

**MINUTES**

**HOUSE COMMITTEE ON LOCAL GOVERNMENT**

August 20, 1993  
Room 521-S -- Statehouse

**Members Present**

Representative Nancy Brown, Chairperson  
Representative Gary Hayzlett, Vice-Chairperson  
Representative Richard Aldritt  
Representative Barbara Ballard  
Representative Les Donovan  
Representative Robert Grant  
Representative Carl Holmes  
Representative Judith Macy  
Representative Doug Mays  
Representative Gayle Mollenkamp  
Representative J. G. Novak  
Representative Greg Packer  
Representative Ted Powers  
Representative Bob Tomlinson  
Representative John Toplikar  
Representative Robert Watson  
Representative Gwen Welshimer  
Representative Jack Wempe  
Representative Bob Wootton

**RECEIVED**  
DEC 9 1993  
Legislative  
Administrative Services

**Staff Present**

Mike Heim, Kansas Legislative Research Department  
Theresa Kiernan, Revisor of Statutes Office  
Shirley Higgins, Committee Secretary

**Conferees**

Frank Moussa, Division of Emergency Preparedness  
Alan Walker, Director, University of Kansas Firefighter Training Program  
Chester Covert, President, Heartland Chapter Academy of Certified Hazardous Materials  
Managers  
Charles Jones, Division of Environment, Department of Health and Environment  
Ed Redmon, State Fire Marshal  
John Wolf, Assistant Dean, Continuing Education, University of Kansas

Bob McDanel, Emergency Medical Service Board  
Don Bruner, Industrial Safety and Health Section, Department of Human Resources  
Jim Jones, Department of Transportation  
Bill Bryson, Oil and Gas Division, Kansas Corporation Commission  
Lt. Sam Grant, Kansas Highway Patrol  
Pat Coughlin, Olathe Fire Chief  
Pat Simpson, Dodge City Fire Chief  
James Woydzick, Emporia Fire Chief, Lyon County Ambulance Director, and Lyon County Fire District No. 4 Fire Chief  
Joe Thibodeau, President, Kansas Firefighters Association  
Horace Hartley, Shawnee Fire Chief

### **Morning Session**

#### **Hazardous Materials Training**

The meeting was called to order at 9:15 a.m., in Room 521-S by Representative Nancy Brown, Chairperson, on August 20, 1993.

Representative Brown began the meeting by calling on Mike Heim to give an overview of the purpose of this meeting. Mr. Heim noted that those involved with hazardous materials training include different parties in state and local government as well as firefighters whose training is a subissue included in this study. The goal of the study is to gather people involved in this subject in one room, hear about all of the programs for hazardous materials training, and determine if there are ways to avoid duplication.

Mr. Heim had distributed copies of the first three chapters of a Kansas Bar Association handbook which explains federal and Kansas laws relating to the cleanup of hazardous substances which have been released into the environment. The first chapter gives an overview of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Superfund Amendments and Reauthorization Act (SARA) and also gets into Kansas law as it relates to hazardous substances.

The second chapter in the handout covers the Resource Conservation and Recovery Act (RCRA) and other state laws on hazardous waste. The third item is a description of the Community Right-To-Know law. In addition, as a background piece, Mr. Heim had copied an article from the *Pennsylvania Township News* that discusses some of the issues involved in hazardous materials training for both volunteer and professional firefighters. (See Attachments 1 and 2.)

Mr. Heim reported that he had contacted Professor David Pierce at the Washburn University School of Law, who is an expert in environmental law. Professor Pierce is willing to come to the next meeting and focus in on hazardous materials training requirements or a different direction if the Committee wants. The professor has a national reputation as an expert in environmental law.

Representative Brown called on Frank Moussa with the Division of Emergency Preparedness (DEP), which is under the Adjutant General's Department. He is also Program

Administrator for the Emergency Planning Committee which has responsibilities under the SARA program. Mr. Moussa focused his testimony on his agency's role in terms of chemical hazardous material training and emergency response.

He explained that EPA defines hazardous material as any substance which could cause irreversible health or environmental damage which includes both chemical and radiological, therefore, from this definition, the DEP's role is defined by a new federal Regulation 0654 which gives DEP off-site responsibility for any accident or incident at the Wolf Creek Nuclear Power Plant. When his agency responds to an incident, their response is in the terms of technical knowledge, not necessarily applying material to neutralize the chemical. His agency accesses information on the site of an incident and provides guidance. State statutes are not specific in relationship to the response itself.

