writing no more than five days after closing operations<sup>2</sup> at the establishment, or after its public release of a decision to close operations, whichever comes first. N.J. Stat. Ann. § 13:1K-9a (2008). Following the submittal of this notice, the owner or operator must “remediate the industrial establishment . . . in accordance with criteria, procedures, and time schedules established by the department.” *Id.* § 13:1K-9b(1). If no remediation is necessary, the owner or operator must provide to the department an “approved negative declaration,” stating that no remediation is necessary, as verified by the department. *Id.* § 13:1K-9c; 13:1K-9d(1). Thus, ISRA not only provides for notice to the relevant environmental authority, it also requires that the *owner or*

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<sup>1</sup> ISRA broadly defines an “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 hazardous wastes on-site, above or below ground . . . .” N.J. Stat. Ann. § 13-1K8.

<sup>2</sup> ISRA also applies to property transfers, imposing basically the same requirements as those for closure. *See* § 13:1K-9a, 13:1K-9b(2).

*operator* of the establishment inspect the property for environmental contamination, and clean up any contamination discovered. *Id.* § 13:1K-9b(1); 13:1K-9c.

In addition to notice of closure, ISRA requires department approval before the cessation or transfer of operations. In other words, an owner or operator cannot close or transfer operation of an industrial establishment unless the department “issues a No Further Action (NFA) Letter, approves a remedial action plan, issues an authorization letter, or executes a remedial agreement with the owner or operator.” 2 Brownfields Law and Practice: The Cleanup and Redevelopment of Contaminated Land § NJ.05[1] (Michael B. Gerrard ed. 2008) (citing N.J. Admin. Code § 7:26B-1.10(c)). ISRA is therefore a powerful tool in preventing abandonment of contaminated manufacturing plants, as it provides for department involvement throughout the entire closure process.

The department is not the only governmental unit involved, however, as ISRA also requires the owner or operator of an industrial establishment to notify the “clerk of the municipality in which the industrial establishment is located . . . that upon written request, the owner or operator shall provide the information required to be submitted to the department pursuant to this subsection, to the municipality.” § 13:1K-9e; *see also* § 13:1K-9a (requiring owner or operator of industrial establishment to submit notice of closing or transfer to both department and municipality). This provision is of particular interest to the questions at hand because it provides a potential avenue for municipal involvement in the remediation process. By requiring municipal notice, this subsection gives local authorities an opportunity to investigate the environmental situation surrounding the establishment’s closure, as well as examine whether it needs to involve itself in the remediation process. Given the WDNR’s apparent desire to

involve local government in the cleanup efforts at closed plant sites, this provision seems to be a helpful template for facilitating that involvement.<sup>3</sup>

*B. The Connecticut Transfer Act*

Although not nearly as comprehensive as ISRA, the Connecticut Transfer Act appears to aim for the same objective: private party discovery and notification of environmental contamination upon plant closure. Under the Act, upon closure of “any facility involved in regulated activities,” the owner or operator must file a notice with the Commissioner of Environmental Protection listing the contact information for “a person employed by the business who may be contacted for information regarding compliance” with the Act. Conn. Gen. Stat. § 22a-134g(b) (2008). “Regulated activities” include “the production, use, storage or handling of any regulated substance by a business if such production, use, storage or handling requires a permit from the Commissioner of Environmental Protection . . . .” *Id.* § 22a-134g(a).

In addition to providing this contact information, the owner or operator must, within 90 days of closure, perform several tasks: 1) “submit to the commissioner a list of all regulated substances located at the facility and all stationary storage vessels”; 2) “drain, remove or otherwise dispose of all regulated substances in accordance with any applicable law”; 3) “post warning signs around any area of land where the soil is contaminated with a regulated substance”; and 4) “submit a certification to said commissioner with regard to whether regulated substances have been removed and disposed of in accordance with applicable law.” *Id.* § 22a-134g(c). Once these processes are complete, the commissioner is obligated to conduct an inspection of the premises “to determine compliance with this section.” *Id.* § 22a-134g(d).

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<sup>3</sup> There are many more ISRA provisions that have not been discussed, but those already mentioned are the most relevant to the issues presented. For the full text of ISRA, see N.J. Stat. Ann. §§ 13:1K-6 – 42.

The Connecticut Transfer Act represents somewhat of a compromise position between ISRA and non-regulation of plant closures. While not making cleanup a prerequisite for property transfer or closure, it does provide the government with valuable information regarding the condition of land used for manufacturing. By helping to identify the status of these properties, the law goes a long way towards establishing responsibility for their remediation. Because the information required under the act must be submitted no later than 90 days after closure, it hopefully would not take nearly as much work to track down responsible parties and take appropriate action. Although this statute does little in terms of “privatizing” cleanup costs or empowering local governments, it does provide the government with valuable notice of plant closures, and sets in motion the processes that ultimately result in remediation.

