THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NEW JERSEY STATE CHAMBER OF COMMERCE, et al.,	:	
	:	No. 85-5088
Plaintiff-Appellees-Cross-Appellants,	:	(85-5087)
	:	(85-5095)
v.	:	
ROBERT E. HUGHEY, et al.,	:	
Defendants-Appellants-Cross-Appellees,	:	
	:	
and	:	
JOSEPH H. RODRIGUEZ, et al.,	:	
Defendant-Intervenors-Appellant-Cross-Appellees.	:	
	:	
FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES, et al.,	:	
	:	
Plaintiff-Appellees,	:	
	:	
v.	:	
WILLIAM VAN NOTE, et al.,	:	
	:	
Defendants-Appellants,	:	
	:	
and	:	
JOSEPH H. RODRIGUEZ, et al.,	:	
	:	
Defendant-Intervenors-Appellants.	:	

APPENDIX

APPENDIX CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NEW JERSEY STATE CHAMBER OF COMMERCE; CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY; NEW JERSEY BUSINESS AND INDUSTRY ASSOCIATION; CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.; MERCK & CO, INC.; MAGNESIUM ELEKTRON, INC.; CP CHEMICALS, INC.; CHEM-MARK, INC.; EXXON CHEMICAL AMERICAS, a division of Exxon Chemical Company, a division of Exxon Corporation; SCHERING CORPORATION; ESSEX CHEMICAL CORPORATION; INGERSOLL-RAND COMPANY; and SHELL CHEMICAL COMPANY, a division of Shell Oil Company,

Plaintiffs,

v.

ROBERT E. HUGHEY, Commissioner of Environmental Protection; J. RICHARD GOLDSTEIN, M.D., Commissioner of Health; and WILLIAM VAN NOTE, Acting Commissioner of Labor, and THE STATE OF NEW JERSEY,

Defendants,

and

JOSEPH H. RODRIGUEZ, Public Advocate of the State of New Jersey; NEW JERSEY STATE INDUSTRIAL UNION COUNCIL, AFL-CIO (IUC); CITIZEN ACTION OF NEW JERSEY; PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY & HEALTH (PHILAPOSH); NEW JERSEY ENVIRONMENTAL LOBBY; NEW JERSEY STATE FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION (FMBA); INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, NEW JERSEY AFL-CIO (IAFF); COMMUNICATION WORKERS OF AMERICA, AFL-CIO (CWA); DISTRICT THREE, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO (IUE); INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO (ILGWU); AMALGAMATED CLOTHING AND TEXTILE WORKERS

Civil Action No. 84-3255

UNION, AFL-CIO, CENTRAL AND SOUTH JERSEY: JOINT BOARD (ACTWU); UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO (UPIU): OIL, CHEMICAL AND ATOMIC WORKERS UNION, AFL-CIO, LOCALS 8-149, 8-760 and 8-5570 (OCAW); UNITED AUTO WORKERS UNION, AFL-CIO, LOCAL 502 (UAW); CHEMICAL WORKERS ASSOCIATION, INC.; INDEPENDENT OIL WORKERS UNION; TRENTON EDUCATION ASSOCIATION; ALUMINUM, BRICK & GLASS WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 514-G; PENNSYLVANIA FEDERATION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, AFL-CIO; COALITION AGAINST TOXICS; LEAGUE OF CONSERVATION VOTERS (NEW JERSEY); CLEAN WATER ACTION (WASHINGTON, D.C. AND NEW JERSEY); STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY (N.J. PIRG); ENVIRONMENTAL ACTION (WASHINGTON, D.C.); LEAGUE OF WOMEN VOTERS OF NEW JERSEY' SIERRA CLUB (NEW JERSEY); AMERICAN LUNG ASSOCIATION OF NEW JERSEY; NEW JERSEY TENANTS ORGANIZATION (NJTO); NEW JERSEY ASSOCIATION OF COUNTY HEALTH OFFICERS; and NEW JERSEY HEALTH OFFICERS ASSOCIATION,

Defendant-Intervenors.

FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES; FLAVOR AND EXTRACT MANUFACTURE'S ASSOCIATION; BUSH BOAKE ALLEN, INC.; DRAGOCO, INC.; FIRMENICH, INC.; INTERNATIONAL FLAVORS AND FRAGRANCES, INC.; ISOGENICS, INC.; H.J. KOHNSTAMM & CO., INC.; V. MANE FILS, INC.; NOVILLE ESSENTIAL OIL COMPANY, INC.; POLAROME MANUFACTURING CORP.; ROURE BERTRAND DUPONT, INC.; TAKASAGO USA, INC.; UNGERER & CO.; and UNIVERSAL FRAGRANCE CORPORATION,

Plaintiffs,

v.

Civil Action No. 84-3892

WILLIAM VAN NOTE, Acting Commissioner of: Labor for State of New Jersey; J. RICHARD GOLDSTEIN, Commissioner of Health for : State of New Jersey; ROBERT E. HUGHEY, Commissioner of Environmental Protection: for State of New Jersey, :

Defendants, :

and :

JOSEPH H. RODRIGUEZ, Public Advocate of : the State of New Jersey; NEW JERSEY STATE INDUSTRIAL UNION COUNCIL, AFL-CIO : (IUC); CITIZEN ACTION OF NEW JERSEY; PHILADELPHIA AREA PROJECT ON : OCCUPATIONAL SAFETY & HEALTH (PHILAPOSH); NEW JERSEY ENVIRONMENTAL : LOBBY; NEW JERSEY STATE FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION (FMBA); : INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, NEW JERSEY AFL-CIO (IAFF);: COMMUNICATION WORKERS OF AMERICA, AFL-CIO (CWA); DISTRICT THREE, INTERNATIONAL: UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS,: AFL-CIO (IUE); INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO (ILGWU);: AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CENTRAL AND SOUTH JERSEY: JOINT BOARD (ACTWU); UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO (UPIU); : OIL, CHEMICAL AND ATOMIC WORKERS UNION, AFL-CIO, LOCALS 8-149, 8-760, and 8-5570: (OCAW); UNITED AUTO WORKERS UNION, AFL-CIO, LOCAL 502 (UAW); CHEMICAL WORKERS : ASSOCIATION, INC.; INDEPENDENT OIL WORKERS UNION; TRENTON EDUCATION : ASSOCIATION; ALUMINUM, BRICK & GLASS WORKERS INTERNATIONAL UNION, AFL-CIO, : LOCAL 514-G; PENNSYLVANIA FEDERATION, BROTHERHOOD OF MAINTENANCE OF WAY : EMPLOYEES, AFL-CIO; COALITION AGAINST TOXICS; LEAGUE OF CONSERVATION VOTERS : (NEW JERSEY); CLEAN WATER ACTION (WASHINGTON, D.C. AND NEW JERSEY); : STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY (N.J. PIRG); ENVIRONMENTAL: ACTION (WASHINGTON, D.C.); LEAGUE OF WOMEN VOTERS OF NEW JERSEY; SIERRA CLUB : (NEW JERSEY); AMERICAN LUNG ASSOCIATION OF NEW JERSEY; NEW JERSEY TENANTS : ORGANIZATION (NJTO); NEW JERSEY ASSOCIATION OF COUNTY HEALTH OFFICERS; :

and NEW JERSEY HEALTH OFFICERS ASSOCIATION, :

Defendant-Intervenors. :

OPINION

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DEBEVOISE, District Judge.

I. The Proceedings

These two consolidated actions challenge the New Jersey Worker and Community Right to Know Act (the "Right to Know Act"), N.J.S.A. 34:5A-1, et seq., primarily on the ground that the Act

is preempted by regulations or standards promulgated under the federal Occupational Safety and Health Act of 1970 (the "OSH Act"),[1] 29 U.S.C. §§ 651, et seq. Plaintiffs further contend that certain of the Right to Know Act's disclosure requirements constitute an unreasonable exercise of the State's police power and will result in a taking of trade secrets without due process of law.

The plaintiffs in Civil Action No. 84-3255 (the "Chamber of Commerce Action") are the New Jersey State Chamber of Commerce, three chemical and business associations, and eight pharmaceutical and chemical companies. Defendants in that action are New Jersey's Commissioner of Environmental Protection, Commissioner of Health, Acting Commissioner of Labor, and the

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[1] I have tried to minimize the use of initials and acronyms. To assist the reader of this opinion, the following will be used from time to time:

CAS Numbers - Chemical Abstract Service registry numbers.

DEP - New Jersey's Department of Environmental Protection.

EPA - The federal Environmental Protection Agency.

FIFRA - Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136, et seq.

MSDS - Material Safety Data Sheets required under the New Jersey Right to Know Act.

OSHA - Federal Occupational Safety and Health Administration.

OSH Act - Occupational Safety and Health Act of 1970.

SIC - Standard Industrial Classification.

State of New Jersey. Plaintiffs ask for injunctive and declaratory relief. They seek an order directing the defendant Commissioners to comply with the provisions of § 18 of the OSH Act (defining federal preemption), 29 U.S.C. § 667, and enjoining the State of New Jersey from enforcing the obligations of the Right to Know Act. Plaintiffs seek a declaratory judgment that § 18 of the OSH Act precludes the New Jersey Commissioners from enforcing the obligations of the Right to Know Act in light of OSHA's Hazard Communication Standard, 29 C.F.R. § 1910.1200, and that the Right to Know Act is, on its face, unconstitutional and preempted by § 18 of the OSH Act and the Hazard Communication Standard.

After defendants in the Chamber of Commerce Action answered, plaintiffs moved for a preliminary injunction against enforcement of the Right to Know Act. A hearing was held on November 15, 1984.

The plaintiffs in Civil Action No. 84-3892 (the "Fragrance Materials Association Action") are two associations, the members of which are engaged in the manufacture and sale of fragrances and fragrance materials, and thirteen corporations which compound, mix, blend and/or manufacture fragrances or their ingredients. The defendants are the three New Jersey Commissioners who are the defendants in the Chamber of Commerce Action.

Plaintiffs in the Fragrance Materials Association Action seek to enjoin enforcement of the Right to Know Act. After defendants answered plaintiffs moved for summary judgment

on Count I (alleging preemption) and on Count II (alleging deprivation of trade secrets without just compensation) or, in the alternative, for a preliminary injunction against enforcement of the Right to Know Act. Plaintiffs' motion was heard on December 10, 1984.

The two cases were consolidated prior to the November 15 and December 10 hearings. The Public Advocate of the State of New Jersey and twenty-nine unions, environmental organizations and other interested groups had moved to intervene. I granted the motion. The intervenors cross-moved for a partial summary judgment in their favor dismissing Counts I and II of the complaint in the Fragrance Materials Association Action. The intervenors as well as the original parties participated in the two hearings.

This opinion addresses all of the pending motions.

II. The Facts

A. The Right to Know Act: On August 29, 1983 New Jersey's Governor signed the Worker and Community Right to Know Act, N.J.S.A. 34:5A-1, et seq., which became effective August 29, 1984.

Defendants submitted affidavits of numerous persons having experience and expertise in the fields of chemical substances and occupational and community hazards resulting from such substances. Included among the affidavits were governmental officials having responsibilities for workplace or community protection from chemical hazards, physicians and scientists whose

careers have been devoted to treating or preventing illnesses caused by dangerous substances and persons familiar with the problems of fire fighting at industrial sites.

Taken together their affidavits demonstrate the rationale for the Right to Know Act. New Jersey, one of the nation's smallest states, is also one of the most densely populated. It has a high concentration of industry in general and of chemical manufacturers and processors in particular. Since World War II the number of available chemicals has grown extraordinarily, there now being approximately 50,000 different chemicals used in industry. Many of these are hazardous. Exposure to these hazardous substances can take place in the plant where they are used or processed; the community can be exposed through emission in the air, through accidental leakage from the plant or through lawful and unlawful disposal outside the plant. Exposure can and does result in debilitating or fatal illness, particularly cancer, lung ailments, sterility and birth defects.

Workers in a plant are often unaware of the dangerous substances with which they deal, or, if they are aware, they may not be advised of the precautions they should take. Often employers are unaware of the dangerous nature of the materials in their plants. The affidavits recite instances in which doctors seeking to treat an employee after exposure to a chemical substance have been unable to do so because the employer is either unable or unwilling to identify the substance.

Further, inhabitants of communities surrounding industrial complexes do not know the nature of chemical vapor to which they are exposed nor do they know the possible hazards which exposure entails. Public health officials cannot advise them because they, too, quite often do not have the necessary information. While some industrial concerns go to great pains to educate and inform both their employees and public officals of the chemical substances in their plants, others do not. Lacking such cooperation there was little that public officials could do to protect citizens from the existence of harmful substances.

In particular fire fighting organizations were often unable to obtain precise information concerning the substances with which they might have to deal in the event of a plant fire. Further, when fires occurred, there was often no way in which firemen could tell quickly what substances were burning in the plants. This information might be vital both to know how to deal with the fire itself and to safeguard firemen and other persons in the area.

New Jersey enacted the Right to Know Act to meet this congeries of problems arising in the workplace and extending into the community at large. The purpose is reflected in the Act's legislative findings and declarations, N.J.S.A. 34:5A-2, and in the statement of purpose contained in the regulations implementing the Act. N.J.A.C. 8:59-1.2.

The Right to Know Act requires that the New Jersey Department of Environmental Protection (the "DEP") develop both an environmental hazardous substance list and an environmental survey designed to enable employers to report information about environmental hazardous substances at their facilities. N.J.S.A. 34:5A-4.

The Department of Health is required to develop four things: (1) a workplace hazardous substance list which must include (a) any substance regulated by the federal Occupational Safety and Health Administration ("OSHA") under 29 C.F.R., Part 1910, subpart z, (b) any environmental hazardous substance and (c) any other substance which the Department determines poses a threat to the health or safety of an employee; (2) "a special health hazard substance list comprising hazardous substances which, because of their known carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity, or reactivity pose a special hazard to health and safety, and for which an employer shall not be permitted to make a trade secret claim;" (3) a workplace survey designed to facilitate the reporting by employers of hazardous substances at their facilities; and (4) a hazardous substance fact sheet for each hazardous substance on the workplace hazardous substance list. N.J.S.A. 34:5A-5.

The Act required that within 5 days of August 29, 1984 (the effective date of the Act), the environmental survey and the workplace survey be distributed to each employer subject to the Act. N.J.S.A. 34:5A-6. Within 90 days of receipt of the

workplace survey the employer is required to complete it and send copies to the Department of Health, the county health department, the local fire department and the local police department. Within the same time the employer is required to complete the environmental survey and send a copy to the DEP and to the county health department and to send "pertinent sections of the survey" to the local police and fire departments. N.J.S.A. 34:5A-7.

Upon receipt of a completed workplace survey from the employer, the Department of Health must transmit to the employer a fact sheet (prepared by the Department, as noted above) for each hazardous substance reported by the employer on the workplace survey. N.J.S.A. 34:5A-8. The Department must maintain a file of completed workplace surveys, require that every employer update its survey annually and make available copies of the surveys and related hazardous substance fact sheets upon request. N.J.S.A. 34:5A-10. The DEP must maintain a file of completed environmental surveys, require that every employer update its survey each year, and make copies of the surveys available upon request. N.J.S.A. 34:5A-9.

Each employer must maintain at its facility a central file in which it shall retain the workplace survey, appropriate hazardous substance fact sheets and, if appropriate, the facility's environmental survey. Notice of availability must be posted and employee access must be provided. N.J.S.A. 34:5A-12. In addition the Right to Know Act contains detailed provisions mandating an education and training program for employees, "which shall be designed to inform employees in writing and orally of

the nature of the hazardous substances to which they are exposed in the course of the employment and the potential health risks which the hazardous substances pose." The employer must also train his employees "in the proper and safe procedures for handling the hazardous substances under all circumstances. N.J.S.A. 34:5A-13.

The Act also contains detailed provisions for labeling containers containing hazardous substances and pipelines. "Within six months of the effective date of this act, every employer shall take any action necessary to assure that every container at his facility containing a hazardous substance shall bear a label indicating the chemical name and Chemical Abstracts Service number of the hazardous substance or the trade secret registry number assigned to the hazardous substance." Further, "[e]mployers shall be required to label pipelines only at the valve or valves located at the point at which a hazardous substance enters a facility's pipeline system, and at normally operated valves, outlets, vents, drains and sample connections designed to allow the release of a hazardous substance from the pipeline." N.J.S.A. 34:5A-14.

The Act goes on to provide that "[w]ithin two years of the effective date of this act, every employer shall take any action necessary to assure that every container at his facility [whether or not it contains a hazardous substance] bears a label indicating the chemical name and Chemical Abstracts Service number of the substance in the container ... or the trade secret registry number assigned to the substance." If a container

contains a mixture of substances, the employer's label must similarly identify the five most predominant substances contained in the mixture. The labeling provisions effective after two years will not apply to any substance constituting less than 1% of a mixture unless the substance is present at the facility in an aggregate amount of 500 pounds or more. Provisions concerning the labeling of pipelines parallel those applying to the period beginning six months after the effective date of the Act. N.J.S.A. 34:5A-14.

The Right to Know Law deals with the problem that disclosure of chemical substances in the workplace and the labeling of containers may result in the disclosure of trade secrets of an employer. Procedures are established whereby an employer may claim that specified information disclosed in an environmental survey or in a workplace survey or through the labeling process constitutes a trade secret. If the DEP or the Department of Health disputes the trade secret claim an administrative hearing and subsequent court review are available. Until the dispute is resolved and after a trade secret claim is either accepted by the agency or favorably adjudicated, confidentiality must be preserved except that disclosure may be made to a physician when such information is needed for medical diagnosis or treatment. N.J.S.A. 34:5A-15.

Trade secret protection is not accorded, however, to substances on the special health hazard substance list, "for which an employer shall not be permitted to make a trade secret claim" N.J.S.A. 34:5A-5b. The Department of Health has prepared

a workplace hazardous substance list consisting of 2051 items. Of these 835 are on the special health hazard list. Of the 835 substances 335 are carcinogens, mutagens (causing genetic mutations) and teratogens (causing birth defects) and are considered special health hazard substances in a pure form or in a mixture at a concentration of 0.1% or greater. The other 500 substances are flammable, explosive, reactive or corrosive substances and are considered special health hazard substances in a pure form or in a mixture at very high concentrations, e.g., 80%, 90%, 95%. See Rosenman Affidavit, Defendants' App. at A19.

The DEP and the Department of Health have adopted regulations implementing the Right to Know Act, N.J.A.C. 7:1G-12, et. seq., N.J.A.C. 8:59-1.1, et seq. As required by the Act, environmental surveys and workplace surveys have been distributed to each employer in the State subject to the Act, including the manufacturing and processing concerns which are plaintiffs in the Chamber of Commerce and the Fragrance Materials Association cases. Unless enforcement of the Act is enjoined the employers must complete and file them as required by the Act.

B. The OSH Act: In 1970 Congress enacted the Occupational Safety and Health Act of 1970 ("OSH Act"). 29 U.S.C. §§ 651, et seq. Finding that personal injuries and illnesses arising out of work situations imposed a substantial burden on interstate commerce, Congress sought to assure working persons safe and healthful working conditions by, among other things, (i) authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses

affecting interstate commerce, (ii) exploring ways to discover latent diseases, establishing causal connections between diseases and work environmental conditions and conducting research relating to health problems, (iii) providing medical criteria which will assure that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience, (iv) providing for the development and promulgation of occupational safety and health standards, (v) encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws, and (vi) providing for appropriate reporting precedures. 29 U.S.C. § 651.

The OSH Act imposes a duty on each employer to furnish his employees a place of employment free from recognized hazards and to comply with occupational safety and health standards promulgated under the Act. 29 U.S.C. § 654.

The Secretary of Labor is given the power and the duty to promulgate, modify or revoke occupational safety or health standards in order to implement the purposes of the OSH Act. 29 U.S.C. § 655. An "occupational safety and health standard" is defined as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8).

