TESTIMONY

of

THE NEW JERSEY PUBLIC INTEREST RESEARCH GROUP (NJPIRG)

before

THE GOVERNOR'S RIGHT TO KNOW ADVISORY COUNCIL
ANNUAL PUBLIC HEARING

Presented By

Program Director, NJPIRG

March 27, 1992
INTRODUCTION

The New Jersey Public Interest Research Group is a non-profit, nonpartisan organization with more than 75,000 members throughout New Jersey. NJPIRG engages in independent research, litigation and advocacy in the areas of environmental preservation, consumer protection, and governmental reform. On behalf of our members, we thank the Right to Know Advisory Council for affording us this opportunity to present our testimony regarding the progress of the New Jersey Worker and Community Right to Know Act.

NJPIRG played a major role in passing both the New Jersey Right to Know Act of 1983 and the Federal Superfund Amendments and Reauthorization Act (SARA) OF 1986. Since the enactment of this landmark legislation, NJPIRG and our national lobbying office, United States Public Interest Research Group (USPIRG), were instrumental in the oversight of the promulgation of the Right to Know regulations by the New Jersey Department of Environmental Protection (NJDEP) and the United States Environmental Protection Agency (USEPA). In addition, NJPIRG and other state PIRGs have been among the first to use the data collected under these laws to inform the public about toxic hazards in their communities. The data available through the right to know law contributed significantly to the passage of the New Jersey Pollution Prevention Act (NJPPA), adopted on August 1, 1991.

THE RIGHT TO KNOW LAWS PROVIDE VITAL INFORMATION

Utilizing the information available through the federal and state Right to Know laws, NJPIRG has authored numerous reports outlining the toxics problem in New Jersey. In the last hearing we described such report, entitled "Chemical Consequences, An Investigation of Toxic Chemical Use and Its Impact on New Jersey." This study revealed that over 7.4 billion pounds of toxic chemicals were used by segment of New Jersey facilities in one year alone. The chemical use figures in this study were derived from the then existing DEQ-100 (now known as the DEQ-114) quantity throughput data which is unique to the New Jersey law.

NJPIRG also examined the Form R Toxic Release Inventory (TRI) data filed by those industrial facilities reporting the largest discharges of toxics to sewer systems in the state. We then compared this data with the facility's discharge permit issued by the receiving sewage treatment plant. In our report, "Permit to Pollute—A Study of Toxics Discharged to New
Jersey's Sewers," we selected thirty facilities with the largest total discharges of Right to Know pollutants to Publicly Owned Treatment Works (POTWs) in 1987.

In an overwhelming number of cases, sewage treatment plants have taken a "hands off" approach to controlling toxics. Our study found that less than 10% of the toxic substances reported by industries in the study are regulated by the sewage treatment plants. The study further reveals the massive volumes of unregulated toxics flowing into sewage treatment plants ill-equipped to handle these hazardous materials. We recommended that sewage treatment plants exercise greater authority in limiting toxics and in addition the treatment plants should be held accountable for toxics they release into the environment.

Using TRI chemical emissions data in our latest report, "Risky Business, An Industry By Industry Investigation of Toxic Releases in New Jersey," we disclosed that over 163 million pounds of hazardous substances were released into New Jersey's environment and transferred to offsite facilities for treatment and disposal. Five industries alone were responsible for over 143 million pounds or 88% of all reported statewide toxic releases. The Chemical and Allied Products industry contributed 110 million pounds or two-thirds of the overall total. The Chemical Industry and the other four top polluting industries are now targeted as the priority industrial facilities in the NJPPA.

These are just a few examples of how the data can be used to ascertain the extent of some of the existing environmental hazards. Availability of these rough data enables citizens of New Jersey to begin to see the quantities of toxics discharged by specific facilities into all environmental media and promotes creative solutions to the problems. However, as alarming as these figures may be, they barely begin to draw a complete picture of the toxics problem in New Jersey.

THE ADVISORY COUNCIL SHOULD TAKE ON AN AGGRESSIVE STANCE

NJPIRG believes that the Right to Know Advisory Council should be instrumental in bringing about some fundamental changes in the progress and enforcement of these important laws. The language within the state Right to Know law confers upon the Council the power to "review any aspect of the appropriate department or implementation of this act, and transmit its recommendations to the appropriate department or departments." N.J.S.A. 34:5A-20(a). We ask today that the Council consider the following suggestions for needed improvements in the existing law and execute its powers to recommend that they are implemented.
RIGHT TO KNOW REPORTING SHOULD DOVETAIL WITH POLLUTION PREVENTION STRATEGIES

One component of the original intent of the Right to Know law was to encourage industrial facilities, for the first time, to take a serious look at their environmental chemical discharges. The expectation was that these facilities would then seek to reduce these emissions and conduct their operations in a more environmentally and economically efficient manner.

