

ADMINISTRATIVE ORDER NO. 2005-05

WHEREAS, in enacting the Toxic Catastrophe Prevention Act (TCPA), the Legislature found and declared that a number and variety of industrial facilities and related operations generate, store, handle, and transport extremely hazardous substances, and that some of those operations may represent a catastrophic threat to public health and safety, especially in a densely populated state; and

WHEREAS, the Legislature therefore directed the Department to work toward reducing this catastrophic threat, by anticipating the circumstances that could result in their occurrence and taking those precautionary and preemptive actions required; and

WHEREAS, the risk of a terrorist attack on facilities and operations regulated under TCPA is a pressing homeland security issue, acknowledged by the New Jersey Domestic Security Preparedness Task Force, by federal agencies such as the Department of Homeland Security, the Department of Justice, and the Environmental Protection Agency, as well as by industry groups such as the American Chemistry Council; and

WHEREAS, N.J.A.C. 7:31-8.2 (a) requires, in part, that owners and operators, and employees and representatives “ shall not hinder or delay, and shall assist, the Department in the performance of all aspects of any inspection and audit.”

WHEREAS, to ensure that the Department’s efforts to inspect facilities and operations regulated under TCPA are not hindered, and that those efforts receive all necessary assistance, the Department seeks to maximize opportunities for employees of these facilities and operations to participate in inspections conducted under TCPA, to:

- (a) Help identify environmental health and public safety hazards, including, but not limited to, such hazards that might result from an intentional terrorist attack; and
- (b) Help identify potential sources of toxic releases, pollution, and other hazards affecting human health and the environment, including, but not limited to, such hazards that might result from an intentional terrorist attack;

THEREFORE, I hereby order that the Department’s Toxic Catastrophe Prevention Act Program take all steps to meet the requirements of N.J.A.C. 7:31-8.2 concerning the rights of employees and their representatives to participate in TCPA inspections.

Summary

This Order establishes procedures for participation by employees and their representatives when the NJDEP inspects, investigates, or audits facilities regulated by the Toxic Catastrophe Prevention Act and any rules and regulations adopted pursuant thereto.

Definitions

The following words and terms, when used in this Order, shall have the following meanings unless the context clearly indicates otherwise.

“Commissioner” means the Commissioner of the Department of Environmental Protection or the person delegated to act on his behalf.

“Department” means the Department of Environmental Protection.

“Employee” means any person allowed or permitted to work by an owner or operator of a covered process, except that independent contractors, subcontractors, consultants, and employees of affiliated companies or corporations shall not be considered employees of the owner or operator of a covered process. For the purposes of this Order, "Employee" shall also not include a supervisory or managerial employee.

“Employee representative” means a representative of the certified or recognized bargaining agent engaged in a collective bargaining relationship with a private or public owner or operator of a facility.

“Facility” means a building, equipment, and contiguous area subject to regulation by TCPA.

“Inspection or investigation” means a physical on-site visit or audit of a facility conducted by the Department for the purpose of determining compliance with the TCPA.

“Owner” or "Operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

"Person" means corporations, companies, associations, societies, firms, partnerships, and joint stock companies, as well as individuals, and shall also include all political subdivisions of this State or any agencies or instrumentalities thereof, and any legal successor, representative, agent or agency of the foregoing.

“TCPA” means the Toxic Catastrophe Prevention Act, N.J.S.A. 13:1k-19 et seq

Employee participation in TCPA inspections

(a) When the Department notifies the owner or operator of a facility of an upcoming TCPA inspection or investigation, the Department shall instruct the owner or operator to:

1. Post a notice, or a copy of any Department notice provided, indicating that there will be a Department inspection or investigation, conspicuously displayed in the area subject to inspection or investigation, immediately upon such notification; and

2. If there is an employee representative at the facility, immediately provide a copy of the posted notice to the employee representative;

(b) If the Department provides a written explanation of the purpose, scope, procedures, progress, or outcome of the inspection or investigation to the owner or operator of the facility, all employees shall be entitled to view a copy of that written explanation. The Department shall instruct the owner or operator of the facility to take the following actions, not more than 24 hours after receiving a copy of the Department's explanation:

1. Conspicuously display the explanation in the area subject to the inspection or investigation; and,

2. If there is an employee representative, provide the employee representative with a copy of the explanation.

(c) If the Department conducts an inspection or investigation at a facility, the Department shall instruct the owner or operator of the facility to afford to an employee who works in, or is familiar with, the portion of the facility being inspected or investigated, and an employee representative of the employees, if there is an employee representative, an opportunity to participate in the inspection or investigation and to accompany Department inspectors during the inspection or investigation.

