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## ENVIRONMENTAL LAW

By NORMAN W. SPINDEL AND PRIYA R. MASILAMANI

### Chemical Plant Security: New Programs Under Consideration

Proposed laws would have significant impact on businesses that use dangerous chemicals

Since Sept. 11, 2001, concern about intentional releases of chemicals through terrorism or criminal activity has increased, and chemical plant security has been identified as a major national security concern. A much quoted report prepared by the United States General Accounting Office in March 2003 stated that, according to worst case scenarios submitted to the United States Environmental Protection Agency in accordance with Clean Air Act requirements, 123 chemical facilities in the United States could each expose more than a million people to toxic gases in the event of an accident or attack, and another 700 facilities potentially threaten 100,000 people in nearby areas. There also have been a number of government and public interest group studies and media reports alleging lax security at chemical plants.

Although many federal regulatory programs aimed at protecting the environment and ensuring worker safety and

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*Spindel is senior counsel to and Masilamani is an associate in the Environmental Department at Lowenstein Sandler PC of Roseland.*

health result in some protections from chemical releases and consequential exposures, there are no federal laws specifically addressing terrorism and criminal activity at chemical plants. Examples of existing safety laws include the Occupational Safety and Health Act which, along with its implementing regulations, contains numerous provisions controlling the use of hazardous substances in the workplace to prevent injuries to employees. The Emergency Planning and Community Right-to-Know Act ensures that chemical safety information is available to employees and emergency response personnel. The CAA requires users of specified highly dangerous chemicals to conduct hazard assessments, including: evaluations of worst case accidental release scenarios; adopt a program to prevent releases; develop a response plan in the event that a release occurs; and coordinate with community emergency response organizations.

Approximately 15,000 such facilities are located around the country. Regulations implementing the Resource Conservation and Recovery Act require facilities storing hazardous waste to use

surveillance systems, install fences and gates, and post warning signs, but these provisions, like those of the CAA, are directed at accidental chemical exposures. The same is true of state statutes like New Jersey's Toxic Catastrophe Prevention Act, which mandates special training for workers and emergency personnel who may have to handle toxic or reactive materials. This state statute, like the federal EPCRA and many other current safety laws, was adopted during the 1980s in response to the Bhopal, India, incident.

New laws are likely to be passed mandating that facilities that use dangerous chemicals adopt security measures specifically designed to prevent terrorists and criminals from gaining access and causing intentional harm. If the proposals are approved, businesses that use hazardous chemicals will have to identify risks posed by their operations, and submit reports and plans to regulators explaining how the risks are being managed. Potentially affected sectors include not only the chemical industry, but also agricultural retailers, drinking and wastewater treatment facilities, food processors and distributors that use ammonia refrigeration systems, and petroleum refineries. No broadly applicable federal law mandating chemical security requirements has been approved, but rules are likely to be adopted as pressure continues to be exerted on governmental officials to address this important area. In the interim, many companies have adopted voluntary safety initiatives sponsored by industry organizations. These programs

may provide an alternative to, or may be incorporated into, government programs.

During 2002 and 2003, Congress considered two major proposals. Sen. Jon Corzine's (D-N.J.) proposal, the Chemical Security Act, viewed as the tougher of the two, would require facilities in high priority categories, to be defined by regulation, to: (1) assess vulnerability to terrorist attacks or other unauthorized releases; (2) identify hazards that might result from an unauthorized release; and (3) prepare a prevention, preparedness, and response plan. Reports and plans would be reviewed by the Department of Homeland Security and the EPA. Use of safer materials and processes would be required if feasible. Penalties for failure to comply with agency orders include civil and criminal fines and imprisonment.

Sen. James Inhofe's (R-Okla.) proposal, the Chemical Facilities Security Act, is viewed as less comprehensive. It calls for oversight by DHS only, separating security issues from current safety reviews. Assessments and plans similar to those required by the Corzine proposal would have to be prepared, but would not have to be submitted for agency approval. Civil, but not criminal, penalties are available. A compromise bill introduced in October 2003 calls for submission, but not review, of reports and plans, and consideration, but not implementation, of safer technology. At this time, legislators have been unable to reach agreement, but several proposals are circulating and calls for action continue.

Several federal measures applicable to specific sectors are already in effect. Transporters and ports that ship hazardous materials are subject to DHS oversight. The Bioterrorism Act of 2002 requires drinking water utilities to submit vulnerability assessments and emergency response plans to the EPA. Nuclear power plants, long subject to security regulation, have adopted enhanced controls.

In New Jersey, the September 11,

2001 Anti-Terrorism Act, adopted in 2002, applies criminal penalties to chemical manufacturers and others who recklessly allow unauthorized individuals to gain access to toxic chemicals. Several chemical security bills were introduced this year. Proposed amendments to the TCPA, designed to promote security in addition to safety, would require companies currently subject to TCPA risk management planning requirements to take additional steps, including assessing security threats, adopting safer technology to eliminate or reduce the identified risks, and submitting prevention, preparedness, and response plans to NJDEP for approval. A second proposal would establish an industrial facilities security and preparedness commission whose members would include representatives of state agencies, chemical manufacturers, oil refiners, environmental public interest groups, and labor. The commission would study security issues and submit a report to the governor and Legislature recommending further action. Another bill suggests that background checks be conducted on independent contractors who work at TCPA regulated facilities.

Several chemical industry organizations have sponsored security initiatives. Most notably, in the summer of 2002, the American Chemistry Council added a security code to its Responsible Care initiative, a safety program established in 1988. The security code requires ACC member companies to conduct safety reviews on a schedule set on the basis of vulnerability to attacks and to assess site, cyber, and transportation security using an extensive risk assessment methodology. Periodic audits, review by a third party such as a government agency or insurance auditor, and several other steps are required. Security improvements are then implemented as appropriate and may include installation of physical barriers, employee training, emergency drills, communication with third parties such as government agencies and the community, and the use of safer chemi-

cals and processes where feasible. The security code is mandatory for ACC members and has been voluntarily adopted by some nonmembers. Compliance with the ACC procedure as an alternative to or an element of federal or local regulation has been suggested.

A basic principle underlying many federal and state environmental and worker safety laws is that members of the public have a right to know of activities that may pose a threat to their safety and health. The objective of the federal EPCRA and Freedom of Information Act, and the New Jersey Open Records Act, is to enhance public safety and health by making information easily available to the public.

With the advent of the Internet and governmental Web sites, information about a neighboring or faraway industry's operations often is only a mouse click away. However, the current perceived need to maintain secrecy about industrial operations and prevent access by terrorists is likely to remove it from the public domain. The CAA risk management plans that provided the figures in the GAO's report have been removed from the EPA's Web site, along with other materials that not only informed the public of local environmental conditions, but also potentially revealed the location of large supplies of dangerous substances. Many of the chemical security proposals provide that plans submitted to government authorities be exempt from disclosure to the public under FOIA and similar laws. In the post-Sept. 11 world, it is widely believed that industrial security plans and information must be kept secret due to the potential for abuse.

If national chemical security laws are adopted, businesses that use dangerous chemicals will have to assess security risks, submit reports and plans to regulators, and take steps to control the risks identified. The details are, of course, unclear at this time. In the meantime, voluntary security programs seek to address this important issue. ■