Severe data limitations restrict the public's ability to assess whether firms are actually achieving toxics use and emissions reductions. The federal section 313 form Rs only require facilities to report their releases or transfers of chemical, not the amounts of the chemical in the wastes created by production process before the wastes are treated and then released or disposed.

Similarly, the state DEQ-114 quantity throughput information is limited to facility-wide chemical use information as opposed to specific production process specific data. It is therefore impossible to differentiate whether a release has been reduced because some kind of treatment or recycling has been added or because less waste is being produced by the productions process. The situation is further complicated by the fact that no data is provided on the amount of product produced by a facility each year. The Right to Know law needs to be expanded and enforced in order to achieve more useful and comprehensive system of gathering this vital information.

To a significant extent, the right to know information will be expanded via the implementation of the New Jersey Pollution Prevention Act. This new law will require a large segment of the state's largest toxics users and producers to conduct a thorough audit of their facility and develop a plan for reductions in the use of hazardous substances and generation of nonproduct output.

Under the Pollution Prevention Act, chemical use reporting will be significantly expanded to include more extensive facility wide and production process information. In order to streamline the program and avoid duplication of resources, some of the information collection and analysis will be accomplished in conjunction with the Right to Know program. We urge the Council to track the progress of the relationship between the Office of Pollution Prevention and
the Right to Know program, as the success of this relationship is crucial to the progress of true pollution prevention in our state.

It is our hope that our pollution prevention program will place New Jersey at the cutting edge of developing cleaner, safer and more cost effective technologies. The Council can play a significant role in ensuring that this goal is achieved.

MORE FACILITIES MUST BE IDENTIFIED

Currently the DEPE is collecting the Form R reporting forms which are required to be submitted to the state agency via the federal right to know law. The DEPE then sends the New Jersey Supplemental Reporting surveys (formerly DEQ-100 and now the DEQ-114) to those companies who actually submit the Form R.

Unfortunately, the DEPE is relying solely upon federal Form R compliance in determining which facilities in New Jersey are mailed the state supplemental reporting forms. We suggest that the DEP utilize the information submitted in the inventory reporting forms to begin to identify more facilities in the state who should be submitting both Form R and the DEQ-100 supplemental reporting forms. They should be actively seeking to expand the scope of coverage of the law to include all of the larger chemical users and dischargers. This would not only provide the agency and the public with more complete statewide toxics release and facility wide use information, but also help to identify companies who should be phased into the pollution prevention program. We hope that the Council will investigate this problem and recommend swift action within the program.

TOO FEW SUBSTANCES ARE COVERED BY THE FEDERAL AND STATE LAWS

The lists of substances contained in both federal and state laws are far too abbreviated. Section 313 of the federal law currently requires reporting of over 330 substances. By virtue of the enactment of the Pollution Prevention Act, the NJRTK list will include all of the substances on the federal Section 313 list. By contrast, over 70,000 hazardous substances are commonly used by industry in the U.S. at the present time. In addition, 500-1000 new substances are created each year.

According to N.J.S.A. 34:5A-19(a) it is a mandatory requirement that the Right to Know Advisory Council "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." Although the Pollution Prevention law will require expansion of the NJ Environmental Hazardous Substance list to include all of the substances on the federal section 313 list, we hope that the Council will seriously consider recommending even further expansion of the hazardous substance lists in the future.

According to a recently released report authored by the Natural Resources Defense Council (NRDC) there are a number of substances which should be included on the list of reportable substances under the federal right to know law. The NRDC report maintains that the Toxic Release Inventory (TRI) excludes over 500 chemicals listed as toxic under various environmental laws including such notorious pollutants as radionuclides, coke oven emissions, dioxin, furans, HCFCs, DDT, 2,4,5-T, Kepone, and polycyclic organic matter. Discharges of the following substances are not publicly reported:

* 16 hazardous air pollutants, 5 extremely hazardous substances, and 43 ozone-depleting substances listed in the 1990 Clean air Act Amendments;

* 40 Clean Water Act priority pollutants;

* 140 chemicals regulated as hazardous waste under the Resource Conservation and Recovery Act (RCRA) because of acute or chronic toxicity;

* 16 Safe Drinking Water Act toxics;

Over 200 chemicals identified as known or probable human carcinogens by EPA, the National Toxicology Program, or the International Agency for Research on Cancer;

