Legal Backgrounder

Washington Legal Foundation

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Vol. 17 No. 33

August 23, 2002

CHEMICAL RISK DATA REMAINS DANGEROUSLY AVAILABLE TO PUBLIC

by

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In June Greenpeace put a color map on the Internet illustrating how a terrorist attack on a New Jersey bleach plant could blanket New York City with a toxic cloud of chlorine, threatening the lives and lungs of millions of people. To celebrate this website addition to their dozens of other maps of Philadelphia, Baltimore and New Orleans, the group sponsored a "Run for Your Life" race to show that most people cannot outrun a drifting chlorine cloud. Greenpeace and other environmental activist groups such as Environmental Defense and OMB Watch collected this hazard assessment information legally from congressionally-mandated federal libraries around the country.

One year after the September 11, 2001 terrorist attacks on America, federal agencies continue to make sensitive information about chemical facilities available to the public despite serious threats to national security from future terrorist attacks in this country. As the debate over the proposed Department of Homeland Security widens in Congress, perhaps it is time to focus inward for a moment and examine the way in which current law inadvertently aids terrorists.

Specifically, the Environmental Protection Agency's ("EPA") 51 public reading rooms, where anyone with a photo ID may currently access information about the names and locations of facilities that manufacture, use, or store hazardous chemicals, and other related information such as worst-case accident scenario reports, should be permanently closed.

While it is appropriate to provide certain information to local rescue and protection authorities in order to implement safety measures and plan emergency responses in case of accidents or terrorist acts, the practice and policy of making this information available to the public at large can no longer continue after September 11. The U.S. should err on the side of national security and adopt a selective "need to know policy" with regard to information sharing rather than the current "everybody has a 'right to know' everything" approach.

Congress' Reaction to Bhopal. In the U.S. the pressure to "do something" to prevent domestic chemical disasters came after a deadly 27-ton chemical release at a pesticide plant in Bhopal, India formed a toxic cloud that spread over an area populated by 520,000 people. Congress responded with the Emergency Planning and Community Right-to-Know Act of 1986 which required chemical industries to report annually to EPA on their use of certain chemicals and the amounts of each released into the environment. *See* Ann Davis, *New Alarms Heat Up Debate on Publicizing Chemical Risks*, WALL ST. J., May 30, 2002, at A3.

Regulatory Timeline. But Congress did not stop there. They drafted the Clean Air Act Amendments of 1990 requiring EPA to regulate over 66,000 high-risk industrial facilities to prevent and or minimize accidental chemical releases. Section 112(r) mandated that such industrial plants and warehouses develop and implement risk management plans ("RMPs") and submit them to EPA.

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Under this rule, tens of thousands of oil refineries, pharmaceutical companies, water treatment plants, electric utilities, food warehouses, chemical plants and even federal military and energy facilities were required to: calculate all risks and hazards at each installation; address accident prevention and responses to leaks for some 200 toxic substances; and draft an off-site consequence analysis ("OCA"), or worst-case scenario, to analyze the dangers posed to the public and the environment by accidental chemical releases. *See* 40 C.F.R. Part 68, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," 112(r)(7).

In addition to illustrating worst-case scenarios in great detail by identifying the hazardous chemical, its physical state and the quantity of the material it would take to cause a catastrophic accident, the amendment required plants to pen hypothetical causes of calamitous leaks. RMPs include such data as mitigation procedures to control accidental releases, descriptions of the topography surrounding the plant, the distance a cloud could travel, the number of people who live in that area, and the wind conditions that would maximize fatalities. In addition, the law required plants to report the facility's longitude and latitude coordinates, the number of full-time employees at the site, and whether there were schools or hospitals located nearby. *See* William H. Lash *EPA Internet Disclosure Idea Plots Terrorist Road Maps*, LEGAL BACKGROUNDER, Washington Legal Foundation, (Oct. 16, 1998).

In 1996 EPA promulgated RMP requirements with a submission deadline set for four years. As of April 2000, 15,000 facilities had filed RMPs with the EPA. Section 112(r) of the Clean Air Act also mandated the full disclosure of this information to the public, and EPA's method of choice was the Internet.

