

New Jersey Law Journal

VOL. CLXXXIII – NO. 6 – INDEX 396

FEBRUARY 6, 2006

ESTABLISHED 1878

ENVIRONMENTAL LAW

New Jersey Takes the Lead On Chemical Plant Security

State is first to impose security requirements on facilities operating within its borders

By **Richard F. Ricci** and
Neil A. Feldscher

On Nov. 29, 2005, Gov. Richard Codey announced that New Jersey was the first state to require “enforceable plant security practices for [New Jersey’s] 140 chemical facilities.” The subject of the press release was not some new legislation or executive order, but rather, a document entitled “Best Practices Standards at TCPA/DPCC Chemical Sector Facilities” (Task Force Best Practices Standards) issued on Nov. 21, 2005, by the Domestic Security Preparedness Task Force (Task Force) and executed on behalf of the Task Force by Attorney General Peter Harvey, as chairman of the Task Force and New Jersey Department of Environmental Protection Commissioner Bradley Campbell, as Task Force Liaison to the

Ricci is chair of the litigation department and Feldscher is an associate in the Environmental Department at Lowenstein Sandler of Roseland.

Chemical Sector. These Task Force Best Practices Standards add to the patchwork of chemical plant security efforts that have evolved since the terrorist attacks of Sept. 11, 2001.

After 9/11, New Jersey, like the federal government and many other states, created a Homeland Security Agency. In October 2001, the New Jersey Domestic Security Preparedness Act (NJDSA) created and funded the Task Force. The Task Force was required to: 1) develop a “proposal to preserve, protect and sustain domestic security and to ensure a comprehensive program of domestic preparedness” and 2) develop, implement and manage “comprehensive responses to any terrorist attack or any other technological disaster and the effective administration, management and coordination of remediation and recovery actions and responses following any such attack or disaster.” The Task Force was further directed to “adopt domestic security and preparedness standards, guidelines and protocols...to preserve, protect and sustain the critical assets of the State’s infrastructure.” The Task Force, thus, set up an Infrastructure Advisory Committee, with responsibility for 20 key areas of infrastructure, including the Chemical Sector. The Task Force was exempted by law from the Open

Public Records Act and Open Public Meetings Act and the Task Force’s adoption of standards was exempt from the Administrative Procedures Act.

In the meantime, the chemical industry had, on its own, taken up the cause of chemical plant security. In 1988, the American Chemistry Council (ACC) first developed its Responsible Care Program (RCP), which was designed primarily to improve industry performance in the areas of worker and process safety, releases to the environment and chemical distribution. In June 2002, the ACC adopted as part of the RCP a Responsible Care Security Code of Management Principles as part of the RCP (Security Code). In July of 2002, the ACC issued an Implementation Guide for the Security Code, consisting of a 300-page manual designed to “help companies achieve continuous improvement in security performance using a risk-based approach to identify, assess and address vulnerabilities, prevent or mitigate incidents, enhance training and response capabilities and maintain and improve relationships with key stakeholders.” All members of ACC were required to have implemented this Security Code by June 2005.

In April 2003, an advisory committee consisting of representatives of the chemical industry in New Jersey submitted a detailed report on chemical plant best practices to the Task Force (hereinafter, the “Industry Best Practices Report.”) This Industry Best Practices Report included seven topics for consideration of best security practices and 68 protective measures to be

taken in response to various possible threat conditions. The Industry Best Practices Report also noted that implementation of the ACC's Security Code was an acceptable alternative to implementation of the Industry Best Practices Report. The Industry Best Practices Report specifically stated that it did "not recommend a blanket mandate of any detailed procedures," but rather, that it was up to each specific company to evaluate what measures may be appropriate considering economics, feasibility and risk. Gov. James McGreevey endorsed the Industry Best Practices Report in September of 2003.

Thereafter, in October of 2004, the DEP, the Task Force, the Chemistry Council of New Jersey, the ACC and the Synthetic Organic Chemical Manufacturers Association (SOCMA) entered into a Memorandum of Agreement (MOA). This MOA committed ACC and SOCMA member companies with facilities in New Jersey to implement the Industry Best Practices Report. Additionally, the MOA provided for quarterly reviews of security preparedness issues, development of table top exercises and functional drills, and the submission to the DEP of annual reports detailing performance and scheduled implementation under the MOA. Although the MOA did not provide for sanctions for facilities that failed to implement the best practices, it did permit the DEP to terminate any noncomplying facility's status as a participant in the MOA. The MOA has never been enforced.

It is against this backdrop that the Task Force issued the Task Force Best Practices Standards in November of 2005. These standards apply to facilities in New Jersey that are, based on Standard Industrial Classification codes or the North American Industry Classification System codes, engaged in the manufacturing of chemical, rubber or plastic products, and are subject to: (1) the Toxic Catastrophe Prevention Act (TCPA) because they manufacture, handle, use or store threshold quantities of extremely hazardous substances, as defined in the TCPA, or (2) the Discharge Prevention, Containment and

Countermeasure Program (DPCC) because they store threshold quantities of hazardous substances. Based upon the Governor's Press Release, 43 of the facilities are subject to the TCPA and the remaining 97 facilities are subject to the DPCC.

