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PROPERTY TRANSFER OR CLOSURE STATUTES

Private parties usually invest resources prior to any transfer of industrial property in a process of “due diligence,” aimed at evaluating whether the parcel contains hazardous materials which may present risks to human health or the environment. When contamination is identified through the due diligence process, the costs associated with the contamination are incorporated into the transaction. Where the risk of contamination can be identified but its presence cannot be determined with certainty, private parties have developed a range of risk allocation mechanisms to move forward the transaction.

Statutes in several states address the transfer or closure of sites containing hazardous substances, and thus impact this due diligence process. Such statutes might require the disclosure of the existence of hazardous substances to any potential purchaser, or to a state agency. They often require recordation of the existence of such substances on a deed. Two states require not only the disclosure of such materials, but also the remediation of any released materials prior to transfer or closure.

State statutes requiring notification prior to transfer attempt to facilitate the due diligence process by increasing the information available to prospective purchasers. Statutes which go further, and require actual remediation of the material, as is the case with New Jersey’s property transfer statute,¹ are in effect altering the nature of the due diligence process in an attempt to gain environmental benefits for the public from that process.

I. Statutes Requiring Disclosure Prior to Transfer

According to the Environmental Law Institute, thirty states require that the owners of property containing hazardous substances disclose the existence of such substances to purchasers of the property.² In some states, this obligation is limited to properties known to the state environmental enforcement agency to contain hazardous substances. Delaware’s property notification provision falls into this category.³ Other states, however, have broader disclosure provisions, turning upon whether private parties, as opposed to the

¹ The Industrial Site Recovery Act, discussed herein.

² Environmental Law Institute, “An Analysis of State Superfund Programs, 50-State Study, 2001 Update,” published in November 2002 [hereinafter referred to as the “ELI 50-State Study”], at 35.

³ Section 9115 of the Hazardous Substance Cleanup Act, or HSCA, requires that:

when a release of a hazardous substance that has been determined by the Secretary to be a threat to public health or the environment has occurred at a facility or property on which the facility is located, the owner of the property shall place a notice in the records of real property kept by the Recorder of Deeds of the county in which the property is located.

state, have knowledge of the contamination. In California, where the owner of a non-residential parcel knows, or has reason to believe, that a hazardous substance is on the property, a written notice to potential purchasers is required.⁴ Michigan also has a broad disclosure requirement.⁵

Both Illinois and Indiana have so-called “Responsible Property Transfer” statutes, which require, for the transfer of properties using hazardous material above threshold levels, that certain disclosure documents be provided to both the prospective purchasers and any lenders.⁶ In Indiana, the statute is applicable to any site with underground storage tanks, any site subject to CERCLA Title III reporting, or any site on the CERCLIS list.⁷

II. Statutes Requiring Disclosure and Remediation Prior to Transfer or Closure

At least two states require not simply disclosure of contamination prior to any transfer, but also remediation or at least a commitment to remediation prior to transfer or closure.⁸

A. New Jersey’s Industrial Site Recovery Act

In 1983, New Jersey, facing a large inventory of contaminated industrial properties presenting significant risks of abandonment, enacted a comprehensive statute aimed at forcing remediation of contaminated industrial properties at the time of transfer or closing. The hope was both to revitalize areas of the state containing such properties, and also reducing the risk of abandonment. The mechanism employed was the first of its kind in the nation. The Environmental Cleanup Responsibility Act, or ECRA, mandated that businesses develop and implement remediations approved by the state upon the happening of

Del. Code Ann. tit. 7, § 9115.

⁴ See Cal. Health & Safety Code § 25359.7(a):

Any owner of nonresidential real property who knows, or has reasonable cause to believe, that any release of hazardous substance has come to be located on or beneath that real property shall, prior to the sale, lease, or rental of the real property by that owner, give written notice of that condition to the buyer, lessee, or renter of the real property. Failure of the owner to provide written notice when required by this subdivision to the buyer, lessee, or renter shall subject the owner to actual damages and any other remedies provided by law. In addition, where the owner has actual knowledge of the presence of any release of a material amount of a hazardous substance and knowingly and willfully fails to provide written notice to the buyer, lessee, or renter, as required by this subdivision, the owner is liable for a civil penalty not to exceed five thousand dollars (\$5,000) for each separate violation.

⁵ ELI 50-State Study at 206.

⁶ ELI 50-State Study at 36.

⁷ ELI 50-State Study at 202.

