

MINIMIZING RISK IN SELLING OR DECOMMISSIONING INDUSTRIAL PROPERTY UNDER ISRA

Julie LaVan, Esq. & Michael Kondrla, Esq., LaVan Law

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In an improving economy, industrial property can change hands frequently. In a declining one, industrial property owners may be forced to wind up operations and close the facility. If you own or intend to purchase or shut down an industrial facility in New Jersey, pay particular attention to the provisions contained in the state's Industrial Site Recovery Act.

ISRA is a unique environmental law that requires industrial facility owners and operators to investigate and remediate environmentally impacted media prior to the sale, transfer, or decommissioning of certain types of businesses. The thrust behind the law centers on the assumption that such industrial establishments, typically of the manufacturing variety, discharge, intentionally or not, contaminants during their useful life. Thus, before a sale, transfer, or closure, such property should be cleaned up appropriately. While there are exceptions, ISRA generally governs as follows.

ISRA applies to any individual or entity, corporate or governmental, who owns an industrial establishment, owns the real property of an industrial establishment, or operates an industrial establishment in New Jersey. The law only regulates those facilities listed in ISRA's Appendix C and as defined by the North American Industry Classification System (NAICS) codes therein. Such industrial establishments falling under ISRA's purview include those used for chemical manufacturing, hazardous waste treatment and disposal, and utilities, to name a few. In addition, to qualify as an industrial establishment for purposes of ISRA, the business must have operated in the state on or after December 31, 1983 and use and/or store hazardous substances as defined by the state's Spill Compensation and Control Act.

As the owner or operator of an industrial establishment, the need to comply with ISRA arises after a triggering event. Triggering events include significant changes in ownership or operation, such as business and property sales, cessation of operations, and leases for 99 years or longer. Examples of transactions not subject to ISRA include corporate reorganization not substantially affecting facility ownership, stock transfers, and easement grants. Similarly, portions of solid or hazardous waste facilities and undeveloped or vacant land are not considered industrial establishments for purposes of ISRA.

If a facility is subject to ISRA, and it does not qualify for any of the waivers or exemptions contained therein, the owner or operator must file a General Information Notice within five (5) days of any triggering event. Once notice is made, the owner or operator must conduct an environmental investigation in compliance with New Jersey's Technical Requirements for Site Remediation, found at N.J.A.C. 7:26E. At a minimum, a Preliminary Assessment (PA) must be performed by a Licensed Site Remediation Professional (LSRP) to identify any and all Areas of Concern. It should be noted that the scope of a PA differs materially from the American Society for Testing and Materials' Phase I standard.

As such, if the PA discovers Areas of Concern, a subsequent Site Investigation shall be performed. The Site Investigation will explore the contaminants and determine if such exceed the current remediation standards contained in N.J.A.C. 7:26C. If contaminant levels exceed current standards, a Remedial Action Workplan (RAW) shall be proposed. The LSRP will oversee all remedial investigations and shall deliver a Response Action Outcome (RAO) once the property is deemed to be remediated to current state standards. For establishments undergoing a sale or transfer, an owner or operator must obtain an RAO, or a LSRP-certified RAW, before the transaction. For properties shutting down, an owner or operator must notify NJDEP after closing and submit a RAO or LSRP-certified RAW thereafter.

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ISRA does however, allow an owner or operator to transfer ownership without an RAO or RAW in limited circumstances. An owner or operator may submit a remediation certification pursuant to N.J.A.C. 7:26B-3.3(c) instead of a RAO, or the Department can approve a regulated underground storage tank or remediation in progress waiver or a de minimis quality exemption.

It should be stressed that both an owner and/or operator are strictly liable, without regard to fault, for compliance with ISRA. An owner or operator's failure to comply with ISRA allows a potential purchaser to rescind the sale and recover damages. Thus, it is of great importance, whether you are looking to buy, sell, or shutter an industrial establishment in New Jersey, to contact an attorney experienced in ISRA. The cost of doing business is great, but the cost of non-compliance is even greater.

For more information, please contact:



Julie LaVan, Esq.
LaVan Law
[Email: julie@jlavanlaw.com](mailto:julie@jlavanlaw.com)



Michael Kondrla, Esq.
LaVan Law
[Email: mike@jlavanlaw.com](mailto:mike@jlavanlaw.com)



New Jersey Office
LaVan Law
11 E. Main Street
Second Floor
Moorestown, New Jersey 08057
(o) 856-235-4079
(f) 856-235-4018

Philadelphia Office
1515 Market Street
Suite 1200
Philadelphia, PA 19102
(P) 215-854-6398
(f) 215-596-0216

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