

Title 13: The Toxic Catastrophe Prevention Act

13:1K-19. Short title

This act shall be known and may be cited as the "Toxic Catastrophe Prevention Act."

L. 1985, c. 403, s. 1, eff. Jan. 8, 1986.

Title of Act:

An Act concerning potentially catastrophic discharges of hazardous substances into the environment, supplementing Title 13 of the Revised Statutes, and making an appropriation .

L. 1985, c. 403

13:1K-20. Legislative findings and declarations

The Legislature finds and declares that a number and variety of industrial facilities and related operations generate, store, handle, and transport extremely hazardous substances; that some of those operations may represent a catastrophic threat to public health and safety, especially in a densely populated state; that, in recent months, the catastrophically tragic event in Bhopal, India, as well as a score of accidental chemical releases into the atmosphere of the State demonstrate that modern technology, operations systems, and safeguards can fail in protecting against such threats to the public; that while a strengthened capacity to minimize and abate discharges once they occur and efficient plans to evacuate populations if those discharges cannot be contained are vital components of a comprehensive public protection program, the single most effective effort to be made is toward prevention of those environmental accidents by anticipating the circumstances that could result in their occurrence and taking those precautionary and preemptive actions required.

L. 1985, c. 403, s. 2, eff. Jan. 8, 1986.

13:1K-21. Definitions

As used in this act:

- a. "Extraordinarily hazardous accident risk" means a potential for release of an extraordinarily hazardous substance into the environment, which could produce a significant likelihood that persons exposed may suffer acute health effects resulting in death or permanent disability;
- b. "Commissioner" means the Commissioner of the Department of Environmental Protection;
- c. "Department" means the Department of Environmental Protection;
- d. "Extraordinarily Hazardous Substance Accident Risk Assessment" or "EHSARA" means a review and safety evaluation of those operations in a facility which involve the generation, storage, or handling of an extraordinarily hazardous substance, as provided in section 6 of this act;
- e. "Extraordinarily Hazardous Substance" means any substance or chemical compound used, manufactured, stored, or capable of being produced from on-site components in this State in sufficient quantities at a single site such that its release into the environment would produce a significant likelihood that persons exposed will suffer acute health effects resulting in death or permanent disability;
- f. "Extraordinarily Hazardous Substance List" means the substances or chemical compounds identified in subsection a. of section 4 of this act and adopted by regulation pursuant to subsection c. of that section;
- g. "Extraordinarily Hazardous Substance Risk Reduction Work Plan" or "work plan" means the document developed by the department for each facility at which is generated, stored, or handled an extraordinarily hazardous substance, setting forth the scope and detail of the EHSARA to which the facility will be submitted, as provided in section 6 of this act;
- h. "Facility" means a building, equipment, and contiguous area. Facility shall not include a research and development laboratory, which means a specially designated area used primarily for research, development, and testing activity, and not primarily involved in the production of goods for commercial sale, in which extraordinarily hazardous substances are used by or under the supervision of a technically qualified person;

i. "Risk management program" means the sum total of programs for the purpose of minimizing extraordinarily hazardous accident risks, including, but not limited to, requirements for safety review of design for new and existing equipment, requirements for standard operating procedures, requirements for preventive maintenance programs, requirements for operator training and accident investigation procedures, requirements for risk assessment for specific pieces of equipment or operating alternatives, requirements for emergency response planning, and internal or external audit procedures to ensure programs are being executed as planned.