⁸ ELI 50-State Study at 36, identifying New Jersey and Connecticut. The study also identifies Hawaii as having such a program. *Id.* This appears to be a reference to a statute in Hawaii establishing a voluntary “prospective purchaser” program. The program allows, but does not require, parties to remediate a site at the time of a transaction and receive liability protection. See Haw. Rev. Stat. § 128D-40.

certain specified events, including closures, sales and transfers of operations. The statute was not well received by the New Jersey business community, which was concerned about the impact the program had upon property transactions in the state. Because of a broadly inclusive definition of the facilities and types of transactions covered,⁹ and because of the intensive regulatory attention each transaction required, a significant backlog in processing transactions occurred.

In 1993, in response to concerns in the business community about the length of time required to complete the ECRA process,¹⁰ the legislature significantly revised the statute, changing its name to the Industrial Site Recovery Act, or ISRA.¹¹ The changes included a relaxation of remediation requirements and streamlining the review and compliance procedures. The general outline of the act is the same, however. Any entity wanting to sell, transfer or close an industrial property in the state must notify the New Jersey Department of Environmental Protection (NJDEP) of the transaction. To proceed with the transaction, the owner or operator of the facility must either confirm that the parcel is free of contamination, or, where contamination exists, the owner or operator must obtain NJDEP approval of a remedial action workplan, or enter a remediation agreement. Failure by the seller to go through this process gives the purchaser the power to void the transaction.¹²

1. Facilities and Transactions Covered

ISRA applies to any “industrial establishment,” engaged in operations involving the use of “hazardous substances or hazardous wastes.” The statute uses standard industrial classification (SIC) codes to delineate the facilities covered.

Covered facilities may trigger the ISRA process for any transaction that results in a change in the control of the industrial establishment. Cessation of substantially all of the operations at an industrial establishment also triggers ISRA, as does initiation of Chapter 7 or Chapter 11 proceedings.¹³ Notice of a triggering event must be sent to the NJDEP.

2. Compliance Requirements

The owner or operator of a covered industrial establishment, upon the occurrence of an event triggering ISRA, must complete a five-step process for the remediation of the site. There must be a preliminary assessment, a site investigation, a remedial investigation, a remedial alternatives analysis, and finally remedial action. If no remedial action is required at a site, the owner or operator submits a proposed

⁹ After ECRA took effect, New Jersey officials rendered opinions on some 6,000 transactions each year. *See* Collaton and Bartsch, “Industrial Site Reuse and Development – An Overview,” 2 *Cityscape* 17, 29 (1996) (hereinafter “Industrial Site Reuse”).

¹⁰ *See* Collaton and Bartsch, “Industrial Site Reuse,” at 28.

¹¹ N.J. Stat. Ann. § 13:1K-6 *et seq.*

¹² N.J. Stat. Ann. § 13:1K-13.

¹³ N.J. Stat. Ann. § 13:1K-8.

negative declaration to NJDEP. The negative declaration certifies that there has been no release of any hazardous substances at the site, or that whatever releases have occurred at the site have been remediated.¹⁴

Industrial establishments can be transferred in the absence of an approved remedial action workplan or approved negative declaration, so long as the facility owner or operator is willing to enter a remediation agreement with NJDEP. Such agreements must contain an NJDEP-approved remediation cost estimate, and evidence of the establishment of a remediation funding source.¹⁵

3. Practical Implementation of ISRA

NJDEP believes that the statute has resulted in a great number of contaminated properties being discovered and remediated. Officials with the Office of the Attorney General in New Jersey also believe that the statute is an effective enforcement tool. From a regulator's perspective, the great advantage in getting involved in site remediation questions at the time of a contemplated transaction is that that is when parties, either the buyer or the seller, are most likely to have access to funds for remediation. At the time of the transaction, both the buyer and the seller are motivated to determine the existence and scope of contamination. Because the transaction will presumably prove profitable for both the buyer and seller, the parties stand a greater chance of being able to secure a funding source to effectuate whatever remediation is required. An additional advantage for the state is that the ISRA obligations can be triggered by a bankruptcy, and an ISRA remediation may be required notwithstanding a bankruptcy.¹⁶

However, as with its predecessor ECRA, implementing the ISRA process is a significant undertaking. There are some forty-five employees on the NJDEP website identified as having a role in the process, and three separate bureaus within NJDEP are involved. The ISRA process also takes a significant amount of time. According to a guide on the ISRA process on the NJDEP website, it takes an average of four months from the time of the triggering event for NJDEP to process a case where little or no sampling is needed. Where sampling is required to determine the nature and extent of any contamination and the development of a remedial action workplan, it may take, according to the NJDEP website, "a year or more" to complete the remediation.¹⁷ Practitioners experienced with ISRA can readily point to sites that have spent significantly more than just one year in the process.