K.S.A. 48-928(e), regarding the duties of DEP, states: "To establish and operate training for public information programs relating to emergency preparedness and assist counties and cities as well as the disaster agencies of such counties and cities and interjurisdictional disaster agencies in the establishment and operation of such programs." The law also gives DEP the duty to establish or register a person with toxic training and skills important to emergency preparedness activities in K.S.A. 48-928(h).

Persons are trained under the same standards required in OSHA regulation 29CFR 1910.120. Educational backgrounds are required for those who are trained to respond to Wolf Creek which is provided either by college courses or training that Wolf Creek provides or training that is provided by the Department of Energy or training obtained at the Emergency Management Institute or The National Fire Academy, both located in Emmittsburg, Maryland.

As far as its being a trainer of first responders, DEP delivers courses which have been accredited by the Emergency Management Institute. The trainers are certified as "train the trainer" type of courses or there have been courses that have been given by contractors that are recognized by The National Fire Academy. Also, DEP contracts with various schools such as the University of Kansas Fire School whose staff is also trained according to the standards of the Emergency Management Institute. Independent contractors are also used. They must be reviewed by the state training committee, and also DEP insures that the courses have been reviewed.

As to the question of the courses being accredited or certified, Mr. Moussa explained that as defined under OSHA regulation 29 CFR 1910.120, the courses cannot be certified by DEP because the employer is the certifying body for the courses. The courses are accredited in a sense because the courses have been recognized by The Emergency Management Institute or The National Fire Academy. Some of the courses acknowledged by The Emergency Management Institute also qualify for college credit.

As far as reciprocity, if the state training subcommittee has the individual or the course on the register, they would be recognized by DEP. Also, DEP would reciprocate with the Emergency Medical Service Board (EMS) as well as the University of Kansas (KU) Fire School as far as recognizing courses that have been recognized by the state training subcommittee.

With regard to criteria used for course requirement, DEP utilizes the OSHA regulation 29 CFR 1910.120 standards for awareness, for operation, for technician, for specialist, as well as instant command training. They also acknowledge the National Fire Protection Association Standard 472 and 473 for EMS personnel.

As to the question if there is an overlap or duplication in emergency response training among state agencies, Mr. Moussa said that more than one agency provides the same type training, but this is not necessarily a duplication. For example, in the area of radioactive monitoring and response regarding spent nuclear fuels being shipped through the state, responsibility lies with fire departments, EMS, and emergency management people; therefore, all need the same training.

With regard to hazardous material training being centralized, Mr. Moussa said there is the responsibility to include some criteria of review of training because there are some vendors who are not necessarily teaching up to the standard of NFA 472 or the OSHA regulation 29 CFR 1910.120.

With regard to the possibility of state certification of emergency response courses, Mr. Moussa said the state may want to consider having a certification process. If the state did make a decision to certify courses, he felt it may want to look at a standardized process of recognizing some format for the training itself, which obviously would involve statutory changes.

Representative Brown noted that the training committee, whose job it is to review courses and instructors, has been both active and inactive over the years. There are now 300 instructors who can teach these courses, and she asked how standards are being maintained and how does anybody know they are qualified to teach these various classes. Mr. Moussa said this has been loosely handled in the past. The committee itself is a volunteer committee and the same number of people are not necessarily there from meeting to meeting. The criteria the committee uses in the review of an instructor is still a valid criteria, that is, a yearly review and a requirement that refresher courses be taken. However, Mr. Moussa explained there is no way to review the quality of the instructors because the committee members are not on site when the instructors are delivering the classes. Recognition of instructors is based on their education, not on the quality of instruction. His agency does not have the manpower to review their educational preparation. The liability rests with the employer rather than the state agency for saying that a person is a qualified instructor or that a course is a qualified course.

Alan Walker, Director of the University of Kansas Firefighter Training Program began his presentation of an overview of the fire service training program at KU with a six-minute video tape on the subject. Mr. Walker also distributed copies of KU catalogues describing courses available for fire service training to give the Committee an idea of the variety and scope of courses offered in this type of training and the responsibility of KU according to its enabling statute, K.S.A 76-227, passed in 1949.