L. 1985, c. 403, s. 3, eff. Jan. 8, 1986.

13:1K-22. Extraordinarily hazardous substance list; registration of facilities generating, storing or handling substances

a. The following chemicals or chemical compounds, in the quantities indicated, shall constitute the initial extraordinarily hazardous substance list: hydrogen chloride (HCl) and allyl chloride in quantities of 2,000 pounds or more; hydrogen cyanide (HCN), hydrogen fluoride (HF), chlorine (Cl₂), phosphorus trichloride, and hydrogen sulfide (H₂S) 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.

b. Within 60 days of the effective date of this act, the department shall develop and issue a registration form to be completed within 120 days of the effective date of this act, by the owner or operator of each facility in the State which at any time generates, stores, or handles any of the extraordinarily hazardous substances on the initial extraordinarily hazardous substance list, pursuant to subsection a. of this section. The registration form shall provide, in addition to any other information that may be required by the department, the following: an inventory of the extraordinarily hazardous substance or substances generated, stored, or handled at the facility and the quantity or quantities thereof, which inventory shall identify whether those substances are end products, intermediate products, by-products, or waste products; a general description of the processes and principal equipment involved in the management of the substance or substances; a profile of the area in which the facility is situated, including its proximity to population and water supplies; the extent to which the risks and hazards of the processes, equipment, and operations have been identified, evaluated, and abated, and the expertise and affiliation of the evaluators and any direct or indirect relationship between the evaluators and the owner or operator of the facility; and the name or names of all insurance carriers underwriting the facility's environmental liability and workers' compensation insurance policies and the scope of these policies, including any limitations and exclusions.

c. Within 18 months of the effective date of this act, the Department of Environmental Protection, in consultation with the Department of Health, shall develop and, after public hearing, adopt as a regulation, pursuant to the "Administrative Procedure Act,"; P.L. 1968, c. 410 (C. 52:14B-1 et seq.), an extraordinarily hazardous substance list. The list shall correlate the substances or compounds with the quantities thereof required to produce the potentially catastrophic circumstance. The department shall have the power to amend, by regulation, the extraordinarily hazardous substance list to accommodate new chemical compounds that may be developed or reflect new information or scientific data that may become available to the department.

d. Within 90 days of the adoption by the department of an extraordinarily hazardous substance list pursuant to subsection c. of this section, the owner or operator of each facility in the State which generates, stores, or handles any of the extraordinarily hazardous substances on the extraordinarily hazardous substance list, not registered pursuant to subsection b. of this section, shall complete the registration form developed and issued by the department.

L. 1985, c. 403, s. 4, eff. Jan. 8, 1986.

13:1K-23. Risk management program of registrants

a. If the owner or operator of a facility that submitted a registration form pursuant to section 4 of this act has established a risk management program, the department shall provide for the submission and review of the risk management program before requiring the owner or operator to take any other action regarding the facility and program pursuant to this act. If the department finds the risk management program has any material deficiencies or omissions that could reduce the effectiveness of the risk management program, it shall recommend to the owner or operator risk management program changes or additions. No later than 60 days after the recommendation, the owner or operator shall submit to the department any action the owner or operator proposes in order to correct the deficiencies or omissions. The owner's or operator's proposals may be in accordance with the changes and additions recommended by the department or in accordance with alternative changes, additions or proposals recommended by the owner or operator.

b. If the owner or operator and the department agree on the measures necessary to correct the deficiencies or omissions in the risk management program, the parties may enter into a consent agreement.

c. If the parties cannot reach agreement, the commissioner, after notice and hearing and written findings of fact, may issue an administrative order requiring changes or additions to correct the deficiencies. Information available on the cost-effectiveness, extraordinarily hazardous accident risk reduction effectiveness and technical feasibility of any changes or additions that the department or owner or operator recommends shall be considered by the department and the commissioner in making any decision. Such an order shall

follow administrative hearing procedures, which are subject to judicial review as necessary. This hearing procedure shall, to the maximum extent practicable and feasible, be accorded priority status.