The Task Force Best Practices Standards direct these facilities to develop "an assessment of facility vulnerabilities and hazards that might be exploited by potential terrorists." The assessment must be conducted by a "qualified security expert" employing a methodology "approved by the American Institute of Chemical Engineer's Center for Chemical Process Safety." The Task Force Best Practices Standards include a minimum list of items that must be included in the assessment, and require consideration of security measures outside the perimeter of the facility and beyond the facility's control and employee and contractor background checks.

In addition, the Task Force Best Practices Standards require that each facility "develop a prevention, preparedness, and response plan that identifies: the implementation status of all Best Practices identified by the Task Force...and all other measures that have been implemented or are planned to be implemented to eliminate or minimize risk of terrorist attack, to mitigate the consequences of any attack that does occur, or to respond to an attack that does occur." For measures that have not been implemented, the facility must develop either a schedule for implementation or documentation that the cost is "not justified by the anticipated security and public safety benefits." Facilities have 120 days from the effective date of the Task Force Best Practices Standards to meet these requirements. Moreover, the Task Force Best Practices Standards require covered facilities to provide employees and their collective bargaining representatives with an opportunity to identify security issues which must then be detailed in the facility assessment. Facilities are also required to have an Emergency Response Plan which addresses the issues raised by any of the employees, the employees' collective

bargaining representatives, the local Office of Emergency Management or the DEP.

Facilities subject to the TCPA are required to perform a "review of the practicability and the potential for adopting inherently safer technology (IST) as part of the assessment and plan." IST is defined to include minimization or elimination of the potential for an extraordinary hazardous substance accident by, for example, reducing the amount of extremely hazardous substances that may be released from a process, substituting less hazardous materials and designing equipment and processes to minimize the potential for equipment failure and human error. The review is required to include an "analysis of whether adoption of IST alternatives is practicable and the basis for any determination that implementation of IST is impractical."

Additional requirements of the Task Force Best Practices Standards include 1) reporting to the DEP citations for violation of the Process Safety Management Standard (29 CFR 1910.119) within three business days of receipt and 2) reporting breaches of facility security within 15 minutes of discovery to local law enforcement, Office of Counter Terrorism, and New Jersey State Police and reporting breaches and within 24 hours to DEP. Documents produced in compliance with the Task Force Best Practices Standards are required to be maintained on site. Where the DEP or the Task Force takes possession of such documents they are to be protected as "privileged and confidential" under the Domestic Security Preparedness Act, though the Task Force may designate records to be available for public inspection if it determines that the inspection will not jeopardize the public safety. The Task Force Best Practices Standards direct the DEP to handle any documents obtained in accordance with the confidentiality and security requirements set forth in the TCPA regulations. Absent the statutory authority of the Task Force, there is no direction or guidance provided to the DEP as to release of this information.

While the Task Force Best Practices Standards do not provide any specific enforcement authority to the Task Force or the DEP, the NJDSPA provides that the Attorney General may institute an action in Superior Court for equitable and other relief where a person knowingly refuses or fails "to comply with applicable domestic security preparedness standards or to furnish information required by this act." Courts are directed to order relief "if necessary to preserve, protect or sustain the public safety or well-being." Such relief may include an award of investigation, inspection and monitoring costs and legal fees.

Despite the level of detail provided in the Task Force Best Practices Standards, they seem to create as many questions as they answer. For example, the standards require covered facilities to consider background checks for employees and contractors, but no such checks are contemplated for DEP and

Task Force employees who will be given access to security-sensitive information. Legislation requiring DEP employees who conduct inspections of a major facility under the Spill Compensation and Control Act or facilities regulated under the TCPA to undergo a criminal background check has been introduced but has failed to leave committee. With respect to IST, the Task Force Best Practices Standards provide no direction as to what constitutes or who is the final arbiter of impracticability nor do they provide any guidance as to whether cost alone is a basis for concluding that an IST is impracticable. Moreover, the whole concept of IST appears to be related much more to minimizing catastrophic accidents than it is to reducing the risk of terrorist attacks.

Finally, the Task Force Best Practices Standards fail to address the broader policy issue of whether chemical plant security can be effectively

addressed at the state, as opposed to the federal level. Currently, New Jersey stands alone in its efforts to impose security requirements on facilities operating within its borders. Consequently, companies faced with significant costs to comply with New Jersey standards, especially standards such as IST, which are not included in the ACC's Security Code, may well conclude that they are better off moving to other states. While this may result in a reduction of risk to New Jersey residents, it will also be a drag on the state's already suffering manufacturing economy. Moreover, there will be no net safety benefit on a national level. A bipartisan bill to address chemical plant security was recently introduced in the United States Senate. It is at this point, however, unclear whether or in what form the bill will be passed and what impact, if any, it will have on the Task Force Best Practices Standards. ■