




## Closing a Plant?

### Labor and Environmental Law Considerations

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## Closing a Plant?

### Labor and Environmental Law Considerations

## Environmental Considerations

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## Environmental Considerations

- Statutory requirements are state specific.
- There may be corporate or business reasons to consider.
- Advance planning is important.



## State-specific Closing/Transfer Statutes

- State law may require disclosure, investigation, or other requirements.
- 50 State Survey of Environmental and Labor Plant Closing Laws.
- Some examples:
  - Ohio Cessation of Regulated Operations
    - Trigger: Cessation of "regulated operations," (defined as the production, use, storage, or other handling of extremely hazardous substances, hazardous substances, flammable substances, and petroleum), for more than thirty days.
    - Requirements:
      - Notify state and local agencies within 30 days after ceasing operations.
      - Certify that hazardous materials have been properly removed.
      - Verify certifications through an inspection by the state.
      - (Ohio Rev. Code Ch. 3752.)



## State-specific Closing/Transfer Statutes

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- New Jersey Industrial Site Recovery Act
  - Trigger: “Industrial establishment” planning to close operations, or transfer ownership or operations.
  - Requirements:
    - Notify the state within five days of ceasing operations or executing an agreement to transfer ownership or operations.
    - Remediate the property pursuant to an approved workplan or remedial action agreement.
    - (N.J. Stat. Ann. § 13:1K.)

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## State-specific Closing/Transfer Statutes

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- Connecticut Site Assessment and Property Transfer Act
  - Trigger: Transfer of an “establishment,” defined as a small or large quantity generator of hazardous waste, a hazardous waste treatment, storage, or disposal facility, a dry cleaner, furniture stripper, or vehicle body repair facility.
  - Requirements:
    - Engage licensed environmental professional.
    - Submit appropriate form to DEP within ten days of transfer certifying to condition of property, and/or to completion of remediation activities.
    - (Conn. Gen. Stat. § 22a-134a)

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## State-specific Closing/Transfer Statutes

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- Local ordinances may impose similar requirements.
- For example:
  - Anaheim, California Municipal Code
    - Submit a Facility Closure Work Plan
    - Obtain a permit prior to the start of plant closure activities
    - (Anaheim Munic. Code § 6.11.090.)

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## Permits and Governing Documents

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- Closure obligations may be triggered.
- For example:
  - Resource Conservation and Recovery Act (RCRA) Hazardous Waste Treatment, Storage and Disposal Facilities (TSDF) Permits
    - Deadlines for implementing the facility's closure plan and removing all hazardous wastes from the facility are triggered by the receipt of the "final volume of hazardous waste."
  - Underground Storage Tanks (USTs) Regulations
    - Tanks that are abandoned or no longer in use according to state-specific regulatory definitions must be closed or removed pursuant to state requirements.

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## Permits and Governing Documents

- Notification requirements may be triggered.
- For example:
  - Wastewater discharge to Publicly Owned Treatment Works (POTW)
    - Change or cessation of operations may require notice to the POTW pursuant to local sewer utility ordinance.
  - Permits for wastewater/stormwater discharge to surface water (NPDES)
    - Change or cessation of operations may require notice to state (e.g., filing of Notice of Termination form for cessation of stormwater discharge).
  - Air permits
    - Change or cessation of operations may require notice to state.



## Other Binding Agreements

- Consent Orders
  - Superfund
  - Other Enforcement Decrees
- On-going State “Voluntary” Cleanup Obligations
- Review Lease Obligations



## Emission Credits

- If the facility is being permanently shut down, consider whether it may be able to sell any air emissions credits generated by the reduction in emissions from ceasing operations.
- Also consider whether the facility may be able to document and transfer any greenhouse gas credits generated by the reduction in greenhouse gas emissions from ceasing operations.