In particular 29 U.S.C. § 655(b)(7) provides in part:

> (7) Any standard promulgated under this subsection shall prescribe the use of labels or

> other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. ...

In order to carry out the purposes of the Act the Secretary of Labor is authorized to enter, inspect and investigate places of employment. 29 U.S.C. § 657(a). Further, the Secretary of Labor, in cooperation with the Secretary of Health, Education and Welfare:

> ... shall issue regulations requiring employers to maintain accurate records of employee exposure to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 655 of this title. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 655 of this title, and shall inform any employee who is being thus exposed of the corrective action being taken.

29 U.S.C. § 657(c)(3).

The statute mandates that information obtained under the OSH Act "shall be obtained with a minimum burden upon employers, especially those operating small businesses.

Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible." 29 U.S.C. § 657(d). The Secretary of Labor and the Secretary of Health, Education and Welfare are directed to prescribe rules and regulations which they deem necessary to carry out their responsibilities under the OSH Act. 29 U.S.C. § 657(g)(2).

C. OSHA's Hazard Communication Standard: On November 25, 1983 OSHA published its final Standard for Hazard Communication. 48 Fed. Reg. 53,340-348.[2] The Standard is codified at 29 C.F.R. §§ 1910.1200, et seq. Its purpose is stated to be:

> ... to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

29 C.F.R. § 1910.1200(a).

The Standard is applicable to all employers in Standard Industrial Classification ("SIC") Codes 20-39, which in general terms includes manufacturing operations. The plaintiff enterprises in the consolidated cases are included in SIC Codes 20-39. 29 C.F.R. § 1910.1200(b)(1).

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[2]There are pending in the Court of Appeals for the Third Circuit petitions challenging the validity of OSHA's Hazard Communication Standard. United Steelworkers of America, et al. v. Thorne G. Auchter, Docket Nos. 83-3554, et al.

Chemical manufacturers and importers are required to evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Criteria and methods of evaluation are prescribed in the Standard. Information concerning any physical or health hazards determined to be present must be transmitted to "downstream" manufacturers by product labels on containers leaving the workplace and by accompanying material safety data sheets ("MSDS"). After evaluation of workplace chemicals, employers are required to develop and implement a written hazard communication program for their workplaces "which at least describes how the criteria specificed ... for labels and other forms of warning, material safety data sheets and employee information and training will be met...." 29 C.F.R. § 1910.1200(d) and (e).

1. Hazard Determination/Material Safety Data Sheets: The primary responsibility for hazard evaluation is placed on chemical manufacturers and importers of hazardous chemicals. 29 C.F.R. § 1910.1200(d)(1). Each chemical must be evaluated for its potential to cause adverse health effects, as well as its potential to pose physical hazards (e.g. flammability). The Standard provides general criteria for the manufacturer or importer to follow in evaluating the scientific evidence on whether a chemical may cause an adverse health effect and provides specific rules for the evaluation of chemical mixtures. 29 C.F.R. § 1910.1200(d)(2), (5); see 48 Fed. Reg. 53,347 (Appendix B to Standard). In addition, the Standard establishes,

by reference to several enumerated lists, a "floor list" of approximately 2300 hazardous chemicals. 29 C.F.R. Part 1910, Subpart Z; 29 C.F.R. § 1910.1200(d)(3), (4).

The MSDS for each hazardous chemical is the primary means, under the Standard, for transmitting comprehensive hazard information. 48 Fed. Reg. 53,305. The MSDS will include the physical and chemical characteristics of the substance, its health and safety hazards, including symptoms of exposure, recommended maximum exposure limits, primary routes of exposure, generally applicable safe handling and use precautions and control measures. 29 C.F.R. § 1910.1200(g). Employer-purchasers will receive copies of the MSDS's produced by manufacturers for all hazardous chemicals in their workplace and will be required to ensure that they are readily accessible to all employees. Id. Workplace container labels designed to communicate to employees by message, word, picture or symbol, the dangers of the chemicals in the container, are keyed to the readily-available MSDS.

2. Labeling: Chemical manufacturers, importers and distributors must ensure that containers of hazardous chemicals leaving the workplace are appropriately labeled, and all manufacturing employers must similarly label in-plant containers. 29 C.F.R. § 1910.1200(f)(1), (4). The labels on containers leaving the workplace must include at least the "identity" of the chemical, appropriate hazard warnings and the name and address of the manufacturer, importer or other responsible party. Id.

The labeling requirement under the Standard expressly takes into account the applicability of other existing statutes or substance-specific health standards regulating hazardous materials. 29 C.F.R. § 1910.1200(a)(4). The Standard also directs that if labels already applied by a manufacturer, distributor or importer comply with the Standard's requirements, additional labels need not be applied. 29 C.F.R. § 1910.1200(f)(9).

The Standard recognizes the practical problems of labeling within a plant and allows a flexible approach. 48 Fed. Reg. 53,336. For example, if there are a number of stationary work containers which have similar contents (such as reactor vessels) within a work area, the employer may post signs or placards which convey the required hazardous information rather than individually labeling each piece of equipment. Employers may also use written material other than labels (e.g. process sheets, batch tickets, etc.) on stationary process equipment, as long as it is readily accessible to employees working in the area. In addition, the Standard as promulgated does not require labels on piping and support systems, the most costly items in any plan. 29 C.F.R. § 1910.1200(c). This resulted in an estimated cost savings of approximately 58% to 67% of the initial compliance cost and 70% of the annual cost associated with earlier proposals for the Standard which required such labeling. 48 Fed. Reg. 53,325.

3. Employee Training: The Standard specifies the subjects which must be covered by employee training programs.

29 C.F.R. § 1910.1200(h)(2).

4. Trade Secrets: The Standard permits a chemical manufacturer, importer or employer to withhold the specific chemical identity from the MSDS if:

> (i) The claim that the information withheld is a trade secret can be supported;
>
> (ii) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;
>
> (iii) The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and
>
> (iv) The specific chemical identity is made available to health professionals, in accordance with the applicable provisions of this paragraph.

29 C.F.R. § 1910.1200(i)(1).

If a treating physician or nurse determines that a medical emergency exists and that the chemical identity of a hazardous chemical is necessary for emergency or first aid treatment, the entity claiming a trade secret must immediately disclose the identity of the chemical. In non-emergency situations more complex procedures are required to obtain the identity of the chemical. These procedures are designed to provide greater protection to the trade secret. 29 C.F.R. § 1910.1200(i)(2) and (3).

D. The Alleged Burdens Imposed by the Right to Know Act: Plaintiffs in the Chamber of Commerce Action have submitted a number of affidavits of corporate executives and scientists describing the effect of having to comply both with OSHA's Hazard Communication Standard and the Right to Know Act.

Labeling of pipelines, including valves, vents, inlets, drains and sample connections would, according to plaintiffs, impose enormous burdens in manpower and money. Some plants, for instance, have thousands of locations which would require labeling. In view of the fact that different materials may be sent through the pipes, it might be necessary to change the labels continually.

It is claimed that the requirement that within two years containers and pipelines be labeled with the chemical names and Chemical Abstract Service registry numbers ("CAS numbers") of the five predominant substances contained in or passing through them (whether hazardous or not) imposes a heavy financial burden and serves to confuse employees and others with an excess of information.

Double sets of labels, reports and training programs will be required to meet both the federal and state requirements.

Out-of-state suppliers may be unwilling to provide the information which New Jersey requires be placed on the labels, particularly when trade secrets are involved. This will result in loss of essential suppliers or an inability to comply with the Right to Know Act provisions.

The education program requirement imposes a far greater burden on employers than the federal standard because it must include extensive information about the Right to Know Act and about all hazardous substances in a plant whether or not in the individual employee's workplace.

The most serious consequences of the Right to Know Act which plaintiffs foresee is the threatened loss of trade secrets. Unlike the federal standard, under which employers can claim trade secret protection for all hazardous substances, the Act mandates disclosure of the presence of all special health hazard substances. There are 835 substances in this category, and as to them no employer may seek trade secret protection. In many instances, plaintiffs assert, the identification of the presence of one of these substances will necessarily result in the disclosure of valuable trade secrets which heretofore have been protected from competitors and others. It is not necessary to know the quantity of the substance involved. According to plaintiffs the mere presence of the substance often constitutes the trade secret.

Defendants have sought to answer plaintiffs' analysis of the effects of the Right to Know Act, and at least to some extent have done so in the affidavits submitted on their behalf (see in particular Rosenman Affidavit, Defendants' Appendix at A13, et seq.). They note that there are many exceptions to the labeling requirements, such as containers labeled pursuant to various federal acts (other than the OSH Act) and that alternate methods of labeling are permitted in special situations. Defendants demonstrate that many state requirements correspond with or complement the federal requirements and that employer compliance with one set of requirements can be used to meet the other set.

Defendants seek to minimize the loss of trade secrets risk which the Right to Know Act creates. There are affidavits which state that using available technology it is almost always possible to ascertain the component substances of a product, and therefore the listing of chemical substances will not disclose anything which a competitor or other interested person could not ascertain in any event. Further, defendants note that of 50,000 chemicals which are commonly used, only 835 are in the category of special health hazard substances. All the rest are entitled to trademark protection under the Right to Know Act. Finally, defendants argue that these 835 substances are capable of causing extraordinary harm to workers and others, and that if there is a conflict between the employer's right to protect his trade secrets and a worker's need to know the identity of the substance to prevent or treat injury or disease, the interest in maintaining trade secrets must give way to the more important health needs.

It is impossible on the present record to measure with any precision the extent of the increased burden imposed by the Right to Know Act, although given the additional requirements of the Act the extra burden must of necessity be considerable. I suspect that not even an extended evidential hearing would enable a court to determine the extent of the risk to trade secrets which would result from implementation of the Right to Know Act. Plaintiffs discussed their trade secrets in only the most general terms. Even when dealing with a claim of a single trade secret, the determination of the validity of the claim is a difficult

process at best. Discussion of a threat to all of the asserted trade secrets of all industrial concerns in New Jersey is necessarily imprecise and nebulous. Similarly defendants' assertions that there is little danger to this undifferentiated mass of trade secrets cannot be totally convincing. The most that can be said is that there is a likelihood that the disclosure requirements will involve a substantial risk of the loss of some trade secrets by some of New Jersey's employers.

III. Conclusions of Law

A. Jurisdiction: Plaintiffs in the Fragrance Materials Association Action assert federal jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337(a) (commerce regulation). Plaintiffs in the Chamber of Commerce Action assert federal jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 1983 (deprivation of federal rights under color of state law) and 28 U.S.C. § 2201 (Declaratory Judgment Act). The latter statute, of course, is not an independent basis of jurisdiction and simply provides for a remedy when a federal court already has jurisdiction.

Defendants urge that under the rule set forth in New Jersey State AFL-CIO v. New Jersey, Docket No. 84-5196 (3d Cir. Nov. 8, 1984) and Exxon Corp. v. Hunt, 683 F.2d 69 (3d Cir. 1982), cert. denied, 103 S. Ct. 727 (1983), this court lacks jurisdiction notwithstanding the fact that plaintiffs rely on a federal statute and regulation as the bases of their claims. Plaintiffs' principal claim is that the Right to Know Act has been preempted by the federal Hazard Communication Standard. In

Exxon plaintiffs sought a declaratory judgment that the existence of the federal Superfund Act, 42 U.S.C. § 9631, preempted New Jersey's Spill Act, N.J.S.A. 58:10-23.11a, and exempted them from paying the tax imposed by the Spill Act. The Court of Appeals ruled that "a complaint seeking a declaration that federal law preempted state regulations did not raise a federal question" and that "a declaratory judgment complaint does not state a cause of action arising under federal law when the federal issue is in the nature of a defense to a state law claim," 638 F.2d at 73.

In State AFL-CIO plaintiffs sought a declaratory judgment that the Employment Retirement Income Security Act of 1974 (ERISA) preempted four New Jersey statutes regulating "closed panel" dental insurance plans. Affirming the district court's dismissal of the action for lack of subject matter jurisdiction, the Court of Appeals held that the case did not arise under federal law since the declaratory relief was sought "only to stave off action by New Jersey against plan providers which might be taken under the state statute." Slip op. at p. 4.

I do not believe these cases are controlling here. Rather, Shaw v. Delta Airlines, Inc., 77 L.Ed.2d 490 (1983) governs the question of jurisdiction. The issue in that case was the extent to which ERISA preempted New York's Human Rights Law and Disability Benefits Law. In a footnote the Supreme Court stated:

> Here, ... companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim are pre-empted by ERISA, as well as declarations that those laws are pre-empted.

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See Ex Parte Young, 209 U.S. 123, 160-162, 52 L. Ed 714, 28 S. Ct. 441 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §1331 [28 U.S.C.S. §1331] to resolve.... (Emphasis added.)

Id. at 500, n. 14.

Plaintiffs here seek injunctive as well as declaratory relief, thus distinguishing the case from Exxon and State AFL-CIO. This may appear to be a distinction without a difference, but at least in this Circuit the Supreme Court's ruling in Shaw gives significance to the distinction.

Further, plaintiffs' trade secret claims allege a deprivation of property without due process of law, a different claim altogether from those advanced in Exxon and State AFL-CIO. Thus I conclude that the instant cases arise under federal law and that jurisdiction lies in this court.

B. Preemption: The principal contention of plaintiffs in both actions is that OSHA's Hazard Communication Standard preempts the Right to Know Act. It must be noted in this regard that when OSHA issued the Standard it limited the Standard's coverage to employers in the manufacturing sector, SIC codes 20 through 39. 29 C.F.R. § 1910.1200(b)(1). It reserved "the right to separately regulate other segments in the future." 48 Fed. Reg. 53,284-87, 53,334. The Right to Know Act covers both the manufacturing and other sectors. In this section of this opinion

I am proceeding on the assumption that preemption, if applicable, would apply only to state regulations affecting manufacturing businesses covered by the federal Standard, i.e., employers within SIC codes 20 through 39.

It is hornbook law that under the Supremacy Clause of the Constitution, Art. 6, Ch. 2, when a state statute conflicts with a federal statute which has preempted the subject matter of the legislation, the state statute must give way. Maryland v. Louisiana, 451 U.S. 725, 746-47 (1981). Preemption may be either express or implied and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

In the present case Congress addressed the preemption question in the statute itself, and therefore the question is one of statutory interpretation, not implied preemption. Section 18 of the OSH Act provides:

> (a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(a), (b).

The OSH Act sets forth criteria to be applied when a state plan is submitted to the Secretary of Labor for approval. Among the criteria is the requirement that when state standards are applicable to products distributed or used in interstate commerce they be "required by compelling local conditions and do not unduly burden interstate commerce." 29 U.S.C. § 667(c)(2). New Jersey has not sought federal approval of its Right to Know Act.

The language of § 18 of the OSH Act provides "both a broad grant of power to the states and a limitation on the exercise of that power." Florida Citrus Packers v. State of California, 549 F. Supp. 213, 216 (N.D. Cal. 1982). Section 18(a) has been consistently interpreted by OSHA and the courts to bar the exercise of state jurisdiction over issues addressed by an OSHA standard, even where the state law may arguably be more stringent or where OSHA has not explicitly addressed a provision. See, e.g., Five Migrant Farm Workers v. Hoffman, 136 N.J. Super. 242, 246 (Law Div. 1975); Stanislawski v. Industrial Comm., 99 Ill. 2d 36,, 457 N.E. 2d 399 (1983); Columbus Coated Fabrics v. The Industrial Comm. of Ohio, 1973-74 O.S.H. Rep. (BNA) ¶ 16,832 (S.D. Ohio 1973), appeal dismissed, 498 F.2d 408 (6th Cir. 1974).

The Hazard Communication Standard itself expressly provides that it "is intended to address comprehensively the issue of evaluating and communicating hazards to employees in the manufacturing sector, and to preempt any state law pertaining to

this subject." 29 C.F.R. § 1910.1200(a)(2). Comparing the Right to Know Act and the Standard, it is apparent that the Right to Know Act deals, to a very great extent, with hazard communication in the workplace, the identification of hazardous substances, labeling, and workplace training and educational programs, the precise issues covered by the Standard. Unless one of the reasons defendants advance for not applying preemption controls, it would appear that the Right to Know Act is subject to the express preemptive effect of the federal statute and administrative Standard. See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-54 (1982).

Defendants and intervenors first argue that preemption is unwarranted because federal jurisdiction under the OSH Act is limited to occupational safety and health, whereas the Right to Know Act is directed to the health and safety of the general public. As described above the New Jersey statute and regulations are designed to protect not only workers but also inhabitants of the state who live near industrial or other facilities and to enable fire and health officials to protect the community from health risks and other hazards. However, to accomplish these objectives the Right to Know Act deals with precisely the same subjects in the workplace as are regulated by the OSHA Standards. The Act clearly asserts jurisdiction over occupational safety and health issues as to which a federal standard is in effect. Consequently § 18(b) of the OSH Act

mandates submission of the Act and the regulations implementing it to the Secretary of Labor for approval. This approval has not been obtained or even sought.

The fact that the Right to Know Act has purposes in addition to occupational health and safety does not insulate it from the preemption provisions of the OSH Act. In Perez v. Campbell, 402 U.S. 637, 651-52 (1971), the Supreme Court rejected as "aberrational" the doctrine that:

> [S]tate law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislators to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy--other than frustration of the federal objective--that would be tangentially furthered by the proposed state law.

It may well be, as defendants and intervenors assert, that the Right to Know Act is not inconsistent with the federal Standard and in fact is the kind of legislation which furthers the OSH Act objectives and is therefore permitted under that Act. Congress, however, has required that a determination in this regard must be made in the first instance by the Secretary of Labor and that until such a determination is made an OSHA standard preempts the area of regulation.

Defendants and intervenors have relied heavily on Pacific Gas & Elec. v. State Energy Res. Conservation & Dev't Comm'n, 75 L.Ed.2d 752 (1983). In that case the Atomic Energy Act expressly permitted states to regulate for "purposes other

than protection against radiation hazards." Id. at 752, quoting 42 U.S.C. § 2021(k). No prior approval of a federal agency was required, as in the case of state regulation of an area covered by an OSHA Standard. Thus, inquiry into the purposes of the State enactment was made relevant by the express terms of the federal statute. The Supreme Court reasoned that:

> At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation. ... the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government."

Id. at 770. The New Jersey Right to Know Act seeks, among other things, to regulate employer activity in the workplace in regard to the dissemination of information on hazardous substances. This is an issue expressly preempted by the federal Standard.

Defendants argue that the preemption provisions of the OSH Act are inapplicable because the Hazards Communication Standard is not a "standard", rather it is a regulation. Both § 18(a) and § 18(b) use the term "standard". Subsection (a) permits a state to act on an issue "to which no standard is in effect." Subsection (b) requires a state to obtain federal

approval of any of its regulatory requirements relating to an occupational safety or health issue "with respect to which a Federal standard has been promulgated."

The OSH Act provides for the adoption of standards promulgated pursuant to 29 U.S.C. § 655(b) and it provides for the promulgation of regulations pursuant to 29 U.S.C. § 657(g)(2). Defendants urge that the Hazard Communication Standard does not fall within the statutory definition of "standard", namely, a rule "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life...." 29 U.S.C. § 655(b)(5). Relying on Louisiana Chemical Ass'n v. Bingham, 657 F.2d 777 (5th Cir. 1981), defendants contend that the Hazard Communication Standard, not being "hazard specific", is a regulation - any rule the Secretary of Labor "may deem necessary to carry out [his] responsibilities under [the Act] ...." 29 U.S.C. § 657(g)(2).

I do not believe that defendants' position is well-taken. In § 3(8) of the OSH Act, an occupational health and safety standard is defined as a standard "which requires conditions or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5) provides for the development of

occupational health and safety standards addressing toxic materials and harmful physical agents. Finally, § 6(b)(7) of the statute requires that a standard promulgated thereunder "prescribe the use of labels or other appropriate forms of warning ... as are necessary to ensure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure." Taken together, these statutory provisions support the status of the Hazard Communication Standard as a § 6(b) standard.