The Internet and Public Reading Rooms. When EPA announced its plans to create an electronic database and post RMPs online to meet the public disclosure provision of the Clean Air Act section 112(r), the Federal Bureau of Investigation, joined by representatives and experts from the International Association of Fire Chiefs, the Fraternal Order of Police, the Bureau of Alcohol, Tobacco and Firearms, the Justice Department and the Central Intelligence Agency, vocally opposed the action citing threats to national security from making such sensitive information electronically available. The major concern was that Internet release of OCA information would provide "one-stop shopping" for terrorists.

But neither EPA nor various environmental activists were moved by these concerns. Environmental activist groups joined EPA in arguing that full public disclosure *guaranteed* the safety of those who live around chemical plants by creating "widespread awareness" about safety and risk. The hope was that such "widespread awareness" would "likely lead [the chemical] industry to make changes and would stimulate dialogue among facilities, the public, and local officials to reduce chemical accident risks." *See* Assessment of the Incentives Created by Public Disclosure of Off-Site Consequence Analysis Information for Reduction in the Risk of Accidental Releases, United States Environmental Protection Agency, Apr. 18, 2000 at 6, http://www.epa.gov/ceppo/pubs/incenAss.pdf.

When it became clear Congress would strike down full Internet disclosure, EPA advocated public reading rooms. Reading rooms would not compromise national security, the agency reasoned, because the photo ID rule meant access would not be anonymous for terrorists or criminals. This policy, they argued, would deter would-be terrorists from accessing information "because such individuals prefer to hide their activities from public view." Part VII Environmental Protection Agency Department of Justice 40 CFR Chapter IV, Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Section 112(r)(7); Distribution of Off-Site Consequence Analysis Information; Proposed Rule., Federal Register, Vol. 65, No. 82, Thursday, Apr. 27, 2000. http://www.epa.gov/ceppo/pubs/OCArule.pdf.

Congress responded by passing the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act PL 106-40 (1999). Among other things, the Act granted limited online public access to restricted OCA information by only permitting the release of RMP executive summaries on the Internet and established federal reading rooms throughout the country where any member of the public could access the full reports.

Unintended Consequences. After a number of hearings and reports from the Department of Justice

  ISBN 1056 3059

and EPA, the ground rules were laid and in early 2001, federal reading rooms were open for business. Here, any member of the public could access full RMPs by going to an EPA or designated federal office (all locations are listed at www.epa.gov/ceppo), presenting a photo ID, and signing a form stating they have not accessed more than 10 RMPs in the last month. The gravest danger posed by the availability of RMPs is the form in which it is made available. The reports are not just obtuse tables of raw, indecipherable data, but include possible accident scenarios bluntly spelled out for absolutely anyone to view. *See* Michael Fumento, *Free Maps for Terrorists*, WASH. TIMES, June 20, 2002. In any of the 51 federally mandated reading rooms one can learn that a chlorine spill and vaporization at a Baltimore plant would endanger over 1.5 million people. And if that is not enough, environmental activist groups have been legally collecting OCA data for over a year from reading rooms and posting it on their websites.

In the name of public safety and furthering the debate, organizations such as Greenpeace, Environmental Defense and OMB Watch decided to bring restricted information to the Internet. Go no further than the Right-to-Know Network, www.rtknet.org, a service provided by OMB Watch, to learn that if a railroad car filled with 90-tons of chlorine ruptured at chemical plant identified by name and address near Detroit, it could threaten three million people. At this website, visitors may search by state to locate plants and request RMPs by e-mail and minutes later the report is e-mailed and recipients may leisurely peruse and print worst-case scenarios. And for anyone interested, this website also provides free data mapping software for Windows along with U.S. county maps and data files. OMB Watch also keeps a running list of everything EPA and other government agencies removed from their websites after September 11, 2001. This data remains available in its entirety on the Internet thanks to the advocacy group.

Greenpeace picks up where OMB Watch leaves off with a series of so-called kill zone maps of industrial facilities and nearby population centers. Greenpeace has stated it will do the same for all 123 plants identified by EPA that store amounts of toxic chemicals that could form deadly vapor clouds which, if released, would endanger over one million people.

Environmental Defense maintains a scorecard website where "concerned citizens" may search for over 6,900 chemicals used in large amounts in the United States and Canada by typing in a zip code to learn what is released or managed in the greatest quantity in that area. Safe Hometowns Initiative, a coalition of right-to-know activists, operates a website that provides instructions on how to use the Right-to-Know network and other sources to gather data on terrorism risks.