L. 1985, c. 403, s. 5, eff. Jan. 8, 1986.

13:1K-24. Extraordinarily hazardous substance risk reduction work plan; accident risk assessments

Upon review of all registrations and accompanying materials submitted pursuant to this section, the department shall, in cooperation with the facility owner or operator, develop an Extraordinarily Hazardous Substance Risk Reduction Work Plan for each registered facility without a risk management program agreed upon by the facility owner and the department or subject to a consent agreement or administrative order entered into pursuant to section 5 of this act. The work plan shall constitute the basis for any Extraordinarily Hazardous Substance Accident Risk Assessment required of that facility, to be performed pursuant to this section. 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, or procedural failure, or the imposition of an external force; the nature, age, and condition of all the equipment and instruments involved in the handling and management of the extraordinarily hazardous substance or substances at the facility, and the schedules for their testing and maintenance; the measures and precautions designed to protect against the intrusions of external forces and events, or to control or contain discharges within the facility; the circumstances that would have to obtain in order for there to result a discharge of an extraordinarily hazardous substance, and the practices, procedures, and equipment designed to forestall such an event; any alternative processes, procedures, or equipment which might reduce the risk of a release of an extraordinarily hazardous substance while yielding the same or commensurate results, and the specific reasons they are not employed; any training or management practices in place which impart knowledge to relevant personnel regarding the dangers posed by a release of an extraordinarily hazardous substance and the training provided to prepare them for the safe operation of the facility and for unanticipated occurrences; any other preventive maintenance measure or on-site emergency response capability or other internal mechanism developed to safeguard against the occurrence of an accidental release of an extraordinarily hazardous substance or any other aspect or component of the facility deemed relevant by the department. The department may, by regulation or on a case-by-case basis, limit the scope or detail of the work plan and the priority or frequency of review of any facility or facility operation or component thereof where it determines, in writing, that the action does not remove or compromise the protection required for the public interest, and enables the department to allocate its resources more efficiently and effectively.

L. 1985, c. 403, s. 6, eff. Jan. 8, 1986.

13:1K-25. Accident risk assessment

The owner or operator of every facility registered with the department pursuant to section 4 of this act shall submit those operations in the facility concerned with the generation, storage, handling or safeguarding of any extraordinarily hazardous substance to an Extraordinarily Hazardous Substance Accident Risk Assessment, except as provided for in section 5 with respect to facilities with an established risk management program. The EHSARA shall be conducted in conformity with the work plan for the facility developed by the department pursuant to section 6 of this act by an independent consultant selected by the department from a list of three candidates submitted by the owner of the subject facility or, at the option of the department, by the department or by an independent consultant contracted for directly by the department; except that the department, with respect to the former option, may request the owner of the subject facility to provide three additional candidate consultants if it finds all three originally submitted by the facility owner unacceptable.

The owner of the subject facility shall be assessed a fee established in accordance with a schedule, established as a regulation by the department, which reflects all the costs of the risk assessment of that facility conducted by, or on behalf of, the department.

L. 1985, c. 403, s. 7, eff. Jan. 8, 1986.

13:1K-26. Extraordinarily hazardous substance risk reduction plan

a. Upon review of the Extraordinarily Hazardous Substance Accident Risk Assessment for each facility, the department shall, if appropriate, order the owner or operator of the facility to undertake an extraordinarily hazardous substance risk reduction plan. The order shall identify the risk or risks which must, within the limits of practicability and feasibility, be abated and a reasonable timetable for implementation of the plan. The department shall, by regulation, establish criteria or quantitative standards for determining risk, which criteria and standards shall reflect, among other factors, the size of the potentially exposed population and the gravity of consequences. The commissioner may order those operations posing the identified risk or risks that have not been abated on schedule to cease until the risk reduction plan has been implemented.

b. The owner of a facility who is aggrieved by an order issued pursuant to subsection a. of this section may petition the commissioner for a review of the matter, pursuant to which he shall provide the commissioner with all data and documents which he believes demonstrate that the order is unwarranted. If the commissioner, after review, affirms the initial order, he shall, at the request of the aggrieved owner, transmit all relevant materials and documents on the matter to the Office of Administrative Law, which shall conduct a hearing on the order

pursuant to the provisions of P.L. 1978, c. 67 (C. 52:14F-1 et seq.). This hearing shall be an adjudicatory proceeding, and shall be conducted as a contested case pursuant to the "Administrative Procedure Act,"; P.L. 1968, c. 410 (C. 52:14B-1 et seq.). The department and the aggrieved owner of the facility shall be deemed parties in interest in the proceeding. Intervention in this hearing by any other person shall be as provided in the "Administrative Procedure Act." After review of the record of the adjudicatory proceeding and the recommendation of the administrative law judge, the commissioner shall affirm or modify his order. The decision of the commissioner shall constitute final agency action on the matter, and shall be subject only to judicial review as provided in the Rules of Court. During the pendency of the review and the hearing, the timetable for compliance with the order giving rise to the proceeding shall be suspended.