Mr. Walker explained that the National Fire Academy (NFA) is an institute in Emmittsburg, Maryland, which is an arm of the Federal Emergency Management Agency (FEMA), and its mission is to enhance training throughout the country. FEMA has identified the University of Kansas as the state's fire service training agency. Therefore, KU acts jointly and cooperatively with NFA. Contractors working for NFA come into Kansas each year to teach courses. Also, they develop courses and ask that an instructor from each state agency be sent to them to take the course. The instructor returns to his agency and, in turn, provides training for field instructors.

KU also works with NFA on the volunteer incentive program in helping advertise and select candidates to attend the Academy in Maryland. If selected, persons attend a one-week course at the Academy.



Mr. Walker called the Committee's attention to the listing of courses in the catalogue for hazardous materials training. KU also offers a variety of certification courses. They are in accordance with the National Fire Protection Association's standard certification program which has been nationally accredited by the International Fire Service Accreditation Congress and the National Board of Professional Fire Service which are the two national organizations which accredit such programs. The hazardous materials first responder awareness courses are designed to meet the National Board of Professional Fire Service's 472 Standard mentioned earlier by Mr. Moussa.

Mr. Walker then drew the Committee's attention to a fact sheet he had furnished which gives an overview statistically of what KU does in a typical year in the terms of course deliveries (see Attachment 3) and continued with a brief review of his written testimony regarding KU's method of delivery of courses through a cadre of fire service field instructors who take train the trainer courses.

Mr. Walker agreed with Representative Brown that it may be the case that KU's train the trainer instructors would be accepted by DEP, but KU would not necessarily accept the instructors at DEP because of the difference in the standards for acceptance, although there is some reciprocity between KU and DEP.

A representative began a discussion of the many mandates on fire departments which are not affordable to smaller fire departments. Mr. Walker said this is the debate that took place at the national level and noted that it is becoming more and more difficult to try to offer training at no charge, particularly for those in need. In addition to financial problems, another factor is the time issue for training for volunteer firefighters who are employed elsewhere. Mr. Walker said efforts are made to offer training courses during the evening and weekends to address this problem.

Another representative asked Mr. Walker if firefighter training is an ever expanding program or if only the same courses are repeated. Mr. Walker replied that the volunteer firefighter program has a 15 to 20 percent turnover so the job of training is never done. Also, training needs to be repeated to maintain the skill in the area of training. KU is operating at the highest level possible now and is not projecting ability to increase in the next few years.

Chester Covert, President, Heartland Chapter of the Academy of Certified Hazardous Material Managers (CHMM), gave the Committee information on the background of the Academy and listed its goals and objectives. (See Attachment 4.)

Representative Brown confirmed that CHMM training cannot be obtained at KU. However, Mr. Covert said his chapter sponsors a review course in conjunction with KU continuing education. Instructors are provided for his group to provide instruction for the review course at KU.

Mr. Covert said that the biggest part of the CHMM membership comes from the private sector, but it is expanding into the public sector, and it is a growing profession because of the increased number of environmental laws enacted in the past 20 years. It has become increasingly difficult to keep training up to date due to the many changes in federal regulations and new regulations enacted. The recertification process is intended for the purpose of keeping up with changes.

Charles Jones of the Division of Environment under the Department of Health and Environment (KDHE) explained the programs of KDHE and what they attempt to accomplish. (See Attachment 5.) Mr. Jones also had individual handouts regarding the Right-to Know Act (see

Attachment 6), emergency notification of spills/accidental releases (see Attachment 7), local emergency planning committees (see Attachment 8), Right-To-Know program data use (see Attachment 9), and the general responsibilities of the SERC under Title III (see Attachment 10).

Representative Brown asked Mr. Jones if there is a training subcommittee at KDHE to review courses and instructors as Mr. Moussa had discussed in his testimony. Mr. Jones indicated there is no one participating in this type review for KDHE. Representative Brown felt this might be an area to be explored during next session.

A representative asked if there is any specific uniformity or required guidelines to the training to be received. Mr. Jones' understanding is that the guidelines are relatively soft. There is a lot of variation among providers of the training. Some training involves a lot of field work whereas other types of training are more classroom based. Also, there is a cost range of from around \$400.00 per person to a very intensive program at a cost of \$995.00 per person which lasts seven days. An inquiry was made as whether the Legislature should consider finding a way to provide more uniformity in training or should it remain as is. Mr. Jones was of the opinion that uniformity is needed to assure that individuals and companies do the right thing in terms of training. Probably, more emphasis needs to be put on field training because this is the area where people tend to get hurt. He said some recognition for technical professions is needed as a means of setting a standard.