*C. Ohio’s “Clean Closure” Law*

This statute imposes requirements similar to those found in New Jersey and Connecticut. More specifically, it requires an owner or operator of a “reporting facility”<sup>4</sup> to provide notice of an intention to cease operations to the director of environmental protection (a government agency), “the local emergency planning committee of the emergency planning district in which the facility is located, and the fire department having jurisdiction where the facility is located.” Ohio Rev. Code Ann. § 3752.04 (2008). This notice must be provided no later than thirty days after the cessation of operations. *Id.*

The owner or operator must also designate a contact person for the reporting facility who has “responsibility to provide access to the facility . . . to inspect the facility for the purpose of ascertaining compliance with this chapter and rules adopted and orders issued under

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<sup>4</sup> The statute defines a “reporting facility” as one where “regulated operations occur in connection with which the owner or operator of the facility is required to submit a list of hazardous chemicals . . . and is required to submit annual emergency and hazardous chemical inventory forms . . . .” *Id.* § 3752.01(V).

it.” *Id.* § 3752.05(A). Additionally, the owner or operator must: 1) “Submit to the director [of environmental protection] a copy of the most recent emergency and hazardous chemical inventory form for the facility submitted to the emergency response commission”; 2) “Submit to the director a copy of the current hazardous chemical list, or of each of the material safety data sheets, that the owner or operator is required to have on file with the [emergency response] commission”; 3) “Submit to the director a list of every stationary tank, vat, electrical transformer, and vessel of any type that contains or is contaminated with regulated substances and that is to remain at the facility”; 4) “Drain or remove all regulated substances from each stationary vat, tank, electrical transformer, and vessel, and from all piping, that is to remain at the facility”;<sup>5</sup> 5) “Remove from the facility all debris, nonstationary equipment and furnishings, nonstationary containers, and motor vehicles and rolling stock that contain or are contaminated with a regulated substance”<sup>6</sup>; and 6) “Make a written certification to the director that the actions required by divisions (A)(4) and (5) of this section have been completed in compliance with those divisions.” *Id.* § 3752.06.

As shown by these provisions, the Ohio Clean Closure Law is a relatively comprehensive closure statute, and may provide a good model if Wisconsin were to attempt new plant closure legislation. The only problem with this law from the WDNR’s standpoint is that it does not provide for local government involvement in the remediation process. It does, however, allow for an inspection by the Ohio director of environmental protection to determine whether private entities have complied with the statutes. Thus, even though it may not create the

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<sup>5</sup> The owner or operator must also dispose of this material in one of the ways listed in Ohio Rev. Code Ann. § 3752.06(4)(a), (b), or (c).

<sup>6</sup> Again, the owner or operator must dispose of this material properly, in accordance with § 3752.06(5)(a), (b), or (c).

municipal involvement that the WDNR is hoping for, this Ohio law does provide the type of private entity accountability and government oversight necessary to avoid abandonment of contaminated manufacturing plants.

*D. The Colorado State Hazardous Waste Siting Act*

Although Colorado does not have a statute listing required processes upon plant closure, the state's administrative code has detailed procedures and requirements for the closure of hazardous waste management and disposal facilities. *See* Colo. Code Regs. § 264.110 – 120 (2008). One such requirement is a detailed closure plan, which outlines the “steps necessary to perform partial and/or final closure of the facility at any point during its active life.” *Id.* § 264.112. Also among these requirements is a 60-day notice provision, under which the owner or operator of a hazardous waste facility must certify to the Colorado Department of Public Health and Environment that the facility “has been closed in accordance with the specifications in the approved closure plan.”<sup>7</sup> *Id.* § 264.115.

These and the surrounding regulations are aimed primarily at waste disposal facilities, such as landfills. However, they could serve as a valuable reference in creating regulations with more widespread application. If the WDNR were to implement regulations designed to apply to all industrial establishments, for example, these Colorado code provisions could be used as a template for the various requirements and processes such regulations would necessarily contain.

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<sup>7</sup> There are several more provisions related to the closure of hazardous waste management facilities in the Colorado Administrative Code, but I believe that they have limited applicability to the issues presented because of the Code's definition of hazardous waste management facilities. Specifically, they are defined as facilities responsible for “the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste.” Colo. Code Regs. § 260.10. As I read this definition and the surrounding regulations, they seem to be focused on waste facilities, such as landfills or waste processing plants. Because this memo is geared more towards general manufacturing plants, it does not seem valuable to detail these regulations any further. All of the regulations can be found, however, in *id.* §§ 264.110 – 120.