In addition, the legislative history of the OSH Act clearly supports the validity of the Hazard Communication Standard as a § 6(b) standard. At the time of the passage of the OSH Act, Congress, in discussing what would constitute a §6(b) standard, stated:

> Standards promulgated under this procedure would include requirements regarding the use of labels or other forms of warning to alert employees to the hazards covered by the standard and to provide them with necessary information regarding proper methods of use or exposure and appropriate emergency treatment, where appropriate, such standards would also prescribe protective equipment and other control measures, as well as, in the case of toxic substances or harmful physical agents, requirements for monitoring conditions or measuring employee exposure as may be necessary to protect employee's health.

1970 U.S. Code Cong. & Admin. News at 5183.

Furthermore, the position of the Agency is clearly set forth in its comments to the Standard, 48 F.R. 53320, and should be accorded the significant weight which courts give to interpretations of an implementing agency. Blum v. Bacon,

457 U.S. 132, 141 (1982); Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 81 L.Ed.2d 694 (1984). OSHA's comments distinguish the Standard from a § 8(g) regulation on the basis that (1) the Hazard Communication Standard requires evaluation of chemical hazards, development of material safety data sheets, and the establishment of educational programs, thereby requiring affirmative action on the part of manufacturers, importers, distributors and employers as to practices, means and methods; (2) the core of the requirements contained in the Standard pertain only to hazardous chemicals; and (3) the labeling and warning requirements of the Standard fit clearly within the language of § 6(b)(7). These characteristics provide a marked contrast to the record keeping provisions that were held to be a § 8(g) regulation, and not a standard, in Louisiana Chem. Ass'n v. Bingham, 657 F.2d 777 (5th Cir. 1981). In Bingham, the Court held that the record access rule which was (1) aimed primarily at the detection of health risk patterns, not at the correction of that risk, (2) which involved a voluntary record creation program, and (3) incorporated thousands of substances into the rule that probably did not present any risk of injury, was not a § 6 Standard. Id. at 781.

Thus I conclude that the Hazard Communication Standard is a "standard" and that, therefore, the preemption provisions of 29 U.S.C. § 667 are applicable.

Defendants further urge that the preemption provisions of the OSH Act are not applicable at the present time because certain of the provisions of the Standard do not become effective

until a later date in order to give employers an opportunity to put themselves in compliance. Section 18(a) of the OSH Act permits states to act concerning issues as to which no standard is "in effect". The language of the Act and common sense require the conclusion that a standard is "in effect" when it is issued (November 25, 1983, in this case) even though for practical reasons employers are given additional time to prepare to meet the requirements of the standard. Given this interpretation Section 18(a) complements Section 18(b) which requires federal approval of state action if the state seeks to regulate any issue as to which a federal standard "has been promulgated". The Hazard Communication Standard is in effect for preemption purposes.

C. The Extent of Preemption: The new Standard covers only employers in the manufacturing sector, SIC codes 20 through 39. The employer plaintiffs in both the Chamber of Commerce Action and the Fragrance Materials Association Action are in the manufacturing sector covered by those codes. The Chamber of Commerce and perhaps some of the other trade association plaintiffs include in their membership employers who are not covered by those codes. Plaintiffs in the Chamber of Commerce Action urge that the preemption doctrine precludes application of the Right to Know Act to these groups as well as to employers in the manufacturing sector.

Plaintiffs advance two arguments in support of their position. First, they urge that non-inclusion of other employers in the Standard represents a deliberate decision by OSHA that

these other employers should not be subject to hazard communication requirements, and that imposition of the Right to Know Act requirements would defeat this decision. Second, and somewhat inconsistently, plaintiffs argue that issuance of a federal standard regulating these other sectors is imminent, and that in such a situation state regulations should not intrude. Neither argument is at all persuasive.

Once again, the question is governed by the express preemption provision of the OSH Act. Section 18(a) affirmatively confers jurisdiction on the states to deal with any occupational safety or health issue as to which no OSHA standard is in effect. No OSHA hazard communication standard is in effect for non-manufacturing employers. Consequently New Jersey is free to act as to those employers.

The fact that OSHA may intend to adopt a standard covering non-manufacturing employers is of no moment. Federal approval of state occupational safety and health standards under Section 18(b) of the OSH Act is required only when a federal standard on the subject "has been promulgated". No federal standard has been promulgated covering employers in the non-manufacturing sectors. Consequently federal approval of state regulation of employers in those sectors is not required.

The defendants urge that preemption does not apply to those provisions of the Right to Know Act which are necessary to carry out the non-workplace purposes of the Act, namely, the provisions designed to assist emergency response services, to enforce compliance with environmental laws and regulations, to

provide the public with information concerning toxic substances used in their communities and emitted into the environment, and to assist health professionals and others in diagnosing, treating and preventing adverse health effects from exposure to toxic substances.

Defendants would exempt from preemption the statutory and regulatory requirements for hazardous substance lists, the surveys, the fact sheets and the labeling provisions.[3] There

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[3]The specific provisions of the right to Know Act which defendants urge not be considered preempted even with respect to employers in the manufacturing sector are:

1. The requirement that the Department of Health and the DEP develop and publicly distribute lists of hazardous substances used, manufactured, stored, or emitted from workplaces in the state. These lists are (a) the environmental hazardous substances list, N.J.S.A. 34:5A-4a; (b) the workplace hazardous substances list, N.J.S.A. 34:5A-5a; and (c) the special health hazard substances list, N.J.S.A. 34:5A-5b.

2. The provision that disclosure of information concerning emissions into the environment, in particular the chemical name and CAS number, may not be withheld from the public by means of a trade secret claim. N.J.S.A. 34:5A-15h.

3. The provision that information concerning special health hazard substances, in particular the chemical name and CAS number, may not be withheld from the public by means of a trade secret claim. N.J.S.A. 34:5A-3s; 34:5A-3t; 34:5A-5b; N.J.A.C. 8:59-10.

4. The requirement that employers complete the environmental survey, N.J.S.A. 34:5A-7b; 34:5A-3k; the emergency service information survey, N.J.A.C. 7:1G-5; and the workplace survey, N.J.S.A. 34:5A-7a; 34:5A-3y, thereby listing those hazardous substances on the Department of Health and DEP lists that are present in their facilities or known to be emitted into the environment.

5. The requirement that the Department of Health prepare, and publicly distribute, hazardous substance fact sheets describing the health effects of exposure to hazardous substances located in employers' facilities or known to be emitted into the environment. N.J.S.A. 34:5A-3n; 34:5A-10a.

Footnote continued on page 40.

seems little question but that New Jersey could enact legislation and regulate employers in order to achieve the non-workplace objectives to which defendants refer. Unfortunately, in the present case the non-workplace regulatory plan is superimposed upon a regulatory foundation which was designed to and does cover precisely the same occupational health and safety issues as are the subject of the OSHA Hazard Communication Standard. The workplace and non-workplace regulatory schemes are inextricably intertwined. The fact that this regulatory base also serves other ends does not save it from preemption. To hold otherwise would permit ready nullification of the Section 18 preemption provision.

It would be otherwise if a state were to adopt a statute and regulations directed as a bona fide effort solely to achieve the kind of non-workplace objectives to which defendants refer. In such a situation the OSH Act's preemption provisions would not be applicable. If in fact the non-workplace regulatory scheme impinged on an OSHA standard, the often difficult question of implied preemption would have to be addressed. But that is not the present case.

Thus the Hazard Communication Standard preempts the Right to Know Act only as the Act covers employers in SIC codes 20 through 39. However, as to those employers the Right to Know Act is preempted in its entirety.

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6. The provision requiring employers to label containers with the chemical name and CAS numbers of the contents of the containers. N.J.S.A. 34:5A-14a; 34:5A-14b.

D. Trade Secrets: Plaintiffs contend that the requirement of the Right to Know Act that employers disclose special health hazard substances without trade secret protection will deprive them of property without due process of law. This issue is academic for employers in the manufacturing sector because the trade secret provisions of the Right to Know Act along with its other provisions have been preempted by the federal standard. The issue is not academic, however, for other categories of employers who remain subject to the Right to Know Act.

It will be recalled that the Act contains a procedure by which employers may claim that the presence of designated substances constitutes a trade secret and that if the trade secret claim can be substantiated the substance will not be revealed in the labels and lists to which the public has access. It will also be recalled that, unlike the federal standard, the Right to Know Act provides for a category of particularly dangerous chemicals designated special health hazard substances, as to which employers are not allowed to obtain trade secret protection. Disclosure of these substances, plaintiffs assert, will result in the loss of trade secrets which may have been the product of substantial and costly research endeavors. The forced disclosure of these trade secrets, it is said, will impair or destroy the employer's investment and endanger his ability to compete.

1. Ruckelshaus v. Monsanto Co.: Many of the questions involved in this aspect of the case were considered in the Supreme Court's decision in Ruckelshaus v. Monsanto Co., 81 L.Ed.2d 815 (1984). That case dealt with the disclosure of trade secrets of pesticide manufacturers who were required to register with federal agencies under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136, et seq. Three periods of time were pertinent to the Court's decision: (i) Prior to amendments enacted in 1972, FIFRA was silent with respect to the Environmental Protection Agency's ("EPA") use and disclosure of data submitted to it in connection with an application for registration. (ii) By virtue of the 1972 amendments to FIFRA, during the period from October 22, 1972 through September 30, 1978 a pesticide manufacturer submitting data was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. Under FIFRA EPA was free to use non-trade secret data when considering the application of another registrant, provided EPA required the subsequent applicant to pay reasonable compensation to the original submitter. The statute, however, prohibited EPA from disclosing publicly, or considering in connection with the application of another, any data submitted by an applicant if both the applicant and EPA determined the data to constitute trade secrets. (iii) FIFRA was further amended effective October 1, 1978. Under that amendment pesticide registrants were granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered

after September 30, 1978. § 3(c)(1)(D)(i). All other data submitted after December 31, 1969 could be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter. § 3(c)(1)(D)(ii). Absent agreement of the parties on compensation, compensation is set by binding arbitration, which is not reviewable absent fraud or misrepresentation. Data not qualifying for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. § 3(c)(1)(D)(iii). Finally the 1978 amendment provides for disclosure of all health, safety and environmental data to qualified requesters notwithstanding the prohibition against disclosure of trade secrets. Disclosure of information that would reveal "manufacturing or quality control processes" or certain details about deliberately added inert ingredients is not authorized unless "the Administrator has first determined that the disclosure is necessary to protect against an unreasonable risk of injury to health or the environment." §§ 10(d)(1)(A) to (C).

Monsanto Company was one of a small group of companies that invent and develop new active ingredients for pesticides and conduct most of the research and testing with respect to those ingredients. The development process may take 14 to 22 years, and it is usually that long before a company can expect any return on its investment. Monsanto instituted suit in the United State District Court against EPA's Administrator seeking injunctive and declaratory relief against the data-consideration

and data-disclosure provisions of FIFRA, alleging, among other things, an unconstitutional taking of property without just compensation.

The District Court declared, among other things, that the statutory provisions for a 10-year period of exclusive use, the 15-year period of compensation and the use for health, safety and environmental purposes were unconstitutional. In reaching this result the District Court made the following determinations:

1. Monsanto possessed property right in the data it submitted.

2. The data consideration provisions contained in § 3(c)(1)(D) appropriated for the benefit of Monsanto's competitors Monsanto's property rights.

3. Monsanto's property was being appropriated for a private purpose and this interference was much more significant than the public good that the appropriation might serve.

4. The operation of the FIFRA disclosure provisions constituted a taking of Monsanto's property, and the cost to Monsanto significantly outweighed any benefit to the general public from having the ability to scrutinize the data. The District Court appeared to believe that the public could derive the assurances it needed about the safety and effectiveness of a pesticide from EPA's decision to register the product and to approve the label.

5. The compulsory binding arbitration scheme contained in § 3(c)(1)(D)(ii) did not adequately provide compensation for the property taken. (A44)

6. A remedy was not available under the Tucker Act for the deprivations of property effected by §§ 3 and 10 of FIFRA.

On direct appeal the Supreme Court reversed and remanded for further proceedings. Both the holdings and the Court's step by step analysis bear critically on the present case.

The Court first addressed the question whether data of the kind which Monsanto submitted to EPA was a property interest protected by the Fifth Amendment's Taking Clause. It noted that property interests are not created by the Constitution but must stem from an independent source such as state law. After reviewing Missouri law (Monsanto being headquartered in that state), the Restatement of Torts, federal cases and other legal sources, the Court concluded:

> ... that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment.

81 L.Ed.2d at 833.

The Court then addressed the question whether a taking occurs when EPA discloses the data or considers it when evaluating another application for registration. Noting that the Court has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action are to be deemed a compensable taking, and further noting that inquiry into whether a taking has occurred is an ad hoc factual inquiry, the Court stated:

> The Court, however, has identified several factors that should be taken into account when

> determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." [Citations omitted.]

81 L.Ed.2d at 834.

The Court found that the force of the third factor - interference with reasonable investment-backed expectations - "is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding that data. The Court examined the expectation factor as it related to each of the three periods described above and reached a separate conclusion for each period.

With respect to the post September 30, 1978 period, the Court ruled that by reason of the provisions of the statute itself Monsanto had no reasonable expectation of non-disclosure:

> We find that with respect to any health, safety, and environmental data that Monsanto submitted to EPA after the effective date of the 1978 FIFRA amendments - that is, on or after October 1, 1978 - Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration.

81 L.Ed.2d at 834.

> If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

81 L.Ed.2d at 835.

Answering Monsanto's contention that the requirement that a registrant give up its property interest in the data constitutes an unconstitutional condition on the right to a valuable governmental benefit, the Court noted that the federal government clearly has the power to regulate the marketing and use of pesticides and

> Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

81 L.Ed.2d at 835.

Prior to the 1972 amendment, FIFRA was silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration. There was in existence another statute, the Trade Secrets Act, 18 U.S.C. § 1905, which imposed a criminal penalty for any federal employee who disclosed, in a manner not authorized by law, any trade secret information revealed to him during the course of his official duties. Notwithstanding the existence of the Trade Secrets Act, the Court held that:

> Thus, with respect to any data that Monsanto submitted to EPA prior to the effective date of the 1972 amendments to FIFRA, we hold that Monsanto could not have had a "reasonable investment-backed expectation" that EPA would maintain that data in strictest confidence and would use it exclusively for the purpose of considering the Monsanto application in connection with which the data were submitted.

81 L.Ed.2d at 837.

The Court came to a different conclusion with respect to data submitted during the period from October 22, 1972 through September 30, 1978. It will be recalled that during that period the statute gave a registrant the opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. By the very terms of the statute EPA was prohibited from disclosing publicly, or considering in connection with the application of another, any data which EPA and the applicant determined to constitute trade secrets. The Court held that "[t]his explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA, consistent with the authority granted to it by the 1978 FIFRA amendments, were now to disclose trade-secret data or consider that data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, EPA's actions would frustrate Monsanto's reasonable investment-backed expection with respect to its control over the use and dissemination of the data it had submitted." 81 L.Ed.2d at 838.

Thus compensation was mandated for disclosure of any trade secrets submitted during the 1972-78 period when the statutory guarantee of secrecy was in effect. The Court observed that if negotiation or arbitration pursuant to § 3(c)(1)(D)(ii) were to yield just compensation, then Monsanto would have no

claim against the government for a taking. Since no arbitration had yet been undertaken, "any finding that there has been an actual taking would be premature." 81 L.Ed.2d at 839.

The Court summarized its "taking" rulings as follows:

> In summary, we hold that EPA's consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972, or after September 30, 1978, does not effect a taking. We further hold that EPA consideration or disclosure of health, safety, and environmental data will constitute a taking if Monsanto submitted the data to EPA between October 22, 1972, and September 30, 1978; the data constituted trade secrets under Missouri law; Monsanto had designated the data as trade secrets at the time of its submission; the use or disclosure conflicts with the explicit assurance of confidentiality or exclusive use contained in the statute during that period; and the operation of the arbitrarion provision does not adequately compensate for the loss in market value of the data that Monsanto suffers because of EPA's use or disclosure of the trade secrets.

81 L.Ed.2d at 839.

The Court concluded that any taking of private property that occurred by operation of FIFRA's data-disclosure and data-consideration provisions between October 22, 1972 and September 30, 1978, was a taking for public, not private, use, even though subsequent applicants may benefit from the disclosures of prior applicants.

Next, the Court cited the rule that equitable relief is not available to enjoin an alleged taking of private property for a public use when a suit for compensation can be brought against the sovereign subsequent to the taking. It rejected the District Court's determination that the Tucker Act remedy is unavailable for whatever taking may occur due to EPA activity pursuant to

FIFRA. It held that where the operation of the data-consideration and data-disclosure provisions of FIFRA effect a taking of property belonging to Monsanto, an adequate remedy for the taking exists under the Tucker Act, and therefore the District Court erred in enjoining the taking. It further held that until Monsanto negotiates with a beneficiary of its data filings and until the controversy goes through arbitration Monsanto's claims with respect to the constitutionality of the arbitration scheme would not be ripe for adjudication.

In conclusion the Court stated:

> We find no constitutional infirmity in the challenged provisions of FIFRA. Operation of the provisions may effect a taking with respect to certain health, safety, and environmental data constituting trade secrets under state law and designated by Monsanto as trade secrets upon submission to EPA between October 22, 1972, and September 20, 1978. But whatever taking may occur is one for a public use, and a Tucker Act remedy is available to provide Monsanto with just compensation. Once a taking has occurred, the proper forum for Monsanto's claim is the Claims Court. Monsanto's challenges to the constitutionality of the arbitration procedure are not yet ripe for review.

81 L.Ed.2d at 843-44.

2. Trade Secrets as Property: In Monsanto the Court weighed FIFRA's data submission provisions against the requirements of the Fifth Amendment. In the present case, since state action is involved, Fourteenth Amendment due process requirements are implicated. However, the same criteria will control the outcome. Following the Supreme Court's rule in Monsanto, it must first be determined whether trade secrets which

non-manufacturing employers submit pursuant to the Right to Know Act are property rights which are protected from governmental taking without just compensation.

It is well established in New Jersey law, as in the law of most jurisdictions, that trade secrets are property rights. E.g., Sun Dial Corp. v. Rideout, 16 N.J. 252 (1954), citing, Restatement of Torts, § 757, comment 6; cf. N.J.S.A. 34:5A-3(g) (defining "trade secrets"). Although no case has been brought to my attention determining whether an uncompensated taking of a trade secret would violate the State Constitution, I see no reason why the New Jersey Supreme Court would not take the same approach as the United States Supreme Court in this regard.

The intervenors argue that since state law defines the property interest in question, when the Right to Know Act was enacted requiring disclosure of certain trade secrets, it simultaneously redefined the property interest in those trade secrets to exclude the right of secrecy. By so redefining the property right, compelled disclosure could not result in a taking of property.

This circular reasoning is unpersuasive. In Monsanto the Supreme Court refuted EPA's similarly strained argument that FIFRA had preempted state laws by declaring that trade secrets were not property rights:

> This argument proves too much. If Congress can "pre-empt" state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. This Court has stated that a sovereign, "by ipse dixit, may not transform private property into public property without compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was

meant to prevent." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US, at 164, 66 L Ed 2d 358, 101 S Ct 446.

81 L.Ed.2d at 838-839.

Trade secrets are property rights under New Jersey law. The Right to Know Act does not change these rights. These are rights which are protected from a taking without just compensation.

3. Right to Know Act Disclosure as a Taking: Still following the Supreme Court's lead in Monsanto, it must be determined whether the mandated disclosures of trade secrets under the Right to Know Act are "takings" which will trigger a right to compensation. I conclude that they are not.

The factors to be considered in determining whether particular governmental regulation effects a taking include the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations. Here the state is acting in an area of great public concern - worker health, environmental effects of hazardous substances in the workplace, community health and safety as it is effected by workplace chemical substances.

