



State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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JON S. CORZINE
Governor

LISA P. JACKSON
Commissioner

ADMINISTRATIVE ORDER NO. 2007-03

WHEREAS, in enacting the Spill Compensation and Control Act, the Legislature found and declared that the storage and transfer of petroleum products and other hazardous substances may represent a threat to public health, safety and welfare; and

WHEREAS, the Legislature therefore directed the Department to work toward reducing this threat, by anticipating the circumstances that could result in their occurrence and taking those precautionary and preemptive actions required, including the adoption of the Discharges of Petroleum and Other Hazardous Substances rules, N.J.A.C. 7:1E (the DPHS rules); and

WHEREAS, the risk of a terrorist attack on facilities and operations regulated under DPHS rules is a pressing homeland security issue, acknowledged by agencies such as the Office of Homeland Security and Preparedness; and

WHEREAS, N.J.A.C. 7:1E-1.9(c) requires, in part, that owners and operators, and employees and representatives "shall assist and shall not hinder or delay the Department in the performance of all aspects of any inspection;" and

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

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

THEREFORE, I hereby order that the Department's Discharge Prevention Program take all steps to meet the requirements of N.J.A.C. 7:1E-1.9 concerning the participation of employees and their representatives in DPHS inspections, as set forth below.

Summary

This Order establishes procedures for participation by employees and their representatives when the Department inspects or audits facilities regulated by the DPHS rules.

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 or her behalf.

“Department” means the Department of Environmental Protection.

“Discharge Prevention Program” means the Department program responsible for administering the DPHS rules.

“DPHS” means the Discharges of Petroleum and Other Hazardous Substances rules, N.J.A.C. 7:1E.

“Employee” means any person allowed or permitted to work by an owner or operator of a major facility, 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 major facility. 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 an owner or operator of a major facility.

“Facility” means any place or equipment that is used to refine, produce, store, hold, handle, transfer, process or transport hazardous substances.

“Inspection or audit” means a physical on-site technical review inspection or audit of a facility conducted by the Department for the purpose of determining compliance with the DPHS rules.

“Major facility” means those facilities defined as such pursuant to N.J.A.C. 7:1E-1.6.

“Owner” or “Operator” means any person who, with respect to any major facility, owns such facility, or operates it by lease, contract or other form of agreement.

“Person” means public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, as well as individuals, and when used to designate the owner of property which may be subject to this Order, includes this State, the United States, any other

state of the United States, and any foreign or government, and any political subdivisions or agents, lawfully owning or possessing property in this State.

Employee participation in DPHS inspections

- (a) When the Department notifies the owner or operator of a major facility of an upcoming DPHS inspection or audit, 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 audit, conspicuously displayed in the area subject to inspection or audit, 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 and procedures of the inspection or audit to the owner or operator of the major facility, all employees shall be entitled to view a copy of that written explanation. The Department shall instruct the owner or operator of the major 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 audit; and,
 - 2. If there is an employee representative, provide the employee representative with a copy of the explanation.

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

- (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 audit if the inspector determines that this will not interfere with the conduct of the inspection or audit. This provision shall not apply to parts of an inspection or audit 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 and procedures of an inspection or audit, 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 audit. 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 audit.
- (g) After the inspection or audit 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 audit in the area subject to inspection or audit 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 audit.
- (i) The Department inspector shall have authority to conduct any interview with employees that the Department inspector deems necessary to effectuate the purposes of this Order and the DPHS rules. The interviews may be conducted without facility and management personnel present, if deemed appropriate by the Department inspector.
- (j) The owner or operator of a major facility may require an employee or employee representative who accompanies a Department inspector on an inspection or audit 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 the DPHS rules 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 major 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 Spill Compensation and Control Act, or any other applicable law.

Additional Duties of the Discharge Prevention Program

- (a) The Discharge Prevention program shall:
 - 1. Produce a fact sheet giving background on the Discharge Prevention program and explaining the purpose and provisions of this Order. This fact sheet, as well as the notice provision in (g) above, shall include the statement that employees have a right to participate in DPHS inspections and audits 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 to owners and operators, employees, and employee representatives.
4. Maintain an electronic data base of contact information for employee representatives at DPHS 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.A. 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 audit 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 April 2, 2007 and shall remain in effect until superseded.

Date: 3/14/07



Lisa P. Jackson
Commissioner