L. 1985, c. 403, s. 8, eff. Jan. 8, 1986.

13:1K-27. Verification of compliance; records

a. The department has the right to enter any facility at any time in order to verify compliance with the provisions of this act and the quality of all work performed pursuant to this act except that facility owners or operators shall be under no obligation to employ any personnel solely to assure access to the facility by the department when this access would otherwise be impossible.

b. The department shall develop and establish, pursuant to regulation, and enforce a system of recordkeeping, which system shall require the owner or operator of each facility registered pursuant to section 4 of this act to report to the department on all risk assessment and risk reduction efforts undertaken pursuant to this act, all ongoing maintenance measures taken, all unanticipated and unusual events, and any other information the department deems appropriate, and which shall be so designed as to prevent the destruction or alteration of information and data contained in those records.

These regulations shall also establish strict penalties, or other sanctions, to be assessed against any party guilty of destroying or tampering with any records required to be kept pursuant to this act.

L. 1985, c. 403, s. 9, eff. Jan. 8, 1986.

13:1K-28. Insurance carriers; release of information

a. The department may 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 the insurance carrier or carriers which underwrite environmental liability or workers' compensation insurance for that facility to release to the department information relevant to the risks posed by the facility's management of the substance or substances. If so authorized, the insurance carrier or carriers shall release the information within the period of time established by the department, but in no case less than two weeks.

b. An insurance carrier or its representative shall not be held liable in a civil proceeding for any statement made or action taken voluntarily or in response to an authorization or request from the client facility pursuant to this section unless actual malice on the part of the insurer or its representative is present. This immunity shall extend to protect an insurance carrier or its representative from being held liable to any party who sustains any loss or injury as a direct or consequential result of the carrier's or its representative's compliance, noncompliance, or attempt to comply with this act.

c. The department is authorized to disclose information obtained from an insurance carrier or its representative pursuant to this section only to its own employees or agents to assist in enforcing the provisions of this act, or for use in a civil or criminal proceeding, if so ordered by a court.

d. A person who, as required by this section, knowingly and willfully refuses to release information required under this act, or fails to hold information received under this act in confidence, is liable for a penalty not to exceed \$5,000.00, to be collected and enforced in a summary manner under "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.). The proceedings may be brought by the department or by a person or an insurer injured by a failure to keep the information confidential. If a money judgment is rendered against the defendant, it shall be paid to the plaintiff. A reasonable and good faith effort to comply with the provisions of this section shall be a defense to an alleged violation of this section.

L. 1985, c. 403, s. 10, eff. Jan. 8, 1986.

13:1K-29. Regulations governing confidential information

a. The department shall, pursuant to regulation, adopt principles, guidelines, and procedures governing the internal management of confidential information supplied to the department pursuant to this act. The regulations shall provide that information obtained pursuant to this act shall be disclosed only to its employees or agents to assist in enforcing the provisions of this act, or for use in a civil or criminal proceeding, if so ordered by a court, and shall include, but not be limited to requirements: (1) that all confidential information supplied pursuant to this act be labeled as such by the facility owner; (2) that receipt of such labeled information be acknowledged in writing by an

authorized employee of the department; (3) that the department establish a review procedure by which only specifically designated personnel be authorized access to such information and then only on a "need-to-know" basis; and (4) that the department establish secure areas for the express purpose of storage of such confidential information.