No evidence whatsoever has been submitted to show what effect, if any, the Right to Know Act trade secret provisions will have on employers in non-manufacturing sectors. The affidavits in this regard were submitted by employers in the manufacturing sector, and they were couched in vague and

conclusory terms. Similarly the affidavits submitted by defendants and intervenors on the trade secret issue were highly generalized, utterly lacking in specificity.

As in Monsanto, reasonable investment-backed expectations of employers would seem to be determinative. On this question plaintiffs focus on and would have this court rely on the Supreme Court's ruling in Monsanto with respect to data submitted during the period from October 22, 1972 through September 30, 1978. However, as described above, the situation during that period was totally dissimilar from the situation in the present case. There during the 1972-1978 period the statute itself gave a registrant the opportunity to protect its trade secrets from disclosure. Registrants submitted trade secret data relying on that statutory guarantee. The 1978 amendment of FIFRA stripped away the protection of the guarantee. That is what the Supreme Court characterized as a taking.

Nothing like that has happened in New Jersey. There has been no antecedent period of disclosure during which the state committed itself to protecting trade secrets. The state has simply adopted a statute and regulations in economic and social areas in which it unquestionably has the power to act. As part of the regulatory scheme disclosure is required which may result in a loss of trade secrets.

This is just the situation which prevailed in the pre-1972 period which was addressed in Monsanto. Prior to the 1972 amendment FIFRA was silent with respect to EPA's authorized use and disclosure of registrants' data submitted to it. As in

the case of New Jersey's Right to Know Act, there was no pre-existing legislation protecting trade secrets submitted by registrants. In such a situation the entity submitting data cannot have a "reasonable investment-backed expectation" that the agency receiving the data will maintain it in confidence. Consequently disclosure of the data is not a taking for which the state must pay compensation under the Fifth Amendment or the Fourteenth Amendment.

Employers may face the unpleasant choice of disclosing trade secrets or limiting or shutting down operations in New Jersey. This may be a more onerous dilemma than Monsanto faced, but the reasoning in the Monsanto case is nevertheless applicable here: as long as the employer is aware of the conditions under which the data are submitted and as long as the conditions are rationally related to a legitimate government interest, a submission under the Right to Know Act does not constitute a taking. 81 L.Ed.2d at 835.

4. Other Trade Secret Contentions: Having concluded that the absence of trade secret protection for certain substances does not constitute a taking requiring compensation, it is unnecessary to pursue other inquiries which the Court made in the Monsanto case. In particular, it is unnecessary to determine whether, as defendants assert here, New Jersey provides a means of compensating persons whose trade secrets are taken in the course of implementing state regulatory programs, thus rendering injunctive relief inappropriate.

E. Disposition of Motions: The pending motions must be disposed of upon the basis of the foregoing conclusions.

Although the plaintiffs in the Chamber of Commerce Action originally moved for an order for a preliminary injunction against enforcement of the Right to Know Act, they later joined the motion for summary judgment filed by plaintiffs in the Fragrance Materials Association Action. Those plaintiffs moved for summary judgment (or, in the alternative, for a preliminary injunction) on Count I of their complaint (preemption) and on Count II of their complaint (trade secrets).

Fed.R.Civ.P. 56 provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I find that there are no genuine issues of fact insofar as the preemption and trade secret claims are concerned. The facts relating to preemption are established by the federal and state statutes and regulations and by the undisputed legislative history of those statutes. The facts relating to trade secrets are established by the same material and by the affidavits sumitted by the parties.

Consequently summary judgment will be entered in both actions (i) declaring that the Right to Know Act is preempted by the OSH Act and the federal Hazard Communication Standard to the extent that the Right to Know Act affects employers in the manufacturing sector (SIC Codes 20-39) and (ii) permanently

enjoining defendants from enforcing the Right to Know Act against such employers until the Act and regulations adopted pursuant to it have been approved by the Secretary of Labor pursuant to the provisions of the OSH Act.

As a practical matter this grant of summary judgment gives the plaintiffs in the Fragrance Materials Association Action full relief and should constitute a final judgment in that action. In the Chamber of Commerce Action there remain persons who are members of the association plaintiffs who are not employers in the manufacturing sector and consequently are not within the terms of the order for summary judgment which will be entered pursuant to the preceding paragraph.

In the Chamber of Commerce Action an order will be entered (i) denying plaintiffs' motion for summary judgment on the preemption issue insofar as the Right to Know Act affects employers who are not in the manufacturing sector and (ii) denying plaintiffs' motion for summary judgment on the trade secret issue. The motion of these plaintiffs for a preliminary injunction will be denied, since, for the reasons previously discussed, they have not shown any likelihood of prevailing on the merits.

The intervenors' cross-moved for summary judgment in the Fragrance Materials Association Action on the preemption and trade secrets claims. Their motion will be denied on the merits on the preemption claim and will not be disposed of on the trade

secrets claim since summary judgment in favor of plaintiffs in that action makes it unnecessary to reach the trade secrets issue.

However, the intervenors are deemed also to have moved for summary judgment on these issues in the Chamber of Commerce Action. In that action (i) their motion for summary judgment on the preemption issue insofar as it relates to employers in the manufacturing sector will be denied; (ii) their motion for summary judgment on the preemption issue insofar as it relates to employers in the non-manufacturing sector will be granted; (iii) their motion for summary judgment on the trade secret claims will be granted.

The attorneys for plaintiffs are requested to submit appropriate forms of orders implementing this opinion.

DATED: January 3, 1985

DICKINSON R. DEBEVOISE
U.S.D.J.

1/10/85

10:25 A.M.

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
P. O. Box 145
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY STATE CHAMBER OF COMMERCE, et als.,	:	Civil Action No. 84-3255
Plaintiffs,	:	ORDER
vs.	:	
ROBERT E. HUGHEY, Commissioner of Environmental Protection, et als.,	:	
Defendants,	:	
-and-	:	
JOSEPH H. RODRIGUEZ, Public Advocate of the State of New Jersey, et als.,	:	
Defendant-Intervenors,	:	
FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES, et als.,	:	Civil Action No. 84-3892
Plaintiffs,	:	
vs.	:	
WILLIAM VAN NOTE, Acting Commissioner of Labor for State of New Jersey, et als.,	:	
Defendants,	:	
-and-	:	
JOSEPH H. RODRIGUEZ, Public Advocate of the State of New Jersey, et als.,	:	
Defendant-Intervenors.	:	

ENTERED
on
THE DOCKET
on 1-11 1985
ALLYN Z. LITE CLERK
By Charles Sanders
(Deputy Clerk)

THIS MATTER having been brought before the Court on motions of the plaintiffs in these consolidated actions for summary judgment or, in the alternative, for preliminary injunctive relief and cross-motion of the defendant-intervenors for summary judgment; and the Court having considered the moving papers, affidavits and briefs submitted by the parties and having heard the argument of counsel;

IT IS on this 10th day of January, 1985,

ORDERED as to the Chamber of Commerce Action, Civil Action No. 84-3255:

1. That summary judgment is entered in favor of plaintiffs in the Chamber of Commerce Action declaring that the New Jersey Worker and Community Right to Know Act ("Right to Know Act") is preempted by the OSH Act and the federal Hazardous Communication Standard ("Standard") to the extent that the Right to Know Act affects employers in the manufacturing sector, SIC Codes 20-39;

2. That defendants are permanently enjoined from enforcing the Right to Know Act in its entirety against employers in the manufacturing sector until the Right to Know Act and regulations adopted pursuant thereto have been approved by the Secretary of Labor pursuant to the provisions of the OSH Act;

3. That the motion for summary judgment of plaintiffs in the Chamber of Commerce Action on the preemption issue insofar

as it affects employers in the non-manufacturing sector is denied;

4. That the motion for summary judgment of the plaintiffs in the Chamber of Commerce Action on the issue of trade secrets is denied;

5. That the motion for preliminary injunction of plaintiffs in the Chamber of Commerce Action insofar as it relates to employers not in manufacturing sector is denied;

6. That the motion for summary judgment of defendant-intervenors on the preemption issue insofar as it relates to employers within the manufacturing sector is in all respects denied;

7. That the motion for summary judgment of defendant-intervenors in the Chamber of Commerce Action on the preemption issue insofar as it relates to employers not in the manufacturing sector is granted;

8. That the motion for summary judgment of defendant-intervenors in the Chamber of Commerce Action on the issue of trade secrets insofar as it relates to employers in the manufacturing sector is granted.

Dickinson R. Debevoise, U.S.D.C.J.

FOR THE DISTRICT OF NEW JERSEY

FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES; FLAVOR AND EXTRACT MANUFACTURERS' ASSOCIATION; BUSH BOAKE ALLEN, INC.; DRAGOCO, INC.; FIRMENICH, INC.; INTERNATIONAL FLAVORS AND FRAGRANCES, INC.; ISOGENICS, INC.; H.J. KOHNSTAMM & CO., INC.; V. MANE FILS, INC.; NOVILLE ESSENTIAL OIL COMPANY, INC.; POLAROME MANUFACTURING CORP.; ROURE BERTRAND DUPONT, INC.; TAKASAGO USA, INC.; UNGERER & CO.; and UNIVERSAL FRAGRANCE COPRORATION,

Plaintiffs,

v.

WILLIAM VAN NOTE, Acting Commissioner of Labor for State of New Jersey; J. RICHARD GOLDSTEIN, Commissioner of Health for State of New Jersey; ROBERT E. HUGHEY, Commissioner of Environmental Protection for State of New Jersey,

Defendants,

and

JOSEPH H. RODRIGUEZ, Public Advocate of the State of New Jersey; NEW JERSEY STATE INDUSTRIAL UNION COUNCIL, AFL-CIO (IUC); CITIZEN ACTION OF NEW JERSEY; PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY & HEALTH (PHILAPOSH); NEW JERSEY ENVIRONMENTAL LOBBY; NEW JERSEY STATE FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION (FMBA); INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, NEW JERSEY AFL-CIO (IAFF); COMMUNICATION WORKERS OF AMERICA, AFL-CIO (CWA); DISTRICT THREE, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO(IUE); INTERNATIONAL LADIES GARMENT WORKERS' UNION, AFL-CIO (ILGWU); AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CENTRAL AND SOUTH JERSEY JOINT BOARD (ACTWU); UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO (UPIU); OIL, CHEMICAL AND ATOMIC WORKERS UNION, AFL-CIO, LOCALS 8-149, 8-760, AND 8-5570 (OCAW); UNITED AUTO WORKERS UNION, AFL-CIO, LOCAL 502 (UAW); CHEMICAL WORKERS ASSOCIATION,

Civil Action
No. 84-3892D

84-3255

ENTERED
on
THE DOCKET
on Jan 14 1985
ALLYN Z. LITE, CLERK
Mary L. Mears
(Deputy Clerk)

FILED

JAN 10 1985

At 8:30 10 25 AM
ALLYN Z. LITE

EDUCATION ASSOCIATION; ALUMINUM, BRICK & GLASS WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 514-G; PENNSYLVANIA FEDERATION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, AFL-CIO; COALITION AGAINST TOXICS; LEAGUE OF CONSERVATION VOTERS (NEW JERSEY); CLEAN WATER ACTION (WASHINGTON, D.C. AND NEW JERSEY; STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY (N.J. PIRG); ENVIRONMENTAL ACTION (WASHINGTON, D.C.); LEAGUE OF WOMEN VOTERS OF NEW JERSEY; SIERRA CLUB (NEW JERSEY); AMERICAN LUNG ASSOCIATION OF NEW JERSEY; NEW JERSEY TENANTS ORGANIZATION (NJTO); NEW JERSEY ASSOCIATION OF COUNTY HEALTH OFFICERS, and NEW JERSEY HEALTH OFFICERS ASSOCIATION,

Defendant-Intervenors.

FINAL JUDGMENT

This action came on for hearing before the Court on plaintiffs' motion for summary judgment, the Honorable Dickinson R. Debevoise, United States District Judge, presiding, and the issues having been duly heard and a decision having been rendered:

It is ORDERED and ADJUDGED that the New Jersey "Worker and Community Right-to-Know Act," N.J.S.A. 34:5A-1, et seq., insofar as said Act is applicable to employers in the manufacturing sector (SIC Codes 20-39 inclusive), is preempted by the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651 et seq., and the Final Rule entitled "Hazard Communication" promulgated by the Occupational Safety and Health Administration on 25 November 1983, 48 Fed. Reg. 53280 et seq., 29 C.F.R. § 1910.1200, and defendant state officials, their successors, agents, employees, attorneys, and all those acting in concert with said defendants, are hereby permanently enjoined from

enforcing, directly or indirectly, any of the provisions of said New Jersey Act or regulations issued pursuant thereto against the individual plaintiffs or any of the members of the plaintiff associations; provided, however, that nothing herein shall preclude the defendant state officials from submitting such provisions to the Secretary of Labor as part of a State plan pursuant to the provisions of § 18 of the OSH Act, 29 U.S.C. § 667. It is further ORDERED that the claims in Counts II and III of plaintiffs' Complaint, having been rendered moot by this Final Judgment in plaintiffs' favor on the claims asserted in Count I, are therefore dismissed without prejudice.

~~Approved as to form this day of January, 1985~~

January 10, 1985

Dickinson R. Debevoise
United States District Judge

Dated at Newark, New Jersey this ___ day of January, 1985.

Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Nos. 84-3255, 84-3892

NEW JERSEY CHAMBER OF COMMERCE, et al.,

Plaintiffs,

v.

ROBERT E. HUGHEY, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey

February 25, 1985

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

Appearances:

FARRELL, CURTIS, CARLIN & DAVIDSON, ESQS.,
BY: JOHN J. CARLIN, ESQ.,
For Plaintiffs in Civil No. 84-3255

MC KENNA & SHEA, ESQS.,
BY: JOHN P. MC KENNA, ESQ.,
For Flavor & Fragrance Plaintiffs

FRANK C. AZZINARO, ESQ.,
For Plaintiffs in Civil No. 84-3892

MICHAEL S. BOKAR, DEPUTY ATTORNEY GENERAL
For State Defendants

SHARAN A. TREAT, DEPUTY PUBLIC ADVOCATE
BENNETT ZUROFSKY, ESQ.,
For Defendant-Intervenors

DANIEL R. THOMPSON, ESQ.,
For Fragrance Manufacturers

PURSUANT TO SECTION 753 TITLE 28 UNITED STATES CODE, THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE RECORD AS TAKEN STENOGRAPHICALLY IN THE ABOVE ENTITLED PROCEEDINGS.

HOWARD A. RAPPAPORT, OFFICIAL COURT REPORTER

P. O. BOX 397
NEWARK, N. J. 07101

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THE COURT: Number 28, New Jersey Chamber of Commerce against Hughey.

Mr. Bokar, you want to stay.

MR. BOKAR: Yes, your Honor.

I would like to very briefly tell the Court why we think that the reasonable probability of success on the merits with respect to the Court's holding that the New Jersey Act is preempted in its entirety without differentiation of its various provisions within the manufacturing sector.

THE COURT: I read your briefs. Let's concentrate on the only part which I would even conceivably give a stay.

Frankly, I think it's inconceivable that I'm wrong on the labeling in the workplace. That may be an abundance of confidence, but that's so clearly preempted, I think, that I can't see a different result.

It could be that the Third Circuit could disentangle the reporting survey provisions from the labeling provisions. That could be you and your cohorts here, I guess it's Mr. Goldberg at the time, sought to sever parts of the statutes from other parts, and it was so utterly ambitious that it defeated, I might as well rule the other way, to sever in that manner.

But it could be the survey might be separated and maybe what I ought to do is have the other side say why that couldn't be separated.

You're talking about the industrial survey or whatever.

MR. BOKAR: Very specifically, those provisions that on their face have nothing at all to do with employee protection --

THE COURT: The environment survey and the emergency services survey.

MR. BOKAR: The latter survey being something not directly referred to in the Act, but in the implementing regulations as authorized by the Act, and the associated hazardous substance fact sheets that accompany those surveys.

THE COURT: Aren't those prepared by the state?

MR. BOKAR: Those are prepared by the state. That's correct. That would impose no burden at all on the employer.

The counterpart sheets under the federal rule are indeed prepared by the employer as the material data safety sheets.

THE COURT: Let me ask Mr. Carlin, are you going to do the talking?

MR. CARLIN: I'll start it.

THE COURT: What harm would it do to except from the injunctive provisions the emergency services information survey and the hazardous waste fact sheet prepared by the state?

MR. CARLIN: Taking first the hazardous waste fact sheet, I think one of the main points we pointed out was how you would have the inconsistent system in New Jersey as opposed to nationwide.

Here what we would have is these fact sheets

disseminated throughout New Jersey.

I think what we have pointed out to the Court was the very reason for the preemption provision --

THE COURT: Suppose the fact sheets were simply distributed to boards of health, fire departments, not to employees, though I suppose there is no reason why an employee can't ask for one if he wants one, but distributed to public authorities who have to deal with health hazards and fire hazards?

MR. CARLIN: The fact sheets are entirely different. These go to each particular product.

Once you have them out, I don't see how you can keep them out of the workplace.

In other words, once they are prepared, once they are given to somebody, what do you do with them?

There is no provision in the statute that it be limited to health or fire or anything of this sort.

THE COURT: I'm reshaping the statute to hold it in a state of hold pending appeal.

What harm if the workers receive the fact sheets?

MR. CARLIN: Now you have something out that is going to be different than what will be disseminated at the time that the OSHA standard has these put into the workplace.

THE COURT: Well, suppose you --

MR. CARLIN: You have inconsistent systems established,

and inconsistent systems that are being taught to the workers, or that will be given to the workers.

THE COURT: Well, let's simply say these are available to workers who want them. Couldn't be any problem with that.

MR. CARLIN: Once you have put them out, there is a problem with it.

One, they are prepared. Two, that they are put into the workplace and, three, that they will be used.

THE COURT: What's wrong with that? They are not false statements. They are not misdiagnosing diseases.

MR. CARLIN: But they have different nomenclature than the federal standards will put out. They are not compatible with the federal system that will be put into place as of, I believe, it's November of 1985.

THE COURT: Let's say they are limited to their being supplied to public health authorities, municipal authorities, fire departments, for their use. And if they have to treat somebody who has been exposed to a particular chemical, they can refer to it and give the treatment.

What harm will that be?

MR. CARLIN: What harm would it do? I'm not quite sure whether --

THE COURT: How would it interfere with the implementation of the OSHA regulations?

MR. CARLIN: I'm talking just about fact sheets right

now. That you have something established as being a terminology that is intertwined with the federal standard.

THE COURT: But it's not going to the workers. If the state were permitted to prepare the fact sheet, not the workplace, but to the health authorities, fire authorities, that doesn't impinge on the federal act.

MR. CARLIN: In order to prepare the work sheets, the -- it is then placed upon the particular employer the burden of complying with the requirements of the state to give them the information to prepare the work sheets.

THE COURT: Why not? Why not?

As I recall, during the course of these proceedings the plaintiffs had no objection to the earlier statutes which required reporting and enabling DEP and Department of Health to give basic information.

You can't say that has been preempted by OSHA.

MR. CARLIN: No, sir. And we still have no objection to that. This type of information can be gained by that environmental survey.

THE COURT: And also by the emergency services information survey.

MR. CARLIN: No. I think that is different than what is contemplated by the earlier statute, that the emergency service now goes to entirely different type of situation than was contemplated by the environmental survey under the earlier

statute.

THE COURT: It was to have been used. It was the basis for doing things which were different. But simply filling out that form and reporting the information to the state, how does that in any way impinge on the enforcement of the OSHA regulations?

MR. CARLIN: I think it does to the extent that there is no protection of trade secrets. That if we go back to the earlier statutes --

THE COURT: I found there are no trade secrets in this context. I ruled against you on the trade secret aspect.

MR. CARLIN: Insofar as the entire package was concerned. I'm not sure that there was any ruling in regard to any specific element in regard to -- in the workplace in regard to the manufacturing sector.