Ed Redmon, State Fire Marshal, testified. (See Attachment 11.) As food for thought, Mr. Redmon distributed copies of an article from *Firehouse* magazine which describes the State of Oregon's statewide hazardous materials response system. (See Attachment 12.) Mr. Redmon emphasized that, contrary to what is often thought, the State Fire Marshal's office is not in the training business although he strongly advocates as much training as possible be obtained by members of fire departments across the state. He feels the training should be uniform but not necessarily by one source and that the local authority of fire chiefs to decide on who gets trained should not be taken away.

Representative Brown relayed to the Committee information she had regarding the possibility of fire training sites being established in Kansas. With this in mind, she asked Mr. Redmon for information he had on the possibility of fire academies being established in the State of Kansas. Mr. Redmon said the only definite information he had regards an academy possibly being established near Dodge City at the location of St. Marys of the Plains College which has been closed.

John Wolf, Assistant Dean of Continuing Education at the University of Kansas, testified in regard to the mission and statutory requirements mandating what is to be done at the Kansas Law Enforcement Training Center. (See Attachment 13.)

With respect to hazardous materials training, the Law Enforcement Training Center trains under 40-CFR 311 which are replications of OSHA regulations. Those regulations outline five levels of training, the first of which is the awareness level, and that is the level law enforcement officers are trained. The purpose of the training at this level is to keep emergency response personnel skilled in recognizing and detecting the presence of any hazardous material, to isolate the area, and to deny entry to unauthorized personnel. Law enforcement officers are not authorized to do anything more. Basically, they just call the fire department.

The program used is one developed by the National Fire Academy and is a four-hour program. There are two people on the staff who are well versed on hazardous materials. Training takes place at the Center or is overseen at one of the regional locations. Part of the reason for off

site training is because the Center can only accommodate 60 persons with bed space for only six women. Women are becoming increasingly a larger percentage of the law enforcement community, but the Center has a serious problem in accommodating them due to problems with bathroom facilities for women. There is also a waiting list for male law enforcement officers.

Representative Brown commented that the interest the Committee initially had in the Law Enforcement Training Center was as an information source as to how to possibly develop a central training center for hazardous waste materials where persons could be boarded during training which would eliminate the need to send persons to different locations to take the courses. Mr. Wolf informed the Committee that originally the Law Enforcement Training Center was located on campus for about 19 months. At the end of that time, the state decided to continue the program and asked KU to find an off-campus location, which they were happy to do. KU was able to develop an excellent model. There are other law enforcement training programs in larger cities such as Wichita which offers a 13-week program, as opposed to KU's eight-week program. However, the training at Wichita includes the same courses as KU's eight-week program but adds courses regarding local law enforcement.

A representative asked if the curriculum of the Center has changed over the years. Mr. Wolf answered that it had changed in the last 20 years because the laws have drastically changed in regard to criminal matters. Also, 20 years ago, the drug problem was not as prevalent, and gangs were not a problem. Ethnic diversity was not as concentrated as it is now because of the shift in population.

### **Afternoon Session**

The Committee reconvened at 1:40 p.m., at which time Representative Gwen Welshimer presented proposed legislation, Substitute for H.B. 2312, which would require bonding of building contractors as a protection from fraudulent acts of contractors. (See Attachment 14.) She explained there was not ample time to discuss H.B. 2312 during the last session, therefore, she had researched the bill and had the proposed amendment prepared. She asked that Committee members talk to people in their districts regarding this matter and study the bill before next session.

Representative Welshimer emphasized that recently there has been too much fraudulent activities by dishonest contractors. She noted that it does not seem that anything that has to do with contractors will be able to be addressed unless they are licensed. All of the other professions that follow the contractor are licensed and are held responsible, but there is no way to address contractors and the building industry until they are brought into focus with some type of license.

Bob McDanel, Emergency Medical Service Board (EMS) (see Attachment 15), said there has been a lot of confusion in the State of Kansas as to whether emergency medical services is a public health agency or a public safety agency. His appearance at this meeting demonstrates some of that confusion because EMS certainly has a public safety role and includes training in public safety. The current issue of how to deal with first responder training for hazardous materials is difficult, and so far, the right answer has not been found. The development of the State Emergency Response Commission (SERC) was one attempt to try to figure out how best to deal with the whole issue of hazardous materials management and training of first responders.