In whose interest are these groups acting when the only driving force of their non-profit activity is a very narrow agenda of banning all hazardous chemical use? Such a reckless disregard for our national security was performed legally, in a federal reading room, all thanks to a law that forces industrial facilities to document all vulnerabilities, only to have such sensitive information widely distributed to the public without discretion. And while these laws and measures were passed before terrorism on U.S. soil had become a large scale reality, Congress allowed the laws to continue to stand despite pleas from intelligence and law enforcement communities at large.

Current Legislation. In July 2002, the Senate's Environment and Public Works Committee approved a bill 19-0 chiefly authored by Senator Jon Corzine and committee Chairman Senator James Jeffords that would require the government to develop safety standards and identify "high-priority" plants vulnerable to terrorist attacks that produce or use hazardous chemicals. The bill sets a deadline of 18 months to comply with prevention-and-response plans developed by the government. Chemical Security Act of 2001, S. 1602. Although it acknowledges the threat of terrorist attacks on chemical facilities by proposing to reduce chemical production, use and storage, as well as mandating a change in production processes and also chemical transportation, the proposed legislation does not address the practically 24-hour availability of security sensitive information.

Another bill before the Committee addresses chemical security risks in terms of the nature of the availability of security sensitive data. Introduced earlier this summer by Senator Kit Bond, the Community Protection from Chemical Terrorism Act, S. 2579, proposes to amend the Clean Air Act to limit access to OCA

  ISBN 1056 3059

data to lessen the risk of criminal releases at industrial facilities. The bill acknowledges the nationwide threat of terrorist attacks and that federally-mandated, publicly available data on worst-case scenario accidents at chemical plants provides a blueprint for terrorists enabling them to plan and carry out attacks. If passed into law, the bill would allow the government to continue to collect OCA information for official emergency and response activities; however, the public would only be allowed to view the reports minus the names, addresses and any other information that would identify a specific facility.

Desired End Remains Unachieved. The reality of full RMP disclosure to satisfy right-to-know laws is that the reports do little to educate the public about risks, as EPA and environmental activist groups have claimed they do. The plans do not outline emergency responses for citizens nor do they consider the most likely risks. The technical information does not say much more than X amount of this chemical is present at this plant and if a catastrophe were to occur, 900,000 people might be affected. The only parties who might directly benefit from the public disclosure of this data are criminals and terrorists. RMPs are in fact no more than thorough lists of chemical and hazardous material stockpiles. And by including addresses, topography descriptions and worst-case accident scenarios, these plans provide the blueprints for mass murder.

Activists who collect and continue to post security sensitive information about chemical plants and facilities claim they act in the interest of the public to save lives and inform communities. But when the required worst-case scenario is a major chemical spill projected to effect 29,000 people in a one mile-radius versus the alternative, or more likely, accident scenario of a pigtail pipe rupture that only travels one-tenth of a mile from the release point, effecting zero people, where is the benefit in the full disclosure of this data? Not only is the information formatted in such a way that it fails to inform of viable risk, the inclusion of worst-case, calamitous events does nothing more than fuel the fantasies of terrorists.

The legislative director of the Greenpeace Toxics Campaign recently praised the success of full RMP disclosure for showing Americans and the government the chemical industry's vulnerability to terrorism in an editorial. Rick Hind, *Hidden Threats Not the Best Protection*, WASH. TIMES, June 30, 2002. Thanks to the RMP program, he wrote, "We know that plant security is lax." This must be the reason his organization and many others insist on posting kill zone maps, census databases, and the addresses and chemical inventories of plants throughout the U.S. Is the driving goal of the RMP campaign to know that plant security is lax? Why, then, have Mr. Hick and countless others defended right-to-know on the basis of protecting lives by educating the public?

Conclusion. Although the government ordered significant amounts of RMP and OCA information removed from federal websites after the attacks of September 11, 2001, the doors to the federal reading rooms remain open. The reality is that more serious attacks can be planned in reading rooms and carried out on hundreds of thousands, perhaps millions, of U.S. citizens. Section 112(r) and community right-to- know laws are misguided and threaten the security and lives of millions of Americans. Without concrete evidence that RMP disclosure results in greater environmental benefits, national security risks far outweigh any possible benefit to the environment. To allow this practice of full disclosure to continue is negligent. EPA should thoroughly restrict the very sensitive data that continues to compromise American security. The public simply cannot afford to wait for new legislation.

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