THE COURT: I think so. My recollection is you lost on that issue. You can use it in the discussion of the case, but perhaps not among --

MR. CARLIN: I think what the ruling was, was that in regard to -- that was what I was going to bring up today on a procedural thing on the order, in regard to the nonmanufacturing sector, that we did not show any trade secrets or that any possibility that trade secrets were involved, so the Court granted summary judgment as to those individuals.

THE COURT: The nonmanufacturing or in the

manufacturing section?

MR. CARLIN: I believe as to the nonmanufacturing, Judge, because you granted the motion on preemption as to the manufacturing.

THE COURT: Manufacturing.

MR. CARLIN: Yes.

THE COURT: So I'm leaving the nonmanufacturing as it was under the state regulation.

MR. CARLIN: That's correct.

THE COURT: Yes.

MR. CARLIN: You ruled against those individuals in regard to any claim on trade secrets or preemption.

THE COURT: Yes -- no, I ruled generally on the trade secrets. That may take away the comfort you were looking for, but generally I did not find the state statute was objectionable because it failed to protect trade secrets under Monsanto.

I can see that might be a matter of great concern.

Well, I still have trouble seeing in what way requiring the employers to complete the emergency services information survey would in any way impinge on federal regulations.

MR. CARLIN: I think, Judge, what has to be done is the emergency service survey has to be looked at as to what exactly you're asking for here.

If it is just a matter of stating what hazards we have and telling the fire department and the health department, our

position has always been we don't object to doing that.

THE COURT: Let's ask Mr. Bokar what does the survey specifically give?

MR. MC KENNA: Could I add a few comments on the behalf of the flavor and fragrance plaintiffs?

To begin with, your Honor, the environmental survey form calls for quite extensive compilation of information. If you look at Section 3K, I believe, where it defines it, it is an extensive undertaking.

A lot of the flavor and fragrance people are quite small companies, as we have pointed out. A lot of them family owned. It is a considerable burden for them.

THE COURT: But the state could do that as long as it is not conflicting with federal law.

MR. MC KENNA: The point is that right now we have a determination, and I think quite a quite proper determination, that under this statute, whatever the state might do in another situation, which is not before the Court, the Court has determined that under this statute it may not act.

Now we are talking about -- you asked the question -- the question the Court posed is what burden.

THE COURT: Yes.

MR. MC KENNA: One is simply the burden of compliance. I would point out to your Honor that the compliance date under the state statute is March 1, for most purposes. There be the

considerable burden of filling out the form.

We would also have to assert all trade secret claims we might want to make and substantiate them, another considerable burden.

This is not an inconsiderable thing for the small companies that we are talking about.

Your Honor also mentioned the question of trade secrets. Your Honor, the fragrance and flavor plaintiffs have received a judgment completely in their favor. We don't have -- we are not obligated in any way under the New Jersey statute.

If we have to proceed under a stay in filling out these forms, your Honor, our trade secrets are going to be jeopardized.

That may or may not constitute an unconstitutional taking, but it certainly constitutes an injury that we would not be subjected to in the absence of a stay.

Your Honor, also with respect to these hazardous substances, the sheets that you're talking about, the statute and the regulations give the companies the option of filling out the sheets themselves, particularly if it's important to preserve some trade secrets.

That is another burden that would be imposed, and those forms might, in very many instances, conflict somewhat with the state forms.

THE COURT: No. I don't understand how they would

conflict. How can you have a form that conflicts?

You might be called for to give different information.

MR. MC KENNA: But we would have to put those forms together, your Honor.

THE COURT: There is nothing inherently in violation of the federal OSHA standards in having to fill out these forms, unless it is so interrelated, as I found it to be initially, with the whole federal regulatory scheme.

If they had a separate statute, were getting into safety of the workplace, educational programs for workers and the like, there is very little doubt that they could require that information and do exactly what this statute does in that area.

MR. MC KENNA: Your Honor, that is a question that I know we have differed on. Under the terms of this statute it was not necessary for the Court to reach it, because this statute, as the Court found, and that's the only statute we are talking about here, maybe the state could some day do something different. But the question right now is whether they should be able to enforce a statute that the Court has found the enforcement to be unconstitutional and invalid. That's the only statute they can act under right now.

THE COURT: But what they are claiming is that there is some chance that the Court of Appeals might excise those parts of the statute and say that even though the vast bulk of it is

unenforceable, they can enforce the parts that deal with information from the employers and providing information to fire departments, health departments, people of that nature.

Therefore, they should be permitted to go forward with that part of the statute.

MR. MC KENNA: Your Honor, under the laws it is not enough. Even the cases they cite, it is not enough to say that. There has to be a substantial showing of success.

Nothing that this Court would do would preclude them from applying to the Third Circuit to see whether there is any inclination on the part of the Third Circuit to start parsing this out in a way that the New Jersey Legislature did not do.

THE COURT: I'm sure that's their next move.

MR. MC KENNA: I'm sure it is. But what I'm saying, your Honor, at this stage there has to be some substantial showing of a likelihood of success.

The only predicate for this application for a stay is that they have filed a notice of appeal. That's all there is.

They filed a notice of appeal. And it seems, your Honor, if that appeal is to work as the predicate for a stay, a stay that would inflict upon us a statute that the Court has found to be unconstitutional, then the paramount consideration, it seems to me, has to be have they shown a substantial likelihood of success, particularly since this complying with even these very limited, just the survey form and the

environmental survey and the emergency survey form, will impose a heavy burden upon the flavor and fragrance companies and the other companies that have to comply, and will jeopardize the trade secrets which under your Honor's ruling are not at risk right now. But they will be at risk under a stay.

THE COURT: They aren't at risk, but illegally held they are unprotectable in the circumstances of this case if the statute is held to be valid.

MR. MC KENNA: Your Honor, any time, in any kind of a context where you're talking about a stay or preliminary injunction, the injury that people are talking about, in this case we are talking about, among other injuries, the burden of compliance plus the trade secret thing, the injury is never legally cognizable independently of the merits of the case.

What I'm saying is to inflict -- it would inflict an injury upon us to let them enforce this thing. It would put our trade secrets at risk.

That's an injury regardless of whether it's an unconstitutional taking.

THE COURT: Yes.

MR. THOMPSON: On the hazardous substance fact sheet, we are in the process now, that is, the fragrance and flavor manufacturers, of preparing the equivalence of that.

We will prepare those subject to the federal rule and that federal rule allows certain amounts of discretion, but

requires a greater amount of judgment, scientific judgment in making decisions.

There is little doubt in my mind at this moment, as far as we have gotten, and I'm intimately familiar with that, that we will make the material safety data sheets which will say things substantially different from what the state may say about the same chemical.

The reason for that is the state has made a number of assumptions as to why a material is hazardous, which assumptions are not necessarily relevant or certainly tenable under the Federal Rules.

There is little doubt in my mind that we'll get a conflict, and what the employees will get, they will get from the state the hazardous substance fact sheets and from the employer that will say another.

THE COURT: Mr. Bokar, you want to respond to this?

MR. BOKAR: Yes.

Taking the last points first. The hazardous substance fact sheets will, under your Honor's premise, be distributed to local fire and police departments and county health departments.

In that sense there will be no conflict at all.

THE COURT: Why can't they distribute them anyway? You must have fact sheets for all the known hazardous chemicals. Why can't you just distribute them?

MR. BOKAR: That's precisely what is being done, your

Honor.

To implement the public purposes of the fact, and that's all we are talking about here when we are talking about the surveys, it is necessary for police, fire and county health officials to know what the substances are, what their nature is.

There is absolutely no conflict in this sense with the federal rule, which is concerned with protection of employees, with distribution of material safety data sheets to employees and to employers, not at all to these emergency response personnel.

THE COURT: You could submit the fact sheets without receiving from the employers the emergency services information survey. You can give every health department and every fire department a set of fact sheets.

MR. BOKAR: But the very -- the purpose, your Honor, is to furnish these emergency services personnel with the names and the identity of the chemicals that are present in a facility in which an emergency, a public emergency may arise.

The fact sheets are themselves totally meaningless, unless you know what the danger is in each facility. That's the purpose of the survey.

THE COURT: Is it your contention that the DEP has not gotten this information through other means over the last three or four years?

MR. BOKAR: The DEP --

THE COURT: Or the Department of Health?

MR. BOKAR: Neither department has gotten that information from any other source, including the industrial survey project, to the degree necessary to enable the state to implement these public purposes.

By the way, your Honor, the basis for the emergency services information survey is the public policy declaration of the state Act, in which the Legislature declares that local health, fire, police, safety and other governmental officials require detailed information about the identity, characteristics and quantities of hazardous substances used and stored in communities within their jurisdictions in order to adequately plan for and respond for emergencies.

THE COURT: Why doesn't New Jersey just adopt an act limited to requiring information and providing it to the public health authorities?

MR. BOKAR: Well, as your Honor has indicated quite perceptively, that may be a step that is taken along the line.

THE COURT: Why shouldn't you do it right away?

MR. BOKAR: As your Honor well knows, the legislative process is a slow one. Legislation is indeed being prepared, but we know already it's going to be very controversial legislation.

The process probably will not be a quick one. It is not something that is going --

THE COURT: The Legislature, if it is as exorcised about what I did, as I gather from the press, I would think they would rapidly push through legislation to do this limited bit of work.

MR. BOKAR: Except as your Honor knows, there are legislators on both sides of the issue, as there are important constituencies on both sides of that issue. It is not something you push through in a week.

THE COURT: It is just flaunting the public will, just so overwhelming that you ought to be able to do almost anything.

MR. BOKAR: I, as the representative of the state in this matter, would not make that charge with respect to this Court. That's indeed what we are asking for, very limited stay, limited only to those provisions which serve substantial public purposes.

MS. TREAT: Your Honor, could I address the severability issue?

THE COURT: Sure, Ms. Treat, go ahead.

MS. TREAT: As you noted earlier, this was not an issue addressed in detail, perhaps was avoided explicitly in the hopes that we wouldn't have to get to it.

THE COURT: Your office sent me a very detailed letter and I quoted it in a footnote in my opinion about what was severable and what was not severable. It seemed very little was not severable.

MS. TREAT: That's a position that we may maintain in the Court of Appeals. At this point you've made it clear that you're not interested in severing the labeling portion, and I'm not going to try to argue that at this point.

There is a good probability of success in the Court of Appeals with respect to specifically community oriented provisions such as the survey, the list, the fact sheets.

The presumption is right in New Jersey that if you have a lot, and part of it a law, and part of it has been established to be unconscious, there is a general statutory provision, N.J.S.A. 1:1-10, which establishes that presumption in federal courts upheld it, where a statute exists like that, state law will control the decision whether or not to sever.

I think that if your Honor looks at this part of the law a little more closely and the Court of Appeals looks at it, you will see that in fact there are separate provisions that deal with community provisions and worker provisions.

It is pretty easy to pull one apart from the other. The standard in the state courts is, essentially, could those provisions that the Court has held are not unconstitutional, standing alone, without the unconstitutional part, do they basically make sense? Is it the sort of thing that the Legislature would have enacted without the unconstitutional provisions?

You have already held the state has a perfect authority

under its police powers to regulate health and safety and to go into this area, even if it is a workplace problem, which then spills out into the community.

As you put it in your opinion, problems arising in the workplace and extending into the community at large are addressed by this law. You upheld the parts that were not in the manufacturing sector.

All we are asking is a stay of those provisions which relate to the manufacturing sector, but are essentially the same provisions that have already been upheld with respect to the nonmanufacturing sector.

I think that there is a substantial likelihood the Court of Appeals will try to parse out that part of the Act, and certainly the public health and safety concerns, the abilities of the state to protect its citizens, particularly with respect to the manufacturing sector, which has the most hazardous chemicals that are used, and certainly the largest quantities of those chemicals, is important. It is important right now and we wouldn't want to hold the state in its regulatory programs before the Court of Appeals rules on this issue.

So we hope that you will in fact look at this again and consider to adopt a stay for these provisions.

THE COURT: All right. Anything else? Mr. Carlin.

MR. CARLIN: I would really like to point out, because I think I've taken a different position than everybody, I think

in theory I believe that there could be a new legislation that could accomplish what everybody is saying is a needed thing.

To take this piecemeal type of approach is going to just create the confusion that the federal preemption provision was trying to avoid.

If you have hazardous fact sheets coming into being in a short period of time, coming out from the state with one nomenclature used, and you have the federal standard put into effect with labeling, with different nomenclature than the state has, I just think that what you're creating is worse than nothing, that you're telling people that you should use this fact sheet when you have an emergency and they will go in and see labeling that complies with the federal standard.

This is why there should be one nomenclature, why everything should dovetail and not use a piecemeal approach.

THE COURT: But if the state decided to simply implement the community notification provision, they could adopt any kind of fact sheet they wanted to when doing that, even though there was confusion and duplication, inordinate amount of work by the companies, provided they didn't get into the area covered by the standard.

MR. CARLIN: What they are asking for is a stay, an extraordinary measure, and they are saying this is really needed. But what they are saying to do, I think if really analyzed, would show would be really harmful. I really

sincerely believe that. That what you're doing is putting into being another system. You're giving the fire department notification that these substances are here, using certain terminology. The federal standard will come into being with labeling used that would be different.

I think it is incumbent upon the New Jersey Legislature to analyze the federal standard and come up with a new statute, a statute that accomplishes their purpose. That's what the Court ruled, that these things are so intertwined that you really can't sever and have a certain part here and a certain part there and say that we are really accomplishing something.

Maybe there would be a difficulty getting the statutes through Legislature. That may be true. But I think here it is needed.

I don't think you can just say I'm severing this portion because it's a good idea. It is not the idea. It is the implementation. It must be done in such a manner that it is consistent with the federal standard.

THE COURT: All right.

I'm going to deny the stay.

First let me note that given the urgency with which the state views this Act, the lack of diligence in prosecuting the appeal and bringing this matter to issue is noteworthy.

My opinion was issued January 3rd, 1985. The application for a stay of injunction was not applied for until

nearly four weeks later and not set down for hearing until today, February 25.

As far as I know, nothing has been done to expedite the appeal.

From the adoption of the Act until today, the state has failed to do what it is required to do, namely, to submit its plan for OSHA approval pursuant to 29 U.S.C., Section 667(b).

Further, if the community information section of the Act is required immediately, legislative action should have been instituted or sought promptly to accomplish that purpose.

I think the purposes of that community information section are important and significant, and I just can't understand why the state has delayed in seeking to implement that alone pending the resolution of the other issues.

I can't help but feel that the state opposes the federal regulation and there may be substantive grounds for doing that, are seeking an all or nothing approach, and in the process are sacrificing the perfectly acceptable and permissible community right to know provisions which could be adopted, could be enacted and put into effect promptly if the state were of a mind to do so.

The criteria for a stay are four in number. First is showing that the parties seeking the stay will suffer irreparable injury if the stay is denied.

Here, if there is irreparable injury, it is of the

state's own doing for not proceeding promptly through other routes to obtain the legislation and regulations which it needs and which all agree are important and should be implemented.

Secondly, it must be shown a strong likelihood of success on the appeal. I am somewhat biased, but I think there is very little likelihood of success on the overall preemption aspect of the opinion which I gave on January 3rd. The federal standard and the federal statutes make that abundantly clear.

It is intended that there be an overall regulatory scheme applicable to industries throughout the United States which would be adversely affected if every state were free to impose an independent and separate regulatory scheme.

It may well be that the state of New Jersey and other states believe that OSHA's approach is inadequate, and if so, the remedy is to proceed through OSHA or Congress to repair what what it deems the deficiencies are. Or, as they are doing, attacking the OSHA standard in the Court of Appeals.

It could be that the Court of Appeals will find a way to sever parts of the state statute which I was unable to find, and it may be the argument and the showing will be such in the Court of Appeals that it will be easier to separate one part of the statute from the other. As presented to me, it seems very difficult to separate the community information provisions of the statute from the safety in the workplace and education of worker section of the statute.

Even there I would estimate that the approach will be to require separate legislation dealing specifically with the community information aspects of the regulatory plan.

There must be a showing that the plaintiffs will not be substantially harmed by the stay. The plaintiffs would be harmed, at least to the extent of having to duplicate reporting, which I don't consider to be enormously significant.

They would also be harmed in that the trade secret aspect of the state statute would be implemented.

The plaintiff would lose the right to protect certain trade secrets.

I pointed out in my opinion that in the federal Act there are methods of protecting all trade secrets. In the New Jersey Act there are certain trade secrets which cannot be protected where chemicals of a particularly hazardous nature are involved.

I concluded in the opinion that the Constitution does not require the protection of the trade secrets in those circumstances and the state could require disclosure. However, I could be wrong on that issue as well, and the plaintiffs may be able to persuade the Court of Appeals that the state statute is defective for the additional reason that it unconstitutionally deprives them of due process of law.

I don't think they will be able to do that, but that is an injury which will be suffered by them if I grant the stay.

As far as the public interest is concerned, there is unquestionably a public interest in health authorities, fire departments having information about hazardous substances in workplaces in the community where they are.

However, as I noticed earlier, that is an interest which can be met by prompt and effective action by the state of New Jersey, short of implementing the statute, which I concluded is preempted by federal law and regulations.

All right. That's the ruling. If you would, submit an order denying the application for a stay.

MR. MC KENNA: Your Honor, we have submitted one in the fragrance and flavor case, and I believe Mr. Carlin submitted a separate order in the Chamber of Commerce case.

THE COURT: Let me see if I have it here. Yes, I think I have one here submitted by Mr. McKenna.

All right. I'll sign it and then the defendants can take it to the Court of Appeals promptly.

MR. CARLIN: I think I also submitted one. I don't know if Mr. McKenna's would cover both of ours.

MR. MC KENNA: Your Honor, it would, with just the addition of the number on top.

THE COURT: I have 84-3892. What's the other number?

MR. CARLIN: 3255, 84-3255.

THE COURT: All right. I'll add that.

I want to file one of your documents, Mr. Bokar. You

have the affidavit of Dr. Kenneth B. Rosen. It has not yet been put in the Clerk's file.

MR. BOKAR: Thank you.

THE COURT: Yes. All right.

All right. That will take care of that.

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the commissioner who shall serve as chairman. Members appointed by the Governor shall be appointed for a 4-year term commencing on July 1 of the year of appointment except that of those first appointed, four shall be appointed for a term of 1 year, four for a term of 2 years, three for a term of 3 years and three for a term of 4 years, which terms shall commence on July 1, 1962. Each member shall hold over after the expiration of his term until his successor has been appointed and has qualified.

Of the members appointed by the Governor; two members shall be selected to represent the public, one member shall be selected from a list of names submitted by the Associated General Contractors Association of New Jersey, one member from a list of names submitted by the Building Contractors Association of New Jersey, one member from a list of names submitted by the National Electrical Contractors Association, New Jersey Chapter, Inc., one member from a list of names submitted by the Mechanical Contractors Association of N.J., Inc., one member from a list of names submitted by the New Jersey Home Builders Association, one member from a list of names submitted by the Structural Steel & Ornamental Iron Association, ~~four~~ five members from a list of names submitted by the New Jersey State Building and Construction Trades Council, one member from a list of names submitted by the New Jersey Society of Professional Engineers, ~~and~~ one member from a list of names submitted by the New Jersey Society of Architects, and one member from a list of names submitted by the Utility Contractors Association of New Jersey, Inc. At least three names shall be submitted by each organization for each member that is to be appointed from its list.

Vacancies shall be filled only for the unexpired term and in the manner provided for the original appointment.

The members of the council shall serve without compensation except for the actual expenses incurred while engaged in their duties as members of the council. It shall be the duty of the council to advise the commissioner in matters relating to the administration of this act. The council shall meet at least every 6 months and at such time as the commissioner may designate at the time and place selected by him. A meeting of the council shall be called by the commissioner when requested by any three members of the council. The head of the Bureau of Engineering and Safety shall serve as secretary of the council.

Amended by L.1971, c. 385, § 1, eff. Jan. 7, 1972.