Mr. McDaneld continued by explaining that when one looks specifically at the role of EMS in dealing with the issue of hazardous materials training, one needs to look at a federal requirement which essentially states that every county must develop a county plan for dealing with hazardous materials. In every case, counties have that plan; and in most of those plans, there is a specific role for the ambulance service or services in that county to play. It is at this point where there is Board involvement in hazardous materials training. Specifically, most of the county plans require that the ambulance services have their attendants trained at the minimum of the awareness level to meet the federal mandate for identification of hazardous materials even if there is no actual involvement with managing hazardous materials. Over the last three years, essentially every ambulance attendant in Kansas has been trained at the awareness level or higher in dealing with hazardous materials. As a result, there has also been a lot of confusion as to what are qualified instructors and what are qualified programs to attend. The Board of EMS had worked with DEP and with SERC to try and resolve some of those problems. The specific thing that the Board currently does to resolve this problem is to review all of its training curriculum of certified attendants to determine if it provides adequate information on working with hazardous materials. The short answer to this question is that EMS does not. It is an issue of when the federal government developed the initial training program, hazardous materials was not the issue it is today, and virtually all of our initial training falls short of providing adequate understanding of hazardous materials and their management.

A second approach by EMS to resolve this problem is the approval of most existing hazardous materials training programs for inclusion in continuing education programs. The EMS Board has arranged that hazardous materials training count towards the continuing education courses required of attendants.

Third, the Board works with a group of certified people who are called instructor coordinators. Those instructor coordinators in the State of Kansas are people who teach attendant training programs across the state. The Board has encouraged these instructors to gain approval to become hazardous materials instructors so they can provide that level of instruction in their home communities. This has been somewhat of a problem, however, because it is an additional training program for attendants and there has been a lot of confusion about what it takes to become a qualified instructor.

Finally, Mr. McDaneld noted that the EMS Board has tried to work closely with the State Emergency Response Commission and DEP to talk about what the needs are and how his agency can help fulfill those needs.

Mr. McDaneld encouraged the Committee to look at statutory changes which essentially would provide specific responsibility to a single entity for both some sort of certification program or approval program for instructors and some sort of certification or approval for the specific training programs so that those people who are looking for training or looking to become instructors know exactly who they need to talk to and exactly what the requirements are to take the training program or become an instructor.

Don Bruner with the Industrial Safety and Health Section of the Department of Human Resources followed with testimony regarding his agency's concern with hazardous materials in the workplace. (See Attachment 16.)

A representative asked Mr. Bruner what type of employers need to be trained by his agency. The employer, under OSHA, has the obligation to have their employees trained for working

with any kind of materials which are considered hazardous such as diesel fuel and gasoline and others declared as a hazard for employees by OSHA. Representative Brown asked further if Mr. Bruner's agency has reciprocity with DEP. He said not directly, however, they have an extensive film library available for public use. He said that his agency acts as an advisor at the employer's request only and does not function at the awareness level.

Jim Jones, Kansas Department of Transportation (KDOT), followed with testimony regarding hazardous materials training within KDOT. Training in KDOT is provided for all employees who could come in contact with hazardous materials. The KDOT's hazardous materials program for employees includes procedures and guidelines to promote safe use, transportation, and storage of these materials. The Department developed this program to comply with SARA Title III. A manual has been developed for employees in connection with the course which is a four-hour course. A record is kept of those employees who receive hazardous materials training although this is not a certification program.

KDOT has also developed a first responder course for both maintenance and construction personnel in compliance with the OSHA standards on hazardous waste operation and emergency response under 29 CFR, 1910.120 as well as responder awareness level individuals who are likely to witness or discover a hazardous substance release or who have been trained to initiate emergency response sequence by notifying the proper authorities of the release. This course was initially designed for KDOT's own field personnel by Jack Teagarden, who was in DEP at the time, and is also approximately a four-hour course usually taught in conjunction with the other course. A record of employees who have taken this course is also kept, and, again, this is not a certification course.

Primarily, KDOT's role in being a first responder type agency is in reporting traffic accidents to local law enforcement and to its own field officers. KDOT's personnel try to identify, if possible, containers in vehicles, identify wind direction, and identify contamination leaks. KDOT may also assist in radiological monitoring and containment of spills and establishing evacuation routes. Basically, KDOT's role as an employer is similar to the role of private sector employers.