Indeed, for complex sites, accurate characterization of the true extent of contamination, and accurate assessments of remediation costs, can involve multiple rounds of sampling and analysis, which in itself can take more than a year. Full remediation of complex sites can take decades. It often is impossible

¹⁴ N.J. Stat. Ann. § 13:1K-9.

¹⁵ N.J. Stat. Ann. § 13:1K-9. A remediation funding source can be established by a remediation trust fund, an environmental insurance policy, a line of credit, a self guarantee, and, for responsible parties who cannot otherwise maintain a remediation funding source, financial assistance from the Hazardous Discharge Site Remediation Fund.

¹⁶ See *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3rd Cir. 1993). The *Torwico* decision does not mention the ISRA statute, but in fact NJDEP initially responded to the site in question pursuant to its authority under ISRA.

for business reasons to delay the finalization of a transaction for the length of time required for a full characterization of a complex site. Accordingly, in the face of these realities, one of the parties to a transaction must commit to undertaking the final remedy in the face of significant uncertainty. Where contamination is discovered, and significant characterization is required, either the transaction stalls or the buyer or the seller must enter a remediation agreement with NJDEP. The party signing may not know the true costs of remediation. Because owners and operators of facilities understand that this is a likely outcome of the ISRA process, some practitioners believe that ISRA serves to discourage at least some amount of transactions which would have gone forward in the absence of ISRA. Additionally, it may be that some underperforming facilities which would otherwise close are continuing with operations simply to avoid the ISRA process.¹⁸ Whether the benefits of the statute outweigh such costs is a complicated judgment.

B. Connecticut's Property Transfer Act

In 1985 Connecticut enacted a property transfer statute similar to New Jersey's ISRA, although it does not allow for nearly as much state involvement in transactions.¹⁹ Under the statute, certain defined "establishments," including businesses generating 100 or more kilograms of hazardous waste in one month,²⁰ must, upon any transfer of ownership, submit certain forms to the Connecticut Department of Environmental Protection (CDEP). Through the forms, the owner is required to certify that no release has occurred at the facility, or that if a historical release has occurred, it has been remediated. If there has been a release at the facility and it is not yet remediated, either the owner or the new purchaser must submit documentation to the CDEP describing a remediation plan and identifying a party responsible for implementation of that plan.²¹ There is no requirement for state approval of a remediation plan prior to the closure of a transaction.

The statute also has a separate provision, passed in 1999, specifically applicable to the closure of a facility. It requires notification of the closure, followed by removal of non-released hazardous substances and identification of any contaminated soil. CDEP must also inspect the site.²²

¹⁷ See <http://www.state.nj.us/dep/srp/irsa/israguide.htm>

¹⁸ See Collaton and Bartsch, "Industrial Site Reuse," at 29, discussing this phenomenon with respect to ECRA. Practitioners assert the same phenomenon is still occurring under ISRA.

¹⁹ See Conn. Gen. Stat. §§ 22a-134 *et seq.*

²⁰ Conn. Gen. Stat. § 22a-134(3). Covered facilities also include any facility generating any amount of waste in more than one location, or any dry cleaner, furniture stripper, or vehicle body repair facility. *Id.*

²¹ Conn. Gen. Stat. § 22a-134a.

²² Conn. Gen. Stat. § 22a-134g. The provision requires that certain facilities involved in the production, use, storage or handling of any regulated substance take the following actions in the event of closure:

Not later than ninety days after such termination, such owner or operator shall (1) submit to the commission a list of all regulated substances located at the facility and all stationary storage vessels, (2) drain, remove, or otherwise dispose of all regulated

The Connecticut statute is credited with assisting in the identification of a great number of contaminated sites. At the time the program was initially implemented, Connecticut believed that it had about 500 contaminated properties. After the program had been up and running for several years, that number had risen to 1,500.²³ For many of these sites, remedial activity is successfully moving forward with the oversight of environmental professionals licensed by the state, but paid for by private parties. Because there is no need for government approval of a remediation plan prior to closure of the transaction, and because the remedial activity for many of the smaller, less hazardous sites is proceeding with only minimal government involvement, the statute does not absorb nearly as many governmental resources as does the New Jersey program. It also presents significantly less risk of negative impact upon property transactions in the state.

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substances in accordance with 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.

Conn. Gen. Stat. § 22a-134g(c).

²³ See Collaton and Bartsch, "Industrial Site Reuse," at 30.