34:5–178. Violations; penalties; compromise of claims

Notes of Decisions

1. Liability

Acts of engineering firm were in the nature of professional services specifically excluded under plaintiff insurer's comprehensive general liability policy, while covered by defendant insurer's architects and/or engineers' professional liability policy, where, inter alia, the supervision by the firm, which was hired by town to oversee sewer construction work done by contractor, was predominantly mental or intellectual, where the main thrust of injured workmen's settled cause of action was firm's alleged failure to observe that contractor was violating safety code as to manner in which trench was fortified, and where firm's acts in that respect clearly required specialized knowledge and skill of a professional engineer. Atlantic Mut. Ins. Co. v. Continental Nat. Am. Ins. Co., 123 N.J.Super. 241, 302 A.2d 177 (L.1973).

CHAPTER 5A. HAZARDOUS SUBSTANCES IN THE WORKPLACE AND COMMUNITY [NEW]

Section

34:5A–1. Short title

This act shall be known and may be cited as the "Worker and Community Right to Know Act."

L.1983, c. 315, § 1, eff. Aug. 29, 1984.

Effective Aug. 29, 1984.

Section 35 of L.1983, c. 315, approved Aug. 29, 1983, provides:

"This act shall take effect one year following enactment except that subsection a. of section 26 and section 34 shall take effect immediately and that the several departments charged with the administration of this act shall take all actions necessary prior to the effective date of this act to implement the provisions of this act on the effective date thereof."

Title of Act:

An Act concerning certain hazardous substances in the workplace and the community, and making an appropriation. L.1983, c. 315.

34:5A–2. Legislative findings and declarations

The Legislature finds and declares that the proliferation of hazardous substances in the environment poses a growing threat to the public health, safety, and welfare; that the constantly increasing number and variety of hazardous substances, and the many routes of exposure to them make it difficult and expensive to adequately

monitor and detect any adverse health effects attributable thereto; that individuals themselves are often able to detect and thus minimize effects of exposure to hazardous substances if they are aware of the identity of the substances and the early symptoms of unsafe exposure; and that individuals have an inherent right to know the full range of the risks they face so that they can make reasoned decisions and take informed action concerning their employment and their living conditions.

The Legislature further declares that local health, fire, police, safety and other government officials require detained information about the identity, characteristics, and quantities of hazardous substances used and stored in communities within their jurisdictions, in order to adequately plan for, and respond to, emergencies, and enforce compliance with applicable laws and regulations concerning these substances.

The Legislature further declares that the extent of the toxic contamination of the air, water, and land in this State has caused a high degree of concern among its residents; and that much of this concern is needlessly aggravated by the unfamiliarity of these substances to residents.

The Legislature therefore determines that it is in the public interest to establish a comprehensive program for the disclosure of information about hazardous substances in the workplace and the community, and to provide a procedure whereby residents of this State may gain access to this information.

L.1983, c. 315, § 2, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-3. Definitions

As used in this act:

a. "Chemical Abstracts Service number" means the unique identification number assigned by the Chemical Abstracts Service to chemicals.

b. "Chemical name" is the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry or the Chemical Abstracts Service rules of nomenclature.

c. "Common name" means any designation or identification such as a code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

d. "Container" means a receptacle used to hold a liquid, solid, or gaseous substance, including, but not limited to, bottles, pipelines, bags, barrels, boxes, cans, cylinders, drums, cartons, vessels, vats, and stationary or mobile storage tanks. "Container" shall not include process containers.

e. "Council" means the Right to Know Advisory Council created pursuant to section 18 of this act.[1]

f. "County health department" means a county health agency established pursuant to P.L. 1975, c. 329 (C. 26:3A2-1 et seq.), or the office of a county clerk in a county which has not established a department.

g. "Employee representative" means a certified collective bargaining agent or an attorney whom an employee authorizes to exercise his rights to request information pursuant to the provisions of this act, or a parent or legal guardian of a minor employee.

h. "Employer" means any person or corporation in the State engaged in business operations having a Standard Industrial Classification, as designated in the Standard Industrial Classification Manual prepared by the Federal Office of Management and Budget, within Major Group numbers 20 through 39 inclusive (manufacturing industries), numbers 46 through 49 inclusive (pipelines, transportation services, communications, and electric, gas, and sanitary services), number 51 (wholesale trade, nondurable goods), number 75 (automotive repair, services, and garages), number 76 (miscellaneous repair services), number 80 (health services), number 82 (educational services), and number 84 museums, art galleries, botanical and zoologi-

cal gardens). Except for the purposes of section 26 of this act,[2] "employer" means the State and local governments, or any agency, authority, department, bureau, or instrumentality thereof.

i. "Environmental hazardous substance" means any substance on the environmental hazardous substance list.

j. "Environmental hazardous substance list" means the list of environmental hazardous substances developed by the Department of Environmental Protection pursuant to section 4 of this act.[3]

k. "Environmental survey" means a written form prepared by the Department of Environmental Protection and transmitted to an employer, on which the employer shall provide certain information concerning each of the environmental hazardous substances at his facility, including, but not limited to, the following:

(1) The chemical name and Chemical Abstracts Service number of the environmental hazardous substance;

(2) A description of the use of the environmental hazardous substance at the facility;

(3) The quantity of the environmental hazardous substance produced at the facility;

(4) The quantity of the environmental hazardous substance brought into the facility;

(5) The quantity of the environmental hazardous substance consumed at the facility;

(6) The quantity of the environmental hazardous substance shipped out of the facility as or in products;

(7) The maximum inventory of the environmental hazardous substance stored at the facility, the method of storage, and the frequency and methods of transfer;

(8) The total stack or point-source emissions of the environmental hazardous substance;

(9) The total estimated fugitive or non-point-source emissions of the environmental hazardous substance;

(10) The total discharge of the environmental hazardous substance into the surface or groundwater, the treatment methods, and the raw wastewater volume and loadings;

(11) The total discharge of the environmental hazardous substance into publicly owned treatment works;

(12) The quantity, and methods of disposal, of any wastes containing an environmental hazardous substance, the method of on-site storage of these wastes, the location or locations of the final disposal site for these wastes, and the identity of the hauler of the wastes.

l. "Facility" means the building, equipment and contiguous area at a single location used for the conduct of business. Except for the purposes of subsection c. of section 13, section 14, and subsection b. of section 25 of this act,[4] "facility" shall not include a research and development laboratory.

m. "Hazardous substance" means any substance, or substance contained in a mixture, included on the workplace hazardous substance list developed by the Department of Health pursuant to section 5 of this act,[5] introduced by an employer to be used, studied, produced, or otherwise handled at a facility. "Hazardous substance" shall not include:

(1) Any article containing a hazardous substance if the hazardous substance is present in a solid form which does not pose any acute or chronic health hazard to an employee exposed to it;

(2) Any hazardous substance constituting less than 1% of a mixture unless the hazardous substance is present in an aggregate amount of 500 pounds or more at a facility;

(3) Any hazardous substance which is a special health hazard substance constituting less than the threshold percentage established by the Department of Health for that special health hazard substance when present in a mixture; or

(4) Any hazardous substance present in the same form and concentration as a product packaged for distribution and use by the general public to which an employee's exposure during handling is not significantly greater than a consumer's exposure during the principal use of the toxic substance.

n. "Hazardous substance fact sheet" means a written document prepared by the Department of Health for each hazardous substance and transmitted by the department to employers pursuant to the provisions of this act, which shall include, but not be limited to, the following information:

(1) The chemical name, the Chemical Abstracts Service number, the trade name, and common names of the hazardous substance;

(2) A reference to all relevant information on the hazardous substance from the most recent edition of the National Institute for Occupational Safety and Health's Registry of Toxic Effects of Chemical Substances;

(3) The hazardous substance's solubility in water, vapor pressure at standard conditions of temperature and pressure, and flash point;

(4) The hazard posed by the hazardous substance, including its toxicity, carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity and reactivity, including specific information on its reactivity with water;

(5) A description, in nontechnical language, of the acute and chronic health effects of exposure to the hazardous substance, including the medical conditions that might be aggravated by exposure, and any permissible exposure limits established by the federal Occupational Safety and Health Administration;

(6) The potential routes and symptoms of exposure to the hazardous substance;

(7) The proper precautions, practices, necessary personal protective equipment, recommended engineering controls, and any other necessary and appropriate measures for the safe handling of the hazardous substance, including specific information on how to extinguish or control a fire that involves the hazardous substance; and

(8) The appropriate emergency and first aid procedures for spills, fires, potential explosions, and accidental or unplanned emissions involving the hazardous substance.

o. "Label" means a sign, emblem, sticker, or marker affixed to or stenciled onto a container listing the information required pursuant to section 14 of this act.[6]

p. "Mixture" means a combination of two or more substances not involving a chemical reaction.

q. "Process container" means a container, excluding a pipeline, the content of which is changed frequently; a container of 10 gallons or less in capacity, into which substances are transferred from labeled containers, and which is intended only for the immediate use of the employee who performs the transfer; a container on which a label would be obscured by heat, spillage or other factors; or a test tube, beaker, vial, or other container which is routinely used and reused.

r. "Research and development laboratory" 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 hazardous substances or environmental hazardous substances are used by or under the direct supervision of a technically qualified person.

s. "Special health hazard substance" means any hazardous substance on the special health hazard substance list.

t. Special health hazard substance list" means the list of special health hazard substances developed by the Department of Health pursuant to section 5 of this act[5] for which an employer may not make a trade secret claim.

u. "Trade secret" means any formula, plan, pattern, process, production data, information, or compilation of information, which is not patented, which is known only to an employer and certain other individuals, and which is used in the fabrication and production of an article of trade or service, and which gives the employer possessing it a competitive advantage over businesses who do not possess it, or the secrecy of which is certified by an appropriate official of the federal government as necessary for national defense purposes. The chemical name and Chemical Abstracts Service number of a substance shall be considered a trade secret

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only if the employer can establish that the substance is unknown to competitors. In determining whether a trade secret is valid pursuant to section 15 of this act,[7] the Department of Health, or the Department of Environmental Protection, as the case may be, shall consider material provided by the employer concerning (1) the extent to which the information for which the trade secret claim is made is known outside the employer's business; (2) the extent to which the information is known by employees and others involved in the employer's business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information, to the employer or the employer's competitor; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be disclosed by analytical techniques, laboratory procedures, or other means.

v. "Trade secret registry number" means a code number temporarily or permanently assigned to the identity of a substance in a container by the Department of Health pursuant to section 15 of this act.[7]

w. "Trade secret claim" means a written request, made by an employer pursuant to section 15 of this act,[7] to withhold the public disclosure of information on the grounds that the disclosure would reveal a trade secret.

x. "Workplace hazardous substance list" means the list of hazardous substances developed by the Department of Health pursuant to section 5 of this act.

y. "Workplace survey" means a written document, prepared by the Department of Health and completed by an employer pursuant to this act, on which the employer shall report each hazardous substance present at his facility.

L.1983, c. 315, § 3, eff. Aug. 29, 1984.

[1] Section 34:5A–18.
[2] Section 34:5A–26.
[3] Section 34:5A–4.
[4] Sections 34:5A–13, 34:5A–14, 34:5A–25.
[5] Section 34:5A–5.
[6] Section 34:5A–14.
[7] Section 34:5A–15.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1

Library References

Words and Phrases (Perm. Ed.)

34:5A–4. Environmental hazardous substance list; environmental survey; Spanish translation

a. The Department of Environmental Protection shall develop an environmental hazardous substance list which shall include, but not be limited to, substances used, manufactured, stored, packaged, repackaged, or disposed of or released into the environment of the State which, in the department's determination, may be linked to the incidence of cancer; genetic mutations; physiological malfunctions, including malfunctions in reproduction; and other diseases; or which, by virtue of their physical properties, may pose a threat to the public health and safety. The department shall base the environmental hazardous substance list on the list of substances developed and used by the department for the purposes of the Industrial Survey Project, established pursuant to P.L. 1970, c. 33 (C. 13D–1 et seq.) and P.L. 1977, c. 74 (C. 58:10A–1 et seq.), and may include other substances which the department, based on documented scientific evidence, determines pose a threat to the public health and safety.

b. The department shall develop an environmental survey, which shall be designed to enable employers to report information about environmental hazardous substances at their facilities.

c. The department shall prepare and, upon request, make available to employers, county health departments, or the public a Spanish translation of the environmental survey. The department shall also prepare and make available a Spanish translation

of any written material prepared by the department to inform the public of the information available pursuant to the provisions of this act.

d. Three months prior to the effective date of this act the department shall adopt, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B–1 et seq.), the environmental hazardous substance list.

L.1983, c. 315, § 4, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

34:5A–5. Workplace hazardous substance list; special health hazard substance list; workplace survey; hazardous substance fact sheet; Spanish translation

a. The Department of Health shall develop a workplace hazardous substance list which shall include:

(1) Any substance or substance contained in a mixture regulated by the federal Occupational Safety and Health Administration under Title 29 of the Code of Federal Regulations, Part 1910, subpart z;

(2) Any environmental hazardous substance; and

(3) Any other substance which the department, based on documented scientific evidence, determines poses a threat to the health or safety of an employee.

b. The department shall develop a special health hazard substance list comprising hazardous substances which, because of their known carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity, or reactivity pose a special hazard to health and safety, and for which an employer shall not be permitted to make a trade secret claim.

c. The department shall develop a workplace survey designed to facilitate the reporting by employers of those hazardous substances present at their facilities. The workplace survey shall include a copy of the special health hazard substance list.

d. The department shall develop a hazardous substance fact sheet for each hazardous substance on the workplace hazardous substance list.

e. The department shall prepare and, upon request, make available to employers, county health departments, and the public a Spanish translation of the workplace survey and each hazardous substance fact sheet. The department shall also prepare and make available a Spanish translation of any written material prepared by the department to inform employees of their rights under this act.

f. Three months prior to the effective date of this act, the department shall adopt, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B–1 et seq.), a workplace hazardous substance list.

L.1983, c. 315, § 5, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

34:5A–6. Distribution of workplace and environmental surveys to employer

a. Within five days of the effective date of this act, the Department of Health shall transmit copies of the workplace survey to the Department of Labor. Upon receipt of the workplace survey, the Department of Labor shall transmit the workplace survey to each employer in the State.

b. Within five days of the effective date of this act, the Department of Environmental Protection shall transmit an environmental survey to each employer whose business activities, according to criteria developed by the department, warrant the reporting of the information required on the environmental survey. The department may transmit an environmental survey to every employer.

L.1983, c. 315, § 6, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

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34:5A–7. Completion and return of surveys by employer; identification of hazardous substance

a. Except as otherwise provided in section 15 of this act,[1] within 90 days of receipt of a workplace survey, an employer shall complete the survey and transmit a copy of the completed survey to the Department of Health, the health department of the county in which the employer's facility is located, the local fire department, and the local police department. If an employer has reason to believe that a mixture present at his facility contains a hazardous substance as a component, but is unable to obtain from the manufacturer or supplier of the mixture the chemical names and Chemical Abstracts Service numbers of the components of the mixture, he shall list the mixture by its common name in the space provided on the survey. The department shall have the responsibility to obtain the chemical names and Chemical Abstracts Service numbers of the components of the mixture so listed, and, upon obtaining this information, shall transmit it to the employer along with any appropriate hazardous substance fact sheet or sheets and directions to the employer on how to communicate this information to his employees.

b. Except as otherwise provided in section 15 of this act,[1] within 90 days of receipt of an environmental survey, an employer shall complete the survey and transmit a copy of the completed survey to the Department of Environmental Protection and the health department of the county in which the employer's facility is located, and pertinent sections of the survey to the local fire department and the local police department.

L.1983, c. 315, § 7, eff. Aug. 29, 1984.

[1] Section 34:5A–15.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

34:5A–8. Transmission of hazardous substance fact sheet to employer; employers exempt from act

a. Upon receipt of a completed workplace survey from an employer, the Department of Health shall transmit to that employer a hazardous substance fact sheet for each hazardous substance reported by the employer on the workplace survey. If an employer makes a trade secret claim for information on the workplace survey pursuant to section 15 of this act,[1] the department shall transmit a hazardous substance fact sheet for that substance with the identity of the substance concealed.

b. Any employer having a Standard Industrial Classification within certain subgroups of Major Group number 20, 51, or 80, as designated by the Department of Health pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B–1 et seq.), whose workplace survey transmitted to the Department of Health pursuant to section 7 of this act[2] indicates that no hazardous substances are present at the facility, shall be exempt from the provisions of this act, except for the requirement to annually update the workplace survey pursuant to section 10 of this act,[3] and except for the provisions of section 33 of this act.[4] Any employer exempted from the provisions of this act pursuant to this subsection who transmits to the Department of Health an update of the workplace survey which indicates that a hazardous substance is present at the employer's facility shall immediately be subject to the provisions of this act.

L.1983, c. 315, § 8, eff. Aug. 29, 1984.

[1] Section 34:5A–15.
[2] Section 34:5A–7.
[3] Section 34:5A–10.
[4] Section 34:5A–33.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

34:5A-9. Environmental surveys; file; clarifying information; update; request for copy

a. The Department of Environmental Protection shall maintain a file of all completed environmental surveys received from employers. Each environmental survey received by the department shall be retained by the department for 30 years.

b. The department may require an employer to submit information clarifying any statement made on the environmental survey. The department, subject to the provisions of section 15 of this act [1] if applicable, shall transmit this clarifying information to the appropriate county health department, local fire department, and local police department as it deems necessary.

c. The department shall require every employer to update the environmental survey for his facility every other year. If there is any significant change during a nonreporting year in the information reported on his environmental survey, the employer shall inform the department of the change. The department may require an employer to update the environmental survey for his facility every year.

d. Any person may request in writing from the department a copy of an environmental survey for a facility, and the department shall transmit any survey so requested within 30 days of the request therefor.

L.1983, c. 315, § 9, eff. Aug. 29, 1984.

[1] Section 34:5A-15.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-10. Workplace surveys and hazardous substance fact sheets; file; update; copies of employee health and exposure records; requests for copies

a. The Department of Health shall maintain a file of all completed workplace surveys received from employers. Each workplace survey received shall be retained by the department for 30 years. The department shall also retain for 30 years each hazardous substance fact sheet.

b. The department shall require every employer to annually update the workplace survey for his facility, and shall supply each employer with any necessary additional hazardous substance fact sheets.

c. Upon request by the department, an employer shall provide the department with copies of employee health and exposure records, including those maintained for, and supplied to, the federal government.

d. Any person may request in writing from the department a copy of a workplace survey for a facility, together with the appropriate hazardous substance fact sheets, and the department shall transmit any material so requested within 30 days of the request therefor. Any request by an employee for material pertaining to the facility where he is employed made pursuant to this subsection shall be treated by the department as confidential.

L.1983, c. 315, § 10, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-11. Request for Spanish translation

a. An employer shall, upon request, provide an employee whose native language is Spanish with a Spanish translation of a workplace survey, hazardous substance fact sheet, and, if applicable, an environmental survey obtained from the Department of Health or the Department of Environmental Protection, as the case may be. An employer shall, upon request, provide employees whose native language is Spanish

with the education and training program required pursuant to section 13 of this act[1] in Spanish.

b. A county health department shall, upon request, provide copies of the environmental survey and the workplace survey in a Spanish translation provided by the Department of Health and Department of Environmental Protection.

L.1983, c. 315, § 11, eff. Aug. 29, 1984.

[1] Section 34:5A-13.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-12. Employer's central file; posting of notice; distribution of literature on employee rights; employee access to information

Every employer shall establish and maintain a central file at his facility in which he shall retain a workplace survey for the facility, appropriate hazardous substance fact sheets, and, if applicable, a copy of the environmental survey for the facility. Every employer shall post on bulletin boards readily accessible to employees a notice of the availability of the information in the file. Every employer employing employees whose native language is Spanish shall also post the notice in Spanish. Every employer shall supply employees with any material designed and provided by the Department of Health, the Department of Environmental Protection, or the Department of Labor to inform employees of their rights under this act. An employer shall provide an employee with access to a workplace survey, appropriate hazardous substance fact sheets, and, if applicable, an environmental survey, within five working days of a request therefor.

L.1983, c. 315, § 12, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-13. Employee education and training program

a. Every employer shall establish an education and training program for his employees, which shall be designed to inform employees in writing and orally of the nature of the hazardous substances to which they are exposed in the course of their employment and the potential health risks which the hazardous substances pose, and to train them in the proper and safe procedures for handling the hazardous substances under all circumstances. An employer shall provide current employees with the education and training program within six months of the effective date of this act, and annually thereafter. Beginning six months after the effective date of this act, all new employees shall be provided with the training and education program within the first month of employment. Prior to entering an employment agreement with a prospective employee an employer shall notify a prospective employee of the availability of workplace surveys and appropriate hazardous substance fact sheets for the facility at which the prospective employee will be employed.

b. Any employer who has established an employee education and training program for hazardous substances prior to the effective date of this act may request the Department of Health to certify that education and training program, which certification shall constitute compliance with subsection a. of this section.

c. Every employer shall establish an education and training program for his employees who work in a research and development laboratory, which shall be designed to inform employees in writing and orally of the nature of the hazardous substances to which they are exposed in the course of their employment and the potential health risks which the hazardous substances pose, and to train them in the proper and safe procedure for handling the hazardous substances under all circumstances. An employer shall provide current employees with the education and training program within six months of the effective date of this act, and annually

thereafter. Beginning six months after the effective date of this date, all new employees shall be provided with the training and education program within the first month of employment.

L.1983, c. 315, § 13, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

34:5A–14. Labelling of containers containing hazardous substances and pipelines; code or number system for containers in research and development laboratories; exemptions

a. Within six months of the effective date of this act, every employer shall take any action necessary to assure that every container at his facility containing a hazardous substance shall bear a label indicating the chemical name and Chemical Abstracts Service number of the hazardous substance or the trade secret registry number assigned to the hazardous substance. Employers may label containers in a research and development laboratory by means of a code or number system, if the code or number system will enable an employee to readily make a cross-reference to a hazardous substance fact sheet which will provide the employee with the chemical name and Chemical Abstracts Service number of the hazardous substance contained in the container, or the trade secret registry number assigned to the hazardous substance. The code or number system shall be designed to allow the employee free and ready access at all times to the chemical name and Chemical Abstracts Service number of the hazardous substance in the container, shall be designed to allow the employee access to this information without the permission or assistance of management, and shall be available to the employee at close proximity to his specific job location or locations. Employers shall be required to label pipelines only at the valve or valves located at the point at which a hazardous substance enters a facility's pipeline system, and at normally operated valves, outlets, vents, drains and sample connections designed to allow the release of a hazardous substance from the pipeline.

b. Within two years of the effective date of this act, every employer shall take any action necessary to assure that every container at his facility bears a label indicating the chemical name and Chemical Abstracts Service number of the substance in the container, except as provided in subsection d. of this section, or the trade secret registry number assigned to the substance. Employers may label containers in a research and development laboratory by means of a code or number system, if the code or number system will enable an employee to readily make a cross-reference to documentary material retained on file by the employer at the facility which will provide the employee with the chemical name and Chemical Abstracts Service number of the substance contained in the container, except as provided in subsection d. of this section, or the trade secret registry number assigned to the substance. The code or number system shall be designed to allow the employee free and ready access at all times to the chemical name and Chemical Abstracts Service number of the substance in the container, shall be designed to allow the employee access to this information without the permission or assistance of management, and shall be available to the employee at close proximity to his specific job location or locations. If a container contains a mixture, an employer shall be required to insure that the label identify the chemical names and Chemical Abstracts Service numbers, except as provided in subsection d. of this section, or the trade secret registry numbers, of the five most predominant substances contained in the mixture. The provisions of this subsection shall not apply to any substance constituting less than 1% of a mixture unless the substance is present at the facility in an aggregate amount of 500 pounds or more. Employers shall be required to label pipelines only at the valve or valves located at the point at which a substance enters a facility's pipeline system, and at normally operated valves, outlets, vents, drains and sample connections designed to allow the release of a substance from the pipeline. One year after the effective date of this act the Department of Health shall establish criteria for containers which, because of the finished and durable

characteristics of their contents, shall be exempt from the provisions of this subsection. These standards shall be consistent with the intent of this subsection to provide for the labeling of every container which may contain a substance which is potentially hazardous.

c. The labeling requirements of subsections a. and b. of this section shall not apply to containers labeled pursuant to the "Federal Insecticide, Fungicide, and Rodenticide Act," 61 Stat. 163 (7 U.S.C. § 121 et al.). The Department of Health may, by rule and regulation, certify containers labeled pursuant to any other federal act as labeled in compliance with the provisions of this section.

d. One year after the effective date of this act the Department of Health shall adopt, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), a list of substances the containers of which may be labeled with the common name and Chemical Abstracts Service number of their contents. The department shall include on the list adopted pursuant to this subsection only substances which are widely recognized by their common names. An employer shall provide the chemical name of a substance in a container labeled pursuant to this subsection within five working days of the request therefor.

L.1983, c. 315, § 14, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-15. Trade secret claim

a. If an employer believes that disclosing information required by this act will reveal a trade secret, he may file with the appropriate department a trade secret claim as herein provided. As used in this section, "department" means either the Department of Health or Department of Environmental Protection, as the case may be.

b. If an employer claims that disclosing information on either the workplace survey or the environmental survey would reveal a trade secret, he shall file with the appropriate department a trade secret claim within 90 days of receipt of the survey. An employer making a trade secret claim shall submit two copies of the survey to the department, one with the information for which a trade secret claim is being made concealed, and one in an envelope marked "Confidential" containing the information for which a trade secret claim is being made, which the department, during the pendency of the trade secret claim, shall keep in a locked file or room. On the copies of the survey sent to the county health department, local fire department, and local police department, and retained on file at the facility, the employer shall conceal the information for which he is making a trade secret claim.

c. If an employer claims that labeling a container pursuant to the provisions of section 14 of his act [1] would reveal a trade secret, he shall file a trade secret claim with the Department of Health. Upon receipt of the trade secret claim, the department shall assign a trade secret registry number to the claim, and transmit the trade secret registry number to the employer. Upon receipt of the trade secret registry number, the employer shall affix the trade secret registry number to each container containing a substance for which the trade secret claim was made.

d. The department shall act to make a determination on the validity of a trade secret claim when a request is made pursuant to the provisions of this act for the disclosure of the information for which the trade secret claim was made, or at any time that the department deems appropriate. Upon making a determination on the validity of a trade secret claim, the department shall inform the employer of the determination by certified mail. If the department determines that the employer's trade secret claim is not valid, the employer shall have 45 days from the receipt of the department's determination to file with the department a written request for an administrative hearing on the determination. If the employer does not file such a request within 45 days, the department shall take action to provide that the information for which the trade secret claim was made be disclosed pursuant to the provisions of this act. If an employer requests an administrative hearing pursuant

to the provisions of this subsection, the department shall refer the matter to the Office of Administrative Law, for a hearing thereon. At the hearing the employer shall have the burden to show that the trade secret claim is valid. Within 45 days of receipt of the administrative law judge's recommendation, the department shall affirm, reject, or modify the recommendation. The department's action shall be considered the final agency action for the purposes of the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), and shall be subject only to judicial review as provided in the Rules of Court. The department shall inform the employer of its decision on the administrative law judge's recommendation by certified mail. If the department determines that the trade secret claim is not valid, the employer shall have 45 days to notify the department in writing that he has filed to appeal the department's decision in the courts. If the employer does not so notify the department, the department shall take action to provide that the information for which the trade secret claim was made be disclosed pursuant to the provisions of this act.

e. The department shall provide any information for which a trade secret claim is pending or has been approved pursuant to this section to a physician or osteopath when such information is needed for medical diagnosis or treatment. The department shall require the physician or osteopath to sign an agreement protecting the confidentiality of information disclosed pursuant to this subsection.

f. Any workplace survey or environmental survey containing information for which a trade secret claim is pending or has been approved shall be made available to the public with that information concealed.

g. The subject of any trade secret claim pending or approved shall be treated as confidential information. Except as provided in subsection e. of this section, the department shall not disclose any confidential information to any person except an officer or employee of the State in connection with the official duties of the officer or employee under any law for the protection of public health, or to the contractors of the State and their employees if in the opinion of the department the disclosure is necessary for the completion of any work contracted for in connection with the implementation of this act. Any officer or employee of the State, contractor of the State, physician or osteopath, or employee of a county health department, local fire department, or local police department who has access to any confidential information, and who willingly and knowingly discloses the confidential information to any person not authorized to receive it, is guilty of a crime of the third degree.

h. The provisions of this section shall not apply to the disclosure of information concerning emissions, and shall not apply to the disclosure of any information required pursuant to any other act.

i. The Department of Health and the Department of Environmental Protection shall jointly adopt rules and regulations to implement the provisions of this section.

L.1983, c. 315, § 15, eff. Aug. 29, 1984.

[1] Section 34:5A-14.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-16. Employee requests for information; refusal to work; complaint; civil actions; penalty

a. Any employee or employee representative may request, in writing, from his employer, a copy of a workplace survey, hazardous substance fact sheet, or, where applicable, an environmental survey filed pursuant to the provisions of this act for the facility at which he is employed. The employer shall supply this material within five working days of the request. Any employee or employee representative may request, in writing, the chemical name and Chemical Abstracts Service number of the substance contained in any container which is not labeled pursuant to the provisions of section 14 of this act,[1] and the employer shall supply the employee or employee representative with this information within five working days of the request. An employee shall have the right to refuse to work with a hazardous

substance for which a request was made and not honored without loss of pay or forfeit of any other privilege until the request is honored.

b. Any employee or employee representative who believes that an employer has not complied with the provisions of subsection a. of this section may file a complaint with the Commissioner of the Department of Labor. Upon receipt of the complaint, the commissioner shall investigate the allegations contained in the complaint. If the commissioner, following an administrative hearing conducted pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), finds that the employer has violated the provisions of subsection a. of this section, he shall initiate a civil action by summary proceeding pursuant to "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.). Any employer violating the provisions of subsection a. of this section is liable to a penalty of not less than $2,500.00 for each offense.

L.1983, c. 315, § 16, eff. Aug. 29, 1984.

[1] Section 34:5A-14.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-17. Discharge or penalizing of employee for exercising rights; complaint; adjudication

a. No employer shall discharge, cause to be discharged, or otherwise discipline, penalize, or discriminate against any employee because the employee or his employee representative has exercised any right established in this act.

b. Any employee who believes that he has been discharged, or otherwise disciplined, penalized, or discriminated against by an employer in violation of subsection a. of this section may, within 30 days of the violation, or within 30 days of obtaining knowledge that a violation occurred, file a complaint with the Commissioner of the Department of Labor alleging the violation. Within 30 days of the receipt of a complaint, the commissioner shall conduct an investigation of the complaint. If after the investigation the commissioner determines that there is probable cause that the complaint is valid, he may refer the complaint to the Office of Administrative Law, which, upon the referral, shall commence an adjudicatory proceeding on the complaint, to be conducted as a contested case pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), and P.L. 1978, c. 67 (C. 52:14F-1 et seq.). If the Commissioner of Labor or the employee introduces evidence that prior to the alleged violation the employee exercised any right provided in this act, the employer shall have the burden to show just cause for his action by clear and convincing evidence. Within 45 days of the receipt of the recommendations of the administrative law judge, the commissioner shall adopt, reject, or modify the recommendations. The final decision of the commissioner shall be considered the final agency action thereon for the purposes of the "Administrative Procedure Act" and shall be subject only to judicial review as provided in the Rules of Court.

L.1983, c. 315, § 17, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-18. Right to know advisory council; membership; term; qualifications; quorum; officers and employees; compensation

a. There is established in the Department of Health a Right to Know Advisory Council, which shall consist of 11 members appointed by the Governor with the advice and consent of the Senate. Each of these members shall be appointed for a term of three years, provided that of the members of the council first appointed by the Governor, four shall serve for terms of one year, four shall serve for terms of two years, and three shall serve for terms of three years. Of these members, one shall be appointed from persons having training and experience in industrial hygiene recommended by recognized labor unions; one from persons recommended by

recognized environmental organizations; one from persons recommended by recognized public interest organizations; one from persons recommended by recognized organizations of chemical industries; one from persons recommended by recognized community organizations; one from persons recommended by recognized organizations of petroleum industries; one from persons recommended by recognized organizations of firefighters; one from persons recommended by recognized business or trade organizations; one from persons recommended by recognized organizations of small business; one from persons holding an M.D. degree recommended by recognized public health organizations; and one from persons with training and experience in environmental epidemiology recommended by recognized research or academic organizations. In the event that no recommendations for a particular category of membership are made to the Governor three months prior to the effective date of this act in the case of the initial appointments, or within 60 days of the date of the expiration of the term of office of any member or the occurrence of any vacancy in the case of subsequent appointments, the Governor shall appoint as a member for that category of membership a person whom he believes will be representative thereof.

b. A majority of the membership of the council shall constitute a quorum for the transaction of council business. Action may be taken and motions and resolutions adopted by the council at any meeting thereof by the affirmative vote of a majority of the members of the council present and voting.

c. The council shall meet regularly as it may determine, and shall also meet at the call of the Commissioner of the Department of Health, the Commissioner of the Department of Environmental Protection, or the Commissioner of the Department of Labor.

d. The council shall appoint a chairman and other officers as may be necessary from among its members. The council may, within the limits of any funds appropriated or otherwise made available to it for this purpose, appoint such staff or hire such experts as it may require.

e. Members of the council shall serve without compensation, but the council may, within the limits of funds appropriated or otherwise made available to it for such purposes, reimburse its members for necessary expenses incurred in the discharge of their official duties.

L.1983, c. 315, § 18, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-19. Duties

The council shall:

a. Advise the Department of Health on the revision of the workplace hazardous substance list and the Department of Environmental Protection on the revision of the environmental hazardous substance list.

b. Advise the Department of Environmental Protection, the Department of Health, and the Department of Labor on the implementation of his act.

c. Review any matters submitted to it by the Department of Health, Department of Environmental Protection, or the Department of Labor, and state its position within 90 days.

L.1983, c. 315, § 19, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-20. Powers

The council may:

a. Review any aspect of the implementation of this act, and transmit its recommendations to the appropriate department or departments.

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b. Hold public meetings or hearings within the State on any matter or matters related to the provisions of this act.

c. Call to its assistance and avail itself of the services of such employees of any State, county or municipal department, board, commission, or agency as may be required and made available for such purposes.

L.1983, c. 315, § 20, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-21. Joint procedure concerning implementation of act; revision of workplace or environmental hazardous substance list

The Department of Health, the Department of Environmental Protection, and the Department of Labor, in conjunction with the council, shall jointly establish a procedure for annually receiving information, advice, testimony, and recommendations from the council, the public, and any other interested party, concerning the implementation of this act. This procedure shall include a mechanism for revising the workplace hazardous substance list and the environmental hazardous substance list. Any revision of the workplace hazardous substance list or environmental hazardous substance list shall be based on documented scientific evidence. The Department of Health and Department of Environmental Protection shall publicly announce any revisions of the workplace hazardous substance list or the environmental hazardous substance list, and any such additions or revisions shall be made pursuant to the provisions of the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.).

L.1983, c. 315, § 21, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-22. County health department file of surveys; public access

Each county health department shall maintain a file of workplace surveys and environmental surveys transmitted to it pursuant to the provisions of this act. These surveys, pursuant to the provisions of subsection f. of section 15 of this act,[1] shall be made available to the public at reasonable hours and at a fee not to exceed the cost of reproducing the surveys.

L.1983, c. 315, § 22, eff. Aug. 29, 1984.

[1] Section 34:5A-15.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-23. Civil actions for violations; jurisdiction; award

Any person may bring a civil action in law or equity on his own behalf against any employer for a violation of any provision of this act or any rule and regulation promulgated pursuant thereto or against the Department of Environmental Protection or the Department of Health for failure to enforce the provisions of this act or any rule or regulation promulgated pursuant thereto. The Superior Court shall have jurisdiction over these actions. The court may award, whenever it deems appropriate, costs of litigation, including reasonable attorney and expert witness fees.

L.1983, c. 315, § 23, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A–24. Substances not included on hazardous substance lists; reporting; liability

Substances not included on the workplace hazardous substance list or the environmental hazardous substance list shall not be subject to the reporting provisions of this act. However, the absence of any substance from the workplace hazardous substance list or the environmental hazardous substance list, or the provision of any information by an employer to an employee or any other person pursuant to the provisions of this act, shall not in any way affect any other liability of an employer with regard to safeguarding the health and safety of an employee or any other person exposed to the substance, nor shall it affect any other duty or responsibility of an employer to warn ultimate users of a substance of any potential health hazards associated with the use of the substance pursuant to the provisions of any law or rule or regulation adopted pursuant thereto.

L.1983, c. 315, § 24, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

34:5A–25. Local police or fire departments; availability of surveys to public; request for additional information; communications program with research and development laboratory

a. No local police department or local fire department receiving workplace surveys or environmental surveys pursuant to the provisions of this act shall make the surveys available to the public. Any county health department, local police department, or local fire department may request from an employer submitting surveys to it further information concerning the surveys, and the employer shall provide the additional information upon the request therefor. The employer may require the requester to sign an agreement protecting the confidentiality of any additional information provided pursuant to this section.

b. Every employer with a research and development laboratory at his facility shall establish a communications program with the local fire department, which shall be designed to assist the fire department in adequately preparing to respond to emergencies at the research and development laboratory.

L.1983, c. 315, § 25, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

34:5A–26. Worker and community right to know fund; fee assessment against employers; disbursement; audit; expiration of section

a. There is established in the Department of the Treasury a nonlapsing, revolving fund to be known as the "Worker and Community Right To Know Fund." The fund shall be credited with all fees collected pursuant to this section and interest on moneys in the fund shall be credited to the fund and all moneys in the fund are appropriated for the purposes of the fund, and no moneys shall be expended for those purposes without the specific appropriation thereof by the Legislature. The State Treasurer shall be the administrator of the fund, and all disbursements from the fund shall be made by the State Treasurer upon the warrant of the Director of the Division of Budget and Accounting.

b. The Department of Labor shall annually assess each employer a fee of not less than $50.00 nor more than an amount equal to $2.00 per employee to provide for the implementation of the provisions of this act. All fees collected by the department pursuant to this section shall be deposited in the fund.

c. The moneys in the fund shall be disbursed only for the following purposes:

(1) Expenses approved by the Director of the Division of Budget and Accounting and incurred by the Department of Health, the Department of Environmental

Protection, the Department of Labor, the Department of the Treasury, and the county health departments in implementing the provisions of this act; and

(2) Repayment to the General Fund of any moneys appropriated by law in order to implement the provisions of this act.

d. The State Treasurer shall annually disburse the moneys in the fund for expenditures approved by the Director of the Division of Budget and Accounting pursuant to paragraph (1) of subsection c. of this section, but in no case in an amount to the several departments that is greater than the following percentages of the fund available in any one year: the Department of Health, 40%; the Department of Environmental Protection, 20%; the county health departments, 15%; the Department of Labor, 15%; and the Department of the Treasury, 10%.

e. Beginning two years after the effective date of this act, the State Treasurer shall make an annual audit of the fund to determine the adequacy of moneys on deposit in the fund to support the implementation of the provisions of this act. If the State Treasurer, in consultation with the Department of Health, the Department of Environmental Protection, and the Department of Labor makes a determination that the revenues in the fund are sufficient to warrant a reduction in the fee imposed pursuant to this section for the ensuing year, he may reduce the amount of the fee imposed during that year by an amount warranted by the balance in the fund at the time of the determination.

f. The provisions of this section shall expire five years following the effective date of this act.

L.1983, c. 315, § 26.

Subsection a. of § 34:5A-26 effective Aug. 29, 1983 and all of § 34:5A-26 effective Aug. 29, 1984, see note under § 34:5A-1.

Expiration

This section expires five years following the effective date of this act, in accordance with its own terms.

Effective date, see note following § 34:5A-1.

Section 34 of L.1983, c. 315, eff. Aug. 29, 1983, provides:

"There is appropriated $1,700,000.00 from the General Fund as a loan to the "Worker and Community Right to Know Fund", created pursuant to section 26 of this act, to implement the provisions of this act. The loan to the "Worker and Community Right to Know Fund" shall be repaid with interest to the General Fund in installments beginning in the first year following enactment and each year thereafter as surplus moneys accrue to the fund. The rate of interest to be paid shall be the same average annual rate as earned by the State in its general investment account for the year in which a loan repayment installment is made. Notwithstanding the provisions of subsection e. of section 26 of this act, the State Treasurer shall not reduce the fee imposed pursuant to this act until the entire loan has been repaid."

34:5A-27. Legislative intent

It is the intent of the Legislature that the program established by this act for the disclosure of information concerning hazardous substances to employees and the public constitute the principal program in this State. To this end, no municipality or county shall enact any law or ordinance requiring the disclosure of information about, or the identification of, hazardous substances in the workplace or the environment to the extent that the disclosure of information or identification is provided for under this act, and, further, the enactment of this act shall supersede any municipal or county law or ordinance enacted subsequent to May 11, 1983 providing for this disclosure or identification.

L.1983, c. 315, § 27, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-28. **Joint report**

Within two years of the effective date of this act the Department of Health, the Department of Environmental Protection, and the Department of Labor shall jointly prepare and submit to the Governor and the Legislature a report evaluating the implementation of this act, together with any recommendations for legislative or administrative action deemed necessary or appropriate.

L.1983, c. 315, § 30, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-29. **Right to enter facility to determine compliance**

a. The Department of Health shall have the right to enter an employer's facility during the normal operating hours of the facility to determine the employer's compliance with the provisions of subsection a. of section 7, and sections 10, 11, 12, 13, and 14 of this act,[1] and any rules and any regulations adopted pursuant thereto.

b. The Department of Environmental Protection shall have the right to enter an employer's facility during the normal operating hours of the facility to determine compliance with subsection b. of section 7 and section 9 of this act,[2] and any rules and any regulations adopted pursuant thereto.

L.1983, c. 315, § 31, eff. Aug. 29, 1984.

1 Sections 34:5A-7, 34:5A-10, 34:5A-11, 34:5A-12, 34:5A-13 and 34:5A-14.
2 Sections 34:5A-7 and 34:5A-9.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-30. **Rules and regulations**

Except as otherwise provided in this act, the Department of Health, the Department of Environmental Protection, the Department of Labor and the Department of the Treasury shall adopt any rules and regulations necessary to carry out their respective responsibilities under this act.

L.1983, c. 315, § 32, eff. Aug. 29, 1984.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A-1.

34:5A-31. **Remedies**

a. Whenever, on the basis of information available to him, the Commissioner of the Department of Environmental Protection finds that an employer is in violation of subsection b. of section 7, or of subsection b. or c. of section 9 of this act,[1] or any rule and regulation adopted pursuant thereto, or the Commissioner of the Department of Health finds that an employer is in violation of subsection a. of section 7, or of section 10, 11, 12, 13, or 14 of this act,[2] or any rule and regulation adopted pursuant thereto, the Commissioner of the Department of Environmental Protection, or the Commissioner of the Department of Health, as the case may be, shall:

(1) Issue an order in accordance with subsection b. of this section requiring the employer to comply;

(2) Bring a civil action in accordance with subsection c. of this section;

(3) Levy a civil administrative penalty in accordance with subsection d. of this section; or

(4) Bring an action for a civil penalty in accordance with subsection e. of this section.

The exercise of any of the remedies provided in this section shall not preclude recourse to any other remedy so provided.

b. Whenever, on the basis of information available to him, the Commissioner of the Department of Environmental Protection finds that an employer is in violation of subsection b. of section 7, or of sections b. or c. of section 9 of this act[1] or any rule or regulation adopted pursuant thereto, or the Commissioner of the Department of Health finds that an employer is in violation of subsection a. of section 7, or of section 10, 11, 12, 13, or 14 of this act,[2] or any rule or regulation adopted pursuant thereto, the Commissioner of the Department of Environmental Protection or the Commissioner of the Department of Health, as the case may be, may issue an order (1) specifying the provision or provisions of this act, or the rule or regulation adopted pursuant thereto of which the employer is in violation; (2) citing the action which caused the violation; (3) requiring compliance with the provision of this act or the rules and regulations adopted pursuant thereto of which he is in violation; and (4) giving notice to the employer of his right to a hearing on the matters contained in the order.

c. The Commissioner of the Department of Environmental Protection or the Commissioner of the Department of Health, as appropriate, is authorized to commence a civil action in Superior Court for appropriate relief from a violation of this act. This relief may include an assessment against the violator for the costs of any investigation, inspection, or monitoring survey which led to the discovery and establishment of the violation, and for the reasonable costs of preparing and litigating the case under this subsection.

d. The Commissioner of the Department of Environmental Protection or the Commissioner of the Department of Health, as appropriate, is authorized to impose a civil administrative penalty of not more than $2,500.00 for each violation and additional penalties of not more than $1,000.00 for each day during which a violation continues after receipt of an order from the commissioner to cease the violation. Any amount imposed under this subparagraph shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, and duration. No civil administrative penalty shall be imposed until after the employer has been notified by certified mail or personal service. The notice shall include a reference to the section of the act, rule, regulation or order violated; a concise statement of the facts alleged to constitute a violation; a statement of the amount of the civil administrative penalties to be imposed; and a statement of the employer's right to a hearing. The employer 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 finding that a violation has occurred, the commissioner may issue a final order after imposing 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. A civil administrative penalty imposed under this section may be compromised by the commissioner upon the posting of a performance bond by the employer, or upon terms and conditions the commissioner may establish by regulation.

e. An employer who violates this act, an order issued pursuant to subsection b. of this section, or a court order issued pursuant to subsection c. of this section, or who fails to pay in full a civil administrative penalty levied pursuant to subsection d. of this section, shall be subject, upon order of a court, to a civil penalty not to exceed $2,500.00 for each day during which the violation continues. An employer who willfully or knowingly violates this act, or who willfully or knowingly makes a false statement, representation, or certification in any document filed or required to be maintained under this act, or who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device required to be maintained pursuant to this act, is subject upon order of a court, to a civil penalty of not less than $10,000.00, nor more than $5,000.00 per day of violation. Any penalty imposed pursuant to this subsec-

tion may be collected, and any costs incurred in connection therewith may be recovered, in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S. 2A:58–1 et seq.). The Superior Court or county district court shall have jurisdiction to enforce "the penalty enforcement law."

L.1983, c. 315, § 33, eff. Aug. 29, 1984.

1 Sections 34:5A–7 and 34:5A–9.
2 Sections 34:5A–7, 34:5A–10, 34:5A–11, 34:5A–12, 34:5A–13 and 34:5A–14.

Effective Aug. 29, 1984

Effective date, see note following § 34:5A–1.

CHAPTER 6. INSPECTION AND REGULATION OF FACTORIES, MINES, WORKSHOPS AND OTHER INDUSTRIES

ARTICLE 3A. HIGH VOLTAGE LINES

Section
34:6–47.7a. Penalty for violation of act.

ARTICLE 11A. COMMON CARRIERS

34:6–119.1. Company defined.
34:6–119.2. Facilities for employees; rest rooms, lunch rooms, etc.
34:6–119.3. Determination of adequacy by commissioner; rules and regulations.
34:6–119.4. Compliance with act.
34:6–119.5. Investigations and inquiries by Department of Health.
34:6–119.6. Violation of act; penalty.

ARTICLE 1. FIRE ESCAPES AND FIRE PROTECTION

34:6–1 to 34:6–21. Repealed by L.1965, c. 154, § 20

34:6–22, 34:6–23. Repealed by L.1965, c. 154, § 20

ARTICLE 2. ELEVATORS

34:6–24 to 34:6–46. Repealed by L.1965, c. 154, § 20

ARTICLE 3. HOISTWAYS, HATCHWAYS AND WELLHOLES

34:6–47. Repealed by L.1965, c. 154, § 20

Law Review Commentaries

Environmental factors in local governmental restrictions on mines and quarries. Lewis Goldshore, (1977) 9 Rutgers-Camden L.J. 43.

ARTICLE 3A. HIGH VOLTAGE LINES

34:6–47.1. Definitions

For the purpose of this act:

a. "Commissioner" shall mean the Commissioner of Labor and Industry or any of his authorized representatives.

b. "High-voltage lines" means electrical conductors installed above ground and having a voltage differential in excess of 750 volts between any pair of conductors or between any conductor and ground. In the case of alternating current, the voltage shall be measured in R.M.S. value. This definition shall not include approved

last deletions by ~~strikeouts~~

AFFIDAVIT

THOMAS A. BURKE, of full age, being duly sworn according to law, deposes and says:

1. I am Director of the Office of Science and Research of the New Jersey Department of Environmental Protection (herein after referred to as the Department). I have been Director of the Office since September 1980. I have been employed by the Department since January 1977. The Office of Science and Research is responsible for implementing the Department's responsibilities under Worker and Community Right to Know Act.
2. I have received a doctorate in epidimeology from the Department of Research Medicine at the University of Pennsylvania School of Medicine. I received a Masters of Public Health Epidemiology from the University of Texas School of Public Health Science Center at Houston in 1976.
3. Under the 1983 Worker and Community Right to Know Act the Department requires employers to complete an Environmental Survey and Emergency Services Information Survey about the hazardous materials present at their facilities.
4. The Environmental Survey - Part I asks for basic information essential for acquiring data on the location of toxics in the State. Employers are required to complete this survey and send it to the Department and county agencies, which in turn make the information available to the public.
5. The Department's Environmental Survey - Part II is essential for acquiring information about disposal, discharge, and emissions of

toxics to which the public may be exposed. This information is also available to the public through the same mechanisms described above for the Part I Survey.

6. The Department conducted extensive research to develop a list of 154 substances which might pose chronic health effects and therefore should be reported by employers on the Environmental Survev. The federal OSHA hazard communication rule, however, requires employers to determine which substances at their facility are hazardous. The Department's list should aid employers in determining what hazardous substances they use for purposes of complying with the federal rule.

7. The Emergency Services Information (ESI) Survey requires employers to report substances contained in the U.S. Department of Transportation's Hazardous Materials Table. This table, used frequently by emergency response personnel, includes substances that may pose risks under emergency conditions. The ESI Survey is sent directly by employers to fire and police personnel to prepare and respond to emergencies.

8. In contrast to the federal rule, under the Right to Know Act the Department has adopted a list of specific substances developed by the U.S. Department of Transportation, for which employers must report. The Department provides employers with a copy of the list. As a result, unlike the federal rule, employers are not required to conduct extensive research to determine which substances are hazardous. In fact, as with the Department's Environmental Survey, the ESI Survey should ease the burden of compliance with the federal rule by aiding employers in determining what hazardous substances they use.

9. The Department's Environmental Survey Part I and ESI Survey request basic information about the substances on the referenced lists. Each

survey is only one page in length, and the information required for completion of the surveys is available to employers who have inventoried their facilities. Such an inventory is essential for compliance with the OSHA rule. Thus, a stay would place a minimal burden on employers.

10. The employers in the manufacturing sector (Standard Industrial Classification (SIC) Codes 20-39) use a substantial number of hazardous substances in quantities that can pose significant health and safety risks to the citizens of New Jersey. For instance, the Department's Industrial Survey of more than 15,000 employers in the manufacturing sector disclosed annual emission of more than 1,460,000 pounds of vinyl chloride, a human carcinogen.

11. Without a stay which would allow DEP to implement the Right to Know Act in the manufacturing sector, the Department's ability to protect the public health and safety would be severely hampered. Only with information available under the Act can DEP effectively prepare for and respond to emergencies.

12. As evidenced by recent emergencies in chemical plants in the state, it is essential that government agencies closely monitor the precautions taken by industry to safeguard hazardous materials. Without knowledge of the location of hazardous materials (a number of which have the same potential for harm as Methyl isocyanate did in Bhopal) used by manufacturers in the state, the Department's ability to take preventive or remedial action is severely limited. Thus, without Right to Know coverage for the manufacturing sector, the state runs a much greater risk of injury to persons and property from chemical emergencies.

13. Emergency response personnel are also severly handicapped without

access to information, reportable under the Right to Know Act, about hazards at manufacturing facilities. Without this information emergency response personnel will be responding to chemical emergencies unaware of the dangers they may face, and therefore unable to protect their health. They will also lack adequate information to respond to emergencies in an effective manner, thus jeopardizing the public's health. Thus, without the Act there is a potential for serious health effects resulting to emergency response personnel and community residents as a result of chemical emergencies.

14. Scientific evidence continues to mount that any exposure to a carcinogen increases the risk of contracting cancer. Without the data available from the Act, The Department will be unable to track the use and fate of carcinogens in the State. The Department's ability to reduce exposure of the state's citizens to such substances will thus be severely restricted. Although it is impossible to estimate the quantity of carcinogens that would go undetected, it is safe to assume that citizen exposure, and thus the risk of contracting cancer, will be higher than if the Right to Know Act were in effect. In a state with the second highest cancer death rate in the nation such a risk is conceivably great.

15. Without information available under Right to Know, doctors cannot adequately diagnose and treat toxics-related illnesses. In fact, toxics-related ailments can be exacerbated if treated improperly due to misdiagnosis. Thus, without Right to Know many individuals will needlessly suffer.

16. Thus, information required by the Environmental and ESI Surveys is critical to the state's ability to protect public health. Labeling, as addressed in Jim Ross'S affidavit, is essential to emergency response

personnel for dealing with emergency situations. However, even if the New Jersey labeling provision for manufacturing industries remains preempted, there is valuable information that can be obtained from completed surveys.

Thomas A. Burke

Thomas A. Burke

Sworn to and subscibed before me this 28th day of January, 1985.

Scott B. Dubin

Scott B. Dubin
An Attorney at Law of New Jersey

AFFIDAVIT

I, JAMES ROSS, of full age, being duly sworn according to law deposes and says:

(1) I am the Chief of the Office of Emergency Response Preparedness of the New Jersey Department of Environmental Protection (DEP). In this capacity, I directly supervise eight individuals and coordinate the response activities of numerous specialists within the DEP when emergency situations occur in the State.

(2) A detailed account of my responsibilities, academic, employment and training experience, and publications is set forth in my Affidavit, dated December 5, 1984, and filed by the New Jersey Office of the Public Advocate. (A copy of the December 5 Affidavit is annexed hereto.) In that Affidavit I stated that more than 3,000 hazardous emergencies occur in New Jersey annually; examples were described.

(3) This Affidavit is written in support of New Jersey's request for a stay of Judge Debevoise's Order concerning the Worker and Community Right to Know Act ("Act"). The Order exempts employers in the manufacturing sector (Standard Industrial Classification (SIC) Codes 20-39) from the provisions requiring employers to complete

an Emergency Services Information Survey and place labels on containers listing the chemical name and Chemical Abstracts Service number. The requirement that manufacturing employers complete Emergency Services Information (ESI) Surveys regarding substances listed by the United States Department of Transportation would greatly assist emergency response personnel in evaluating risks at facilities. The ESI Survey is sent by employers directly to local fire and police departments to enable them to adequately respond to emergencies. The surveys are also sent to the Department of Environmental Protection to aid our statewide emergency response program.

(4) The Emergency Services Information Survey asks the following information about the substance:

a. Hazardous Material description;

b. Hazard class (U.S. Department of Transportation reference chart is provided to employers);

c. Identification number (a reference chart is provided to employers);

d. Container type (method of storage or type of container used);

e. Mixture (the degree to which the material is present as a component of a mixture; multiple choice of broad range quantities); and

f. Inventory Range (maximum during 1984; multiple choice of broad range quantities).

(5) The U.S. Department of Transportation distributes its Emergency Response Guidebook to all fire departments in the nation, one free copy per vehicle. The Guide is the firefighter's first and primary tool in the identification of hazardous substances. Once the material is identified, the Guide provides protective action. If a person cannot identify the material, he or she cannot use the Guide to determine the emergency protective action. There are more sophisticated guides; however, they all require the same basic facts -- knowledge of the name and the number of a substance to be effectively used. It is important for a person using a guide to know the correct spelling of a substance. Subtle changes can entirely change the nature of the compound and thereby lead to improper mitigation techniques. A U.S.D.O.T. or U.N. identification number is shared by many compounds having similar flammable hazards. They may, however, have distinctly different toxic hazards. It is,therefore, necessary to know both the name and identification number of a hazardous substance to protect the firefighter and emergency responder from these hazards while responding to a fire, spill, or other emergency.

(6) The Act also requires that employers place labels on containers identifying hazardous constituents. This requirement enables firefighters and emergency response personnel to take necessary precautions and use appropriate means to protect themselves and the public to contain and control emergencies. The federal government regulates hazardous materials when they are in the form of cargo, requiring that transporters list the name and identification number of a material on manifests and labels when it is being shipped. When the material arrives at a facility and is placed in different , smaller containers for use at a facility, the material is no longer identified. At best, these smaller containers are labeled with names which do not reveal the toxicity or hazard class, but rather only the purpose for which the material is intended. The only indication to the firefighters that there may be a hazard is if the material is placed in a red can (indicating a flammable material). Employers at the scene of an emergency are often unable to provide a description of the containers for the emergency responders.

(7) Even if the New Jersey labeling provision for manufacturing industries remains preempted, crucial information is obtained from completed Emergency Services Information Surveys. Emergency response personnel need this information to respond to emergencies at manufacturing facilities. If the manufacturing sector is exempt from the requirement to provide this information, it will not be

available to the people whose lives are on the line when they enter a facility to respond to a fire, spill, or other emergency. Without information about hazardous substances at manufacturing facilities, emergency response personnel will be responding unaware of the dangers they may face; they may be unable to adequately protect their health and safety. They will also lack adequate information to respond to emergencies in an effective manner, thus potentially jeopardizing the public safety as well.

JAMES ROSS

Sworn to and subscribed before
me this 28th day of January 1985

Scott B. Dubin
An Attorney at Law of New Jersey

STATE OF NEW JERSEY)
)
COUNTY OF MERCER) ss. AFFIDAVIT

Dr. KENNETH D. ROSENMAN, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Director of Occupational and Environmental Health Services for the New Jersey State Department of Health. I am board certified in Internal Medicine and in Preventive and Occupational Medicine. I am also a former professor of epidemiology.

2. I am responsible for directing the implementation of the Worker and Community Right-to-Know Act by the Department of Health and for directing the State Health Department's efforts to protect the public from environmental health hazards.

3. I have reviewed the affidavits prepared by Dr. Thomas Burke and Jim Ross of the Department of Environmental Protection concerning those provisions of the law which are particularly important to protect the community's public health. I wish to point out that both departments need to have the right of entry into a workplace to assure protection of the community's public health. The Department of Environmental Protection needs the right of entry to ensure that the emergency services information survey is filled out correctly and accurately. The

Department of Health needs the right of entry to ensure that the public's health is protected from exposure to hazardous chemicals and to assess the public health effects from such chemicals. The major source of information on the human health effects of environmental exposure to chemicals is data on the health effects to individuals exposed to higher levels in the workplace. In order to protect the public's health from environmental exposure to hazardous chemicals it is necessary for the Department of Health to enter a workplace to conduct health and exposure surveys. Section 10(c) of the law (N.J.S.A. 34:5A-10(c)) provides the Department with important health and exposure information for these surveys.

4. Labeling of hazardous substances is also an important provision that I believe is necessary to protect the public from chemical hazards. Firefighters and other emergency responders conduct preventive fire activity by inspecting facilities for their storage and handling of chemical containers. They need to see labeled containers in order to adequately perform their job to protect the public and themselves from fires, chemical explosions and spills.

Kenneth D. Rosenman, M.D.

Sworn to and subscribed before
me this 7th day of February, 1985

Richard Willinger
An Attorney at Law of New Jersey