b. The owner of a facility who alleges that certain information required to be disclosed pursuant to this act contains or relates to a trade secret or constitutes security information which, notwithstanding the management procedures for such information adopted by the department pursuant to subsection a. of this section, must be kept privileged so as not to competitively disadvantage the facility, or compromise the security of the facility or its operations, shall petition the commissioner for the right to withhold the information. Upon receipt of the petition, the commissioner shall review the matter. If the commissioner, in his discretion, denies the petition, he shall, at the request of the facility owner, transmit all relevant information to the Office of Administrative Law, which shall conduct a hearing on the claim pursuant to the provisions of P.L. 1978, c. 67 (C. 52:14F-1 et seq.). At the hearing, the petitioner shall have the burden to show that the trade secret or security risk claim is valid. This hearing shall be an adjudicatory proceeding, and shall be conducted as a contested case pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.).

L. 1985, c. 403, s. 11, eff. Jan. 8, 1986.

13:1K-30. Violations; penalties

a. If any person violates any of the provisions of sections 4 through 8 of this act or any rule, regulation or order promulgated or issued pursuant thereto, the department may institute a civil action in a court of competent jurisdiction for injunctive or any other appropriate relief to prohibit and prevent this violation and the court may proceed in the action in a summary manner.

b. Any person who violates the provisions of sections 4 through 8 of this act or any rule, regulation or order promulgated pursuant thereto is liable to a civil administrative penalty of not more than \$10,000.00 for the first offense, not more than \$20,000.00 for the second offense, and up to \$50,000.00 for the third and each subsequent offense. If the violation is of a continuing nature, each day during which it continues constitutes an additional, separate and distinct offense. No civil administrative penalty shall be levied except subsequent to the notification of the violator by certified mail or personal service. The notice shall include a reference to the section of the statute, regulation, order or permit condition violated; a concise statement of the facts alleged to constitute the violation; a statement of the amount of the civil penalties to be imposed; and a statement of the violator's right to a hearing. The violator shall have 20 days from receipt of the notice within which to deliver to the commissioner a written request for a hearing. Subsequent to the hearing and upon a finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. If no hearing is requested, the notice shall become a final order upon the expiration of the 20-day period. Payment of the penalty is due when a final order is issued or when the notice becomes a final order. The authority to levy a civil administrative penalty is in addition to all other enforcement provisions in this act, and the payment of a civil administrative penalty shall not be deemed to affect the availability of any other enforcement provision in connection with the violation for which the penalty is levied.

c. The department is authorized and empowered to compromise and settle any claim for a penalty under this section in such amount in the discretion of the department as may appear appropriate and equitable under all of the circumstances, including the posting of a performance bond by the violator.

d. Any person who violates any of the provisions of sections 4 through 8 of this act, or any rule, regulation, or order promulgated or issued pursuant thereto, or an administrative order issued pursuant to subsection b. of this section or a court order issued pursuant to subsection a. of this section or who fails to pay a civil administrative penalty in full pursuant to subsection b. of this section is subject, upon order of the court, to a civil penalty not to exceed \$10,000.00 per day of the violation, and each day's continuance of the violation constitutes a separate and distinct violation. Any penalty imposed under this subsection may be recovered with costs in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.). The Superior Court shall have jurisdiction to enforce "the penalty enforcement law."

L. 1985, c. 403, s. 12, eff. Jan. 8, 1986.

13:1K-31. Fees

The department is authorized to charge and collect fees from facility owners registered pursuant to section 4 of this act, in accordance with a schedule adopted as a rule or regulation, which schedule shall reflect the costs to the department of reviewing individual facilities while enabling the department to continue to administer the program on a self-supporting basis.

L. 1985, c. 403, s. 13, eff. Jan. 8, 1986.

13:1K-32. Local governmental programs; inconsistent ordinances; approval

The department shall make every effort to involve hazardous materials advisory councils, where they exist; local government officials, and other pertinent entities in explaining actions taken in regard to facilities in their areas. Local ordinances which are inconsistent with, in

conflict with, or more restrictive than the provisions of this act must be approved by the department before adoption.

L. 1985, c. 403, s. 14, eff. Jan. 8, 1986.