(d) A Department inspector may permit additional employee representatives and additional employees to accompany him or her if he or she determines that to do so will aid the inspection. A different employee, employee representative and representative of the owner or operator may accompany the Department inspector during each different phase of an inspection or investigation if the inspector determines that this will not interfere with the conduct of the inspection or investigation. This provision shall not apply to parts of an inspection or investigation in which the Department is exclusively examining written records.

(e) If the Department conducts a meeting with the management personnel of the owner or operator of a facility to explain the purpose, scope, procedures, progress or outcome of an inspection or investigation, the Department shall instruct the owner or operator of the facility to invite to the meeting any employee and employee representative that participates in the inspection or investigation. If the Department deems it necessary, the Department shall arrange and conduct a separate meeting with participating employees and employee representatives.

(f) Department inspectors shall have the authority to resolve all disputes as to who is the representative authorized by the owner or operator and the employees for the purpose of this Order. If there is no employee representative, or if the Department inspector is unable to determine with reasonable certainty who the representative is, he or she shall consult with those employees he or she deems necessary to the effective conduct of the inspection or investigation.

(g) After the inspection or investigation is concluded, the Department shall instruct the owner or operator to conspicuously display the name and telephone number of the Department inspector for a period not less than 30 days after the conclusion of the inspection or investigation in the area subject to inspection or investigation and to promptly provide this notice to the employee representative, if applicable.

(h) The Department inspector may, at his or her discretion, deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection or investigation.

(i) The Department shall have authority to conduct any interview with employees that the Department deems necessary to effectuate the purposes of this Order and the TCPA. The interviews may be conducted without facility and management personnel present, if deemed appropriate by the Department.

(j) The owner or operator of a facility may require an employee or employee representative who accompanies a Department inspector on an inspection or investigation to sign an agreement solely for the purpose of protecting trade secrets and confidential business information, except that nothing in this Order shall be construed to alter any rules or regulations adopted pursuant to TCPA concerning the protection of trade secrets and confidential business information. Nothing in this Order shall affect pre-established employee obligations concerning trade secrets.

(k) In the case of a facility which contains information classified pursuant to law by an agency of the federal government in the interest of national security, only persons who are authorized to have access to that information may accompany a Department inspector in areas of the facility containing the information.

(l) Nothing in this Order shall be construed as delegating any enforcement power of the Department to any employee or employee representative.

(m) Nothing in this Order shall be construed to supersede any provisions of State or federal law concerning labor-management relations or to reduce any rights or remedies available to employees or employee representatives under any collective bargaining agreement, the Clean Air Act, or any other applicable law.

Additional Duties of the TCPA Program

(a) The TCPA program shall:

1) Produce and distribute prior to inspections or investigations a fact sheet explaining the purpose and provisions of TCPA and this Order for the owner or operator, employees, employee representatives, and other interested parties. This fact sheet, as well as the notice provision in 2.(g), shall include the statement that employees have a right to participate in TCPA inspections and investigations without retaliation.

2) Include the information from the fact sheet on the Department web page.

3) Take other appropriate measures to explain and publicize this Order and the TCPA program to owners and operators, employees, and employee representatives.

4) Maintain an electronic data base of contact information for employee representatives at TCPA regulated facilities.

Sovereign Immunity

Pursuant to the provisions of the "New Jersey Tort Claims Act," N.J.S.A. 59:1-1 et seq., including, but not limited to, N.J.S. 59:2-6 and N.J.S.A. 59:3-7, the Department shall not be subject to any liability by virtue of the participation of an owner or operator or employee or employee representative in an inspection or investigation pursuant to this Order.

Severability

If the provisions of any section, subsection, paragraph, or clause of this Order shall be judged invalid by a court of competent jurisdiction, such order or judgment shall not affect or invalidate the remainder of any section, subsection, paragraph, or clause of this Order.

Effective Date

This Order shall take effect on October 1, 2005 and shall remain in effect until superseded.

Date: _____

Bradley M. Campbell
Commissioner