Representative Brown confirmed that KDOT hazardous waste training is conducted by in-house trainers after training its own trainers. Mr. Jones said this is the easiest method due to the large number of employees involved (approximately 1,500). Training is typically done in the winter months in district offices when work on highways cannot be done. Also, KDOT works closely with DEP in its training, and training in this area was not given before it was mandated.

Bill Bryson, Director of the Kansas Corporation Commission (KCC), Conservation Division, spoke regarding oil spill response. (See Attachment 17.)

A representative wanted to know the reason the number of spills have been increasing during the past few years and asked what could be done to reverse the trend. He wondered if this is related to enforcement, location, or lack of resources by KCC. Mr. Bryson said the reasons could include all of those mentioned, but it could also be due to other factors. For instance, it is not possible to inspect every lease every day of every week due to the number of personnel available. A risk analysis has been done, and it was found that more problems occur after a spring thaw than in January, but there are other possibilities. Many spills are reported to them, but about 10 percent of spills go unreported and result in fines on the landowner. Ninety percent of companies that are fined do a better job, but 10 percent go the other way.

Lieutenant Sam Grant, Kansas Highway Patrol (KHP), addressed the Highway Patrol troopers' role as responders to hazardous material spills that result from motor vehicle accidents. (See Attachment 18.)

Representative Brown confirmed that the training classes offered at KHP are in very close connection with DEP. Lt. Grant said that for recruit classes, DEP teaches five hours and the KHP teaches eight hours.

Jack Taylor, Liberal Fire Chief, addressed hazardous training programs for firefighters. He noted his views come from the prospective of a Fire Chief in a smaller community but that hazardous materials escape from containers in small cities also and require firefighters there to use training that is also mandated for firefighters in large cities. Training is also mandated in small cities for medical response.

A main difference between small communities and larger ones is that firefighters in small communities have a limited number of resources and less frequency of incidents. When an incident occurs in Liberal, they have fewer number of resources both within the department and by mutual aid from other fire departments due to long distances involved. Therefore, Liberal has to be prepared and well trained with the resources on hand. The lower frequency of incidents requires that the lack of repetition of skills in actual incidents has to be made up in training, which makes training even more important.

In smaller communities, generally a person or a couple of persons are appointed to insure that training is adequate for the department. Some have the ability and expertise to handle training locally. However, the more likely scenario is that limited training is provided locally and then other training, as mentioned in previous testimony, is relied upon for the remainder of the training. The training from outside agencies may be provided in a variety of ways. It may be done on site locally or it may be done regionally or it may be done centrally within the state. He said that he prefers to do as much training locally as possible because that is the way that allows most of their firefighters to be trained at once.

Several of the groups from which the Committee has heard at the meeting today control a large amount of money that is directed towards training in one way or another. In his 18 years of fire service in the State of Kansas, Mr. Taylor has utilized training from each one of those agencies, and he believes each and every dollar allocated for training needs to be used as efficiently as possible. As much training as possible needs to be provided locally to reach the maximum number of firefighters. Only through the maximum use of every training dollar can adequate training be provided for all firefighters from the smallest volunteer department to the largest full-time department. Their training needs are critical in order to provide the best possible protection for the public they serve. Mr. Taylor concluded by urging the Legislature to help firefighters by considering means to better coordinate the available training dollars to be used to their best benefit in order to provide equally for all communities.

Pat Coughlin, Olathe Fire Chief, testified with regard to coordination at the state level of individual training activities in the areas of emergency training for hazardous material, medical service, and fire suppression, and with regard to the mandates for training at the federal and state levels. Mr. Coughlin also had recommendations with regard to the Legislature addressing the entire scope of emergency training.

Representative Brown began a discussion reviewing those agencies which keep a record of certification of employees completing training and followed with recalling that the Fire Marshal's office does not offer training but yet keeps a record of certification. Mr. Coughlin echoed her feeling that it is unclear why the Legislature created the position of training officer in the State Fire Marshal's office when that office does not engage in training. Mr. Coughlin added that he feels this clouds the issue as to if fire departments are participants or customers of the agency. The Legislature needs to determine who is in charge and who should be the certifying agency.

Pat Simpson, Dodge City Fire Chief, presented his view of hazardous material training as one pane in the picture window of emergency response. FEMA is at present going through