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Goodbye to ISRA letters of non-applicability: What are the impacts to the NJ Real Estate Community?

In late April, the NJ Department of Environmental Protection (NJDEP) significantly altered the framework for commercial real estate deals in New Jersey in announcing it would no longer issue applicability determinations (commonly referred to as letters of non-applicability or LNA's) with respect to the Industrial Site Recovery Act (ISRA). This decision, effective April 30, 2008, could have far-reaching implications on all commercial property transactions in NJ.

ISRA is the NJ law that requires, with limited exceptions, a company to go through a clearance process for site contamination as a condition to the sale, transfer or cessation of operations of an industrial establishment (as determined by the facility's SIC or NAICS code) that handles hazardous substances. ISRA compliance is required to commence within five days



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of a "triggering event" such as the execution of an Agreement of Sale or a reduction in workforce at a facility to certain specified levels in anticipation of closing the business operation at the industrial establishment.

The complexity of certain transactions and the nature of extensive business operations frequently raise issues as to whether the transaction or the company's SIC or NAICS code was one to which ISRA applied. For many years, NJDEP has issued

LNA's as a service to the regulated community so that parties engaging in a transaction or ceasing operations could take some comfort that the agency had concluded that their transaction or their business operations were not subject to ISRA. This will no longer be done, and it is unclear how parties to such transactions will fill this void, which previously provided a measure of regulatory certainty.

NJDEP attributes the discontinuation of this service to budgetary constraints and the need to focus on required services. Because this service has been funded by application fees for many years, the desire to refocus the NJDEP's Site Remediation Program seems the more plausible explanation. This is part of a systematic effort to redirect the agency's resources into management and processing of active site remediation cases rather than providing what the

agency apparently views as a non-essential service, but which the regulated community found to be extremely helpful in facilitating transactions. Indeed, NJDEP processed an estimated 5,000 applicability determinations annually, and our firm has facilitated a countless number of LNAs for clients in transactions ranging from the simple sale of real estate to stock sales and corporate mergers involving multiple facilities and subsidiaries throughout the State.

A requirement to secure an ISRA LNA has often been a condition of a purchase agreement or a loan commitment and is frequently a standard term in leases. As LNAs will no longer be available, those engaging in sales of real estate and businesses which may give rise to ISRA compliance obligations will have to adjust their practices to reflect NJDEP's current practice. Since a

regulatory framework still exists for determining whether ISRA applies to a particular transaction, parties will certainly want to carefully document any conclusion that ISRA does not apply to the deal, particularly before making any type of representation or warranty to the contrary. Because the implications of ISRA compliance are substantial with respect to time and costs, those contemplating transactions involving industrial establishments in NJ will need to adjust to this new administrative reality and proceed with caution.

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