## Proper Disposal/Decommissioning of Equipment and Materials

- Ensure any unused chemical products, oils, or hazardous materials are appropriately disposed of, sold, or returned to the vendor.
- Materials abandoned on site may be considered hazardous waste, and the company could be subject to civil and criminal penalties for disposal of hazardous waste without a RCRA permit.
- Ensure all equipment is properly decontaminated before selling or disposing of it.
- Ensure hazardous waste is timely disposed of at a licensed TSDF, including any residues in trenches, pits, piping and machinery. Waste stored on site for more than 90 days from the time it is generated may subject the facility to RCRA permitting requirements.
- Asbestos
  - Demolition
  - Sale



## Soil/Groundwater and Compliance Issues

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- Identify, review, and develop resolution plan for any ongoing voluntary environmental cleanups.
- Identify, review, and develop resolution plan for any unresolved violations of environmental laws.
- Even where there is no other obligation to perform investigation or remediation, consider voluntary Phase I/II:
  - Corporate Policy
  - Risk Management
  - Potential Sale
  - Community Relations

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## Recordkeeping and Reporting

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- Review environmental record retention requirements and consider establishing an environmental record retention policy.
  - For example, pursuant to OSHA regulations, material safety data sheets must be retained for at least 30 years after the date they are no longer in use.
- Make all required notifications associated with facility permits.
- Ensure compliance with FASB SFAS No. 143 for reported long lived assets. Under this standard, companies are required to report and account for the retirement of long lived assets under certain circumstances.

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## Recordkeeping and Reporting

- New Source Review (NSR). If the facility is a major source and is considered to be permanently shutdown, a new NSR permit, including a new “best available control technology” analysis, will be required before the facility is allowed to restart.
- Consider taking the following steps to ensure the shutdown is considered temporary (and review the most current EPA and any applicable state guidance or regulations).
  1. Keep any shutdown period as short as possible, preferably less than two years.
  2. Make every effort to ensure pre-shutdown emissions will continue to be included in the state emissions inventory.
  3. Prepare documentation for the record explaining the reason for the shutdown and explaining the company’s concrete plans to restart the facility some time in the reasonably foreseeable future.
  4. Keep all permits in force and timely apply for renewals.
  5. Keep paying all applicable emission, discharge, etc. fees.
  6. Keep up with inspection and maintenance activities at the facility consistent with the fact that the company fully intends to restart the facility sometime in the future.
  7. Maintain the facility in such a condition that costs and physical efforts to restart can be minimized.



## Temporary Shutdowns

- RCRA Closure Obligations.
  - The receipt of the “final volume of hazardous waste” triggers the obligation to implement the facility’s RCRA closure plan, and a new RCRA permit would be required upon restart.
  - However, extensions to the deadlines for implementing the closure plan may be available if the facility can show:
    - There is a reasonable possibility that it will receive additional hazardous wastes,
    - It has the capacity to receive additional wastes, and
    - It has taken all steps to prevent threats to human health and the environment, including compliance with all applicable permit requirements.
  - Work closely with the RCRA permitting authorities to ensure they are aware of the plans for temporary shutdown and are prepared to grant the necessary extensions.



## Respecting the Corporate Structure

- *U.S. v. Best Foods*, 524 U.S. 51 (1997)
  - Parent corporation can be held directly liable for environmental liability as an operator in certain limited circumstances.
  - Focus is on the relationship between the parent corporation and the facility in question – was the parent corporation actually operating the facility.
  - Actions by dual employees relating to a subsidiary are presumed to be on behalf of the subsidiary unless their actions are well outside the normal parent-subsidary relationship.
- Where there may be long-term obligations, consider retaining the subsidiary form.



## Environmental Considerations

- Statutory requirements are state specific.
- There may be corporate or business reasons to consider.
- Advance planning is important.



## Closing a Plant? Labor and Environmental Law Considerations

### Labor and Employment Law Considerations

David J.B. Froiland



## WARN Act (Short Background)

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- Federal law.
- Applies in all states.
- Requires 60 days notice to affected employees.  
Notice also required for:
  - Chief elected official (i.e., mayor),
  - Dislocated worker agency for the state,
  - Union, if applicable.
- Regs require various ingredients for these notices (i.e., employee's notice contains different elements than mayor's or Union's).



## Damages for Violating WARN

- Damages for violation: up to 60 days of backpay and benefits for every employee who should have received notice but didn't.
- Some notice is better than none. For example:
  - If Company provides 45 days notice, then damages are limited to 15 extra days in which notice should have been given (but wasn't).
  - If Company provides 15 days notice, then damages are limited to 45 days.
- Damages are above and beyond any severance or other benefit to which employees are already entitled.



## WARN Act

- WARN Act triggered by either “plant closing” or “mass layoff”.
  - “Plant closing” means a shutdown of facility or unit affecting 50 or more employees.
    - Tip: You can have a plant closing even if the whole plant doesn't close.
  - “Mass Layoff” means a reduction affecting at least 50 employees *and* 33% of the workforce; or 500 employees regardless of percentage.



## How to Apply WARN

- To trigger the notice obligation, these covered events must take place within a 90-day aggregation window.
- To trigger the notice obligation, these covered events must occur within a single site of employment.



## Ways to Avoid WARN Liability

- Best way: Whenever possible, send the notices 60 days ahead of time.
- Some other approaches:
  - Stage the layoffs so that no covered event occurs within a 90-day period (i.e., never trigger WARN).
  - Provide notice for some of the days and provide backpay for the balance of the 60-day period.
  - Pay the backpay for all 60 days.
  - Offer enough alternative jobs to fall below the threshold levels.
    - Must be within a reasonable commuting distance.



## State Specific (“Baby WARN”) Laws

- California
- Connecticut
- Hawaii
- Illinois
- Kansas
- Maine
- Maryland
- Massachusetts
- Michigan
- New Hampshire
- New Jersey
- New York
- Oregon
- Rhode Island
- South Carolina
- Tennessee
- Wisconsin



## Some Baby WARN Acts Are Insignificant

- Massachusetts still has a law on the books but apparently no one enforces it.
- Michigan law “encourages” employers to provide as much notice as possible.
- Rhode Island merely regulates the way in which wages are paid following a plant closing.



## Others Are Onerous (Wisconsin)

- Wisconsin law requires the same 60-day notice obligation, but is triggered for much smaller plant closings and mass layoffs – events that would not trigger federal WARN.
  - “Plant closing” means a shutdown of facility or unit affecting 25 or more employees (as opposed to 50).
  - “Mass Layoff” means reduction of 25 employees and 25% of the workforce (rather than 50 and 33%).



## Others Are Onerous (New York)

- New York employers who employ 50 or more “full-time” employees are required to provide 90 days’ advance written notice of mass layoffs, relocations, and plant closings.
- An employer must provide notice if:
  - the mass layoff impacts 25 full-time employees who represent at least 33% of the workforce, or
  - the plant closing results in 25 employees losing their positions over a 30-day period.
- An employer must also provide a 90 days’ written notice in the event of an employer’s relocation of all or substantially all of its operations to a location at least fifty miles from the current location.



## Others Are Onerous (Illinois)

- In Illinois, a “mass layoff” triggering the notice requirements occurs when 25 or more full-time employees are laid off if they constitute 33% or more of the full-time employees at the site, or 250 or more full-time employees.



## Other Types of State Specific Requirements

- Must continue health insurance for 120 days (Connecticut).
- Must provide severance pay (Hawaii).
- Must apply to the state Secretary of Labor for permission to limit or cease operations (Kansas).
- Must send notice to other parties, including Bureau of Labor Standards (Maine).
- Must pay larger penalties than backpay if notice obligations are violated (New Jersey).





## Other Labor-related Obligations

- Labor Contract (for Unionized Plants)
  - Does the contract require the Company to bargain about the closing?
  - Regardless, the Company will almost always be required to bargain about the “effects” of the closing (i.e., sequence of employees to leave, pay and benefits upon termination, etc. . . ).



## Employee and Morale Issues

- Whenever possible, over-communicate.
  - Avoid leaving an information gap that can be filled by gossip and messaging that is unfairly negative.
- Consider media strategies.
  - Would a press release be helpful?
- Consider whether sabotage is a risk.
- Consider providing EAP or other support resources for frustrated workers.
- Consider outplacement.



## Closing a Plant? Labor and Environmental Law Considerations

### Real Estate Considerations

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## Real Estate Planning Issues

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- Assemble Due Diligence Materials
  - Title Abstracts, Commitments, Policies
  - Surveys
  - Zoning Agreements
  - Property Taxes & Assessments
  - Engineering and Inspection Reports
  - Environmental Assessments and Reports
  - Building Warranties
  - Building Plans
  - Occupancy Permits
  - Maintenance and Service Contracts
  - Itemization of Fixtures Desire to Remove

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## Real Estate Planning Issues

- Update Due Diligence Materials
  - Title
    - Inquiry Regarding Unrecorded Arrangements
    - Recent Construction and Major Repairs – Lien Waivers
  - Survey
  - Building Records Search
  - Any Required Certificates of Inspection
- Broker Arrangements
  - Selection Process
  - Listing Agreement



## Real Estate Planning Issues

- Contract Review
  - Business Park Covenants – restrictions and rights of first refusal
  - Maintenance and Service Contracts - assignment restrictions / termination notices and requirements
  - Government Incentive Obligations
    - Tax Abatement, Bonds, Employment or other Tax Credits
    - Recapture or Other Penalties
    - Employment Obligations
    - Property Tax Value and Other Covenants



## Real Estate Planning Issues

- Commitments in Finance Documents
  - Conventional Financing
  - Government Financing
    - TIF Financing
    - Industrial Revenue or Similar Financing
- Insurance Review



## Real Estate Planning Issues

- Lease Considerations
  - Restrictions on Abandonment / Discontinuance of Operations
  - Assignment / Subletting Restrictions
    - Consent
    - Recapture
    - Share upside
  - Accounting Consideration – Discontinuance of Operations Charge
  - Negotiated Early Buyout



## Closing a Plant? Labor and Environmental Law Considerations

### New Markets Tax Credit

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## Transitioning a Facility to a New Use(r)

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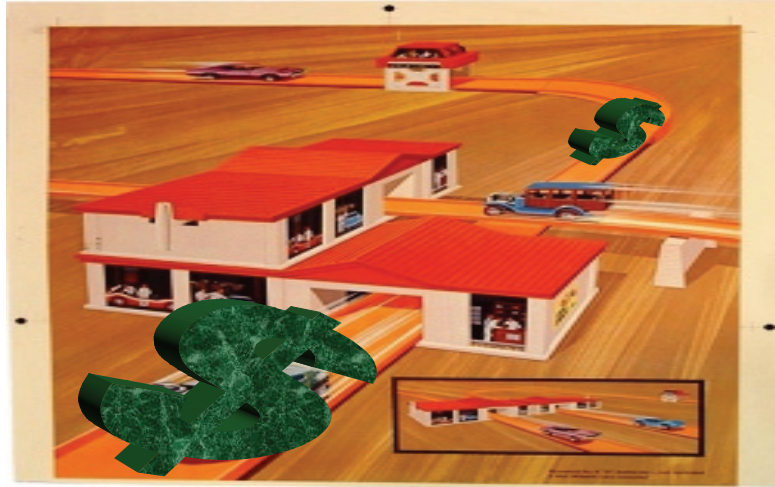
- Public assistance available to:
  - Promote new uses
    - Tax credits
    - Grants
    - Jobs credits
  - Prevent idle/brownfield properties
    - Assessment and Cleanup Grants
    - Revolving Loan Funds
    - Tax Increment Financing
    - Property Reassessment
- New Market Tax Credits
  - Versatile
  - Lucrative
  - Blind to “causation”

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## What is the New Markets Tax Credit?



## What is the New Markets Tax Credit?

- Section 45D of the Internal Revenue Code
- Indirect federal tax credits for qualified investments to introduce capital to underserved markets
- \$5 billion of allocation authority available, pending Congressional approval
- \$26 billion in tax credit allocation since 2001



## Why Consider NMTC

- Ideal size is \$7 - \$20 million

Allocation (Project Cost)	\$10,000,000
Credit Price	\$0.70
Exit Fee (% of QEI)	30.00%
NMTC Equity	\$2,730,000
Leverage Loan(s)	\$7,477,500
Net Up-Front NMTC Benefit	\$1,797,500
<b>Total Annual Costs</b>	<b>\$53,767</b>
Exit Fee	\$ 696,750
Put Fee	\$1,000
<b>Net Residual Value to Borrower</b>	<b>\$ 1,099,750</b>



## How Does the NMTC Work?

- NMTCs are awarded by the Treasury Department to entities that qualify as Community Development Entities (CDE) and that apply for an allocation of credit
- A CDE can be owned or sponsored by either a for-profit or a non-profit entity or both
- To qualify, the entity must have a primary mission of community development and must be accountable to the community



## How Does the NMTC Work?

### ■ Example

- First-Ring Industrial Redevelopment Enterprises, Inc. (FIRE) forms a limited partnership, limited liability company or subsidiary corporation to apply for CDE status and an allocation of NMTCs
- Some CDEs are for-profit affiliated (e.g., Johnson Bank, Sears, Waveland)
- Others are non-profit, mission driven (Local Initiatives Support Corp., Delta Institute)



## Investment in the Community

- Once a CDE receives tax credits, investors (such as USB Community Development Corp.) invest in the CDE by contributing cash
  - Current rate is \$0.67 - \$0.70/credit
  - 2008 rate was \$0.85/credit
- The CDE uses cash from the investment to invest in qualifying businesses
- Investment in qualifying business may be in the form of:
  - Capital or equity investment (“Leveraged” or “Equity” Model) or
  - Loans to qualifying businesses (“Debt” Model) (subsidized interest rate)





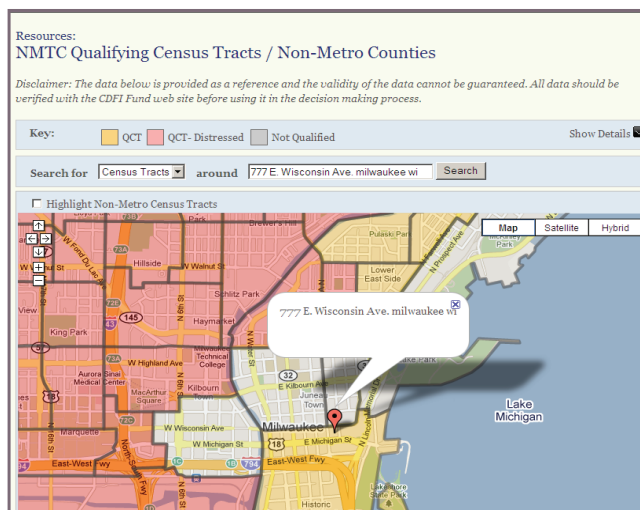
## Qualifying Businesses

- A wide range of businesses are eligible for assistance, including for-profit retail, manufacturing, services businesses and non-profit businesses
- A “low income community” is defined as a census tract where:
  - Poverty rate exceeds 20% or
  - Median income is below 80% of the greater of:
    - State-wide median income or
    - Metropolitan area median income (for metropolitan tracts only)



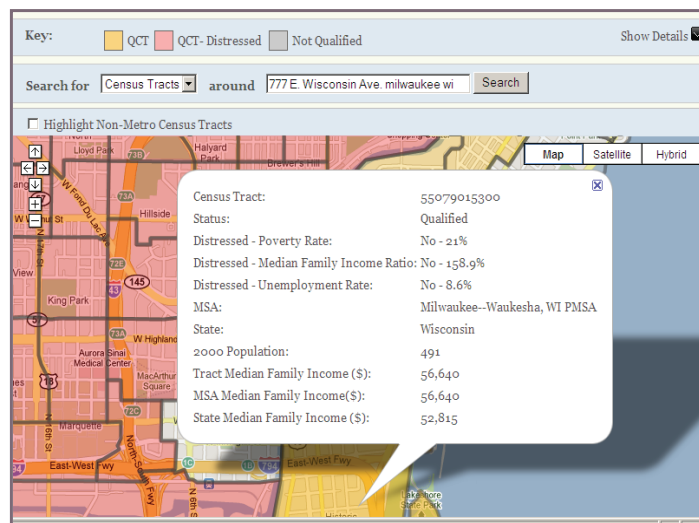
## Qualifying Census Tracts

[www.novoco.com/new\\_markets/resources/ct/](http://www.novoco.com/new_markets/resources/ct/)





## Qualifying Census Tract – Criteria



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## When to Consider NMTC

- When transitioning a facility to a new user or a new purpose that requires significant investment;
- Can be a part of a larger plan to work with local government to “prevent” brownfields
  - EPA auto sector property revitalization initiative  
<http://epa.gov/brownfields/policy/autosector.pdf>
  - Wisconsin Plant Recovery Initiative  
<http://dnr.wi.gov/org/aw/rr/rbrownfields/wpri.htm>

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## Closing a Plant? Labor and Environmental Law Considerations

### Questions & Answers

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## Thank You

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