69 FIFRA special review pesticides

90 reproductive toxins identified by the California Department of Health


RATE RELEASE INFORMATION AND ENFORCEMENT MECHANISMS

Other points of concern for the Right to Know Program are the lack of release rate information and the lack of proper enforcement mechanism to identify non compliers. Release rate information is critical to assessing the immediate and long term risks posed to residents via concentrations of chemicals in the air. Without these data it is impossible to determine if one year's releases occurred over 300 days or 3 hours.
It is apparent that neither the NJDEP nor the USEPA have established anything but crude mechanisms for detecting non-compliers under the Right to Know laws. If either law is to be respected by companies there must be an assurance that those who fail to submit information or submit misleading information will be discovered and penalized.

THE COUNCIL SHOULD PLAY AN ACTIVE ROLE IN CLOSING FEDERAL REGULATORY LOOPTHLES

Contrary to the law and the spirit of right to know, the EPA's regulatory policies are allowing companies to ship millions of pounds of toxic wastes off-site to "recycling" facilities without informing the public. This "recycling loophole" in the right to know reporting is diminishing the value of our right to know law. Toxic wastes which are passing unreported through the recycling loophole have cause serious harm to public health and the environment. Further, the gap in the right to know reporting tends to provide a systematically distorted picture of industry's environmental record. Most importantly, the regulatory loophole is seriously undermining the usefulness of both the national and New Jersey data collection and is creating a significant barrier on the availability of accurate information to citizens who have the right to know about toxic contamination in their communities and workplaces.

TASK FORCE ON UNIVERSAL LABELING

NJPIRG applauds the Council for its creation of the Task Force on Universal Labeling. We understand that discussions among representatives from various constituencies, including representatives from industry, emergency response, labor, environment, Department of Health, and Department of Environmental Protection and Energy yielded some important improvements to the labeling regulations. We urge the Council to ensure that the Task Force continue to function in the event of the need to address other universal labeling issues. We hope that the Task Force's suggested regulatory improvements will deter any attempts to weaken the substantive law.

COUNCIL SHOULD MONITOR POTENTIAL AMENDMENTS TO RTK LAW

The NJRTK law is the strong law of its kind in the entire country. In fact, it has become the national model. We urge the Council to carefully monitor any legislation introduced this session that might potentially weaken any provision of the law. At a time when we should be moving forward and expanding the public's right to know, weakening changes to the state right
to know law would be a step backward in terms of protecting the citizens and the environment of New Jersey.

COUNCIL SHOULD ACTIVELY SUPPORT EXPANDED FEDERAL RTK LEGISLATION

It is important to note that many of the issues we have raised today will be addressed in federal legislation. The Community Right to Know More Act introduced by Representative Sikorski (D-MN) seeks to increase the number of facilities and substances reporting under the existing federal RTK law, close the "recycling loophole," require rate release information, and create a provision for toxics use reduction planning and reporting. We urge the Council to actively support the Sikorski measure. A letter from the Council to the New Jersey Delegation would send the message to our representatives in congress that New Jersey supports federal Right to know expansion.

CONCLUSION

The Right to Know law mandates that citizens have access to detailed information on toxic substances being used in their workplaces and stored or released in their communities across the state. The Right to Know Advisory Council should continue to use its advisory power to insure that the law be strengthened, enforced and that complete information be made more easily available to workers and the public. Our right to know will give us the power to act; and together we can ensure a cleaner and safer workplace and environment for the residents of New Jersey. Thank you.
to send the label information once, similar to material safety data sheet transmittal, as long as the material is the same and it is being shipped to the same customer. In these situations, there should be no hazard to anyone handling the metal from the time it is produced in solid form, until the time someone works on it in a way that releases a chemical hazard. Since the label information transmitted would only reflect the chemical hazards released when it is later worked on, the label would not provide any hazard information that is needed by those handling the material in transit. It must be emphasized that this exception is only for the solid metal itself—any hazardous chemicals present in conjunction with the metal in such a form that employees may be exposed when handling the material (e.g., cutting fluids, lubricants, and greases), require labels with each shipment. This tailoring provision, therefore, does not diminish worker protection—workers get the hazard information they need.

