

***Toxic Catastrophe—Chemical Spills, Releases—Environment N.J. Stat. Ann. §§ 13:1K-19 to -34 (West Supp. 1986).***

In response to the Union Carbide tragedy in Bhopal, India as well as several recent chemical releases in Union and Middlesex Counties, the Governor signed the "Toxic Catastrophe Prevention Act"<sup>1</sup> on January 8, 1986. The bill, A.4145, authored by Assemblyman Byron Baer (D-Bergen), provides the New Jersey Department of Environmental Protection ("DEP") with the power to order industrial plants to upgrade operations, in an effort to prevent accidental releases of dangerous chemicals.

The Toxic Catastrophe Prevention Act, which took effect immediately, incorporates a provisional list of eleven toxic compounds which are deemed to have the most potential for causing a Bhopal-like disaster.<sup>2</sup> The Act requires that the DEP and the Department of Health, adopt a more comprehensive extraordinarily hazardous substance list within eighteen months. The Act establishes that each owner or operator of a facility in the State which at any time stores or handles one or more of the hazardous substances on this list must fill out a registration form which will be provided by the DEP.

In registering with the DEP, each owner or operator will be required to disclose: an inventory of the hazardous substances used; the nature of the work involving the substances; the efforts to reduce potential risks; the proximity of the facility to populous areas and the names of all insurance carriers underwriting the facilities' environmental liability. Based upon this information, the DEP will evaluate what measures should be undertaken to minimize risks.

With regard to those facilities that have a pre-existing risk management program, the DEP will review that program before requiring any additional action. If the DEP finds deficiencies in the established risk management program it may require changes

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<sup>1</sup> 1986 N.J. Sess. Law Serv. — (West); N.J. STAT.ANN. § 13:1K-19 to -34 (West Supp. 1986).

<sup>2</sup> The chemicals are hydrogen chloride (HCL), and allyl chloride in quantities of 2,000 pounds or more; hydrogen cyanide (HCN), hydrogen fluoride (HF), chlorine (CL<sub>2</sub>), phosphorous trichloride, and hydrogen sulfide (H<sub>2</sub>S) in quantities of 500 pounds or more; and phosgene, bromine, methyl isocyanate (MIC), and toluene-2, 4-diisocyanate (TDS) in quantities of 100 pounds or more.

or additions to the program. Importantly, the Act limits the DEP's discretion by requiring that it consider the cost effectiveness and technical feasibility of any changes or additions that it recommends.

Procedurally, if the owner or operator and the DEP agree on the recommended changes, the parties may enter into a consent agreement. If the parties disagree, after notice and hearing, the DEP Commissioner may issue an administrative order mandating the recommended changes or additions. This order will be subject to judicial review.

As to those facilities without a risk reduction plan, the Act requires that the DEP in cooperation with the facilities' owners or operators, develop a work plan for implementing risk reduction procedures. The work plan shall require the reporting of the identity and quantity of all extraordinarily hazardous substances generated, stored, handled or that could unwittingly be produced in the event of an equipment breakdown, human error, design defect, procedural failure, or the imposition of an external force. Also, emphasis will be placed on the nature and condition of all the equipment involved in the handling of the hazardous substances.

Upon evaluation of this information, the DEP, where appropriate, will order the owner or operator of the facility to undertake an extraordinarily hazardous substance risk reduction plan. Here, if the owner of a facility feels the order is unjust he may petition the Commissioner for review. If he fails upon review, he may request that the matter be transferred to the Office of Administrative Law which will be given the power to affirm or modify the order.

With regard to the enforcement of all risk reduction initiatives, the Act empowers the DEP to enter any facility at any time to verify compliance. It also imposes a requirement to continuously update the DEP as to risk reduction efforts.

As a method of detecting possible risks, the Act empowers the DEP to institute an administrative procedure to determine whether an owner of a facility which generates, stores or handles any extraordinarily hazardous substances should be required to authorize its insurance carriers to release to the DEP information relevant to the risks posed by the facility's management of the

substances. Furthermore, the Act imposes a fine of \$5,000 for failure to disclose this information after being required to do so.

The Act attempts to provide facility owners with protection against disclosure of confidential information. Emphasis is placed on allowing access to confidential information only for purposes of enforcing the Act. Also, where the owner believes a trade secret may be jeopardized by disclosure, the Act provides that he may petition the Commissioner to prevent the disclosure. If the petition is denied, an appeal may be made to the Office of Administrative Law.

As for penalties for violations of the Act, the statute provides a \$10,000 penalty for the first offense, not more than \$20,000 for the second offense and up to \$50,000 for the third and each subsequent offense. Upon imposition of a fine a hearing is allowed. Also, the Act empowers the DEP to compromise and settle any claim at any amount which is deemed equitable.

Finally, the Act appropriates \$500,000 to the DEP to institute the program. Ultimately the Act is intended to be self-supporting since it authorizes the DEP to collect fees from subject facilities. Although this is true, the bill encourages future Legislatures to continue levels of funding necessary to compensate for any shortfalls in these fees or from any program expansion.

As Assemblyman Baer stated, the Toxic Catastrophe Prevention Act will promote "the running of plants safely to avoid catastrophe instead of having people run from catastrophe".<sup>3</sup> Through its comprehensive investigative power it appears well equipped to succeed. Most importantly, by incorporating numerous administrative safeguards, fair and non-arbitrary enforcement can be insured.

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<sup>3</sup> The Star-Ledger (Newark, N.J.), Jan. 9, 1986, at 1, col. 6.