(g) Material Safety Data Sheets

Under the hazard determination provisions, a requirement is included which indicates that there are situations where the percentage cut-off for mixtures would not apply—when the released chemical is particularly hazardous, or when it would exceed an established permissible exposure limit or Threshold Limit Value when released (paragraph (d)(5)(iv)). Although this is clearly a requirement of the rule, see also 48 FR 53336, the material safety data sheet provisions for disclosure of hazardous ingredient identities did not address that particular situation. Clearly it was OSHA’s intent to have all hazardous ingredients of mixtures listed on a material safety data sheet, even those in very small concentrations, when the hazard determination provisions of paragraph (d) mandate that they are to be considered hazardous for purposes of the HCS. As noted in the HCS preamble discussion of the material safety data sheet provisions: “Employers must also list ingredients present in concentrations of less than one percent if there is evidence that the permissible exposure limit may be exceeded or if it could present a health hazard in those concentrations.” Id. at 53337. This obvious oversight has been corrected by a minor amendment to the rule. Paragraph (g)(2)(i)(C)(2).

Another situation which raises practical concerns because of the expansion of the scope of the rule involves employers who purchase hazardous chemicals from local retail distributors, rather than directly from the chemical manufacturer or importer, or from wholesale distributors as is more commonly done in the manufacturing sector. Under the current HCS, distributors of hazardous chemicals must automatically provide commercial customers material safety data sheets (paragraph (g)(7)). Retail distributors often sell to businesses and the general public and frequently have no way of knowing who a particular purchaser is. Under the current rule, retail distributors might have to provide material safety data sheets to each customer to ensure that commercial customers get the information they need under the HCS. A specific statement regarding retail distributors is, therefore, included in paragraph (g)(7) to address this practical problem. Those retail distributors who sell hazardous chemicals to employers must provide a material safety data sheet upon request, and must post a sign or otherwise inform the employers that an MSDS is available. According to Schneider Hardware of Banksville, Inc., this is a reasonable approach (Ex. 2–179).

If OSHA does require commercial customers to get information through a retail outlet, I do not foresee any problems with that arrangement. The manufacturer could supply us with the information, as they are required to now for shipments to manufacturing plants, and we could make it available to customers upon request. We would merely keep the sheets in a file drawer and post a sign informing customers of their availability. We have less than 100 chemicals that would probably be affected, and keeping information on those would require at most, one file drawer. It would not be burdensome. The retail distributors likely affected are those dealing in building supplies, hardware, etc. Retail distributors will have to assess their product lines, and whether or not they have commercial accounts, to determine whether they must comply with this provision. It is clear that most other types of retail establishments (e.g., grocery stores, clothing stores, etc.) would not.

With regard to the maintenance of material safety data sheets so that they are readily available to employees whereas manufacturing facilities are generally fixed work sites with fixed locations for these materials; in some types of nonmanufacturing work operations, employees must travel between work areas during a workshift. For example, employees involved in servicing oil and gas wells may have a central office location, but then travel by truck to the wells to perform their work. These remote locations may not have any staff, or may not have an office facility. OSHA has added a provision to the MSDS requirements to allow MSDSs to be kept at a central location in this type of situation, as along as the employer ensures that the employee can immediately obtain the information in an emergency, paragraph (g)(9).

OSHA believes that this provision tailors the HCS so that it remains practical, yet effective, in getting workers the hazard information they need. This was also supported by a number of ANPR commenters (see, e.g., Exs. 2–83, 2–107, 2–114, 2–116, and 2–117).

The current rule, as well as the expanded standard, allows downstream employers to rely on upstream chemical manufacturers and importers to provide MSDSs. However, there is a duty for downstream users to request an MSDS when they don’t receive one at the time of the first shipment. There have been some questions regarding how the downstream user will know a data sheet is required without doing a hazard evaluation. Such an evaluation is not necessary. If the label indicates a hazard, the employer will know he needs a data sheet and must request one if it is not received. If there are no hazards on the label, the downstream user can assume the product is not hazardous and a data sheet is not required.

(h) Employee Information and Training

OSHA is not making any modifications to the current rule’s information and training provisions. These requirements remain performance-oriented and designed so that each employer will adequately address the hazards posed by chemicals in the workplace. An explanation of these provisions can be found at 48 FR 53310–12, 53337–38.

One question that does arise regarding training is whether it needs to be done specifically on each chemical, or whether employers can train regarding categories of hazards. Either method would be acceptable. See 48 FR 53312, 53338. If employers are exposed to a small number of chemicals, the employer may wish to discuss the particular hazards of each one. Where there are large numbers of chemicals, the training regarding hazards could be done on categories (e.g., flammable liquids; carcinogens), with employees being referred to substance-specific information on the labels and MSDSs. Similarly, the re-training occurs when the hazard changes, not just when a new chemical is introduced into the workplace. If the new chemical has hazards which employees have been trained about, no re-training occurs. If the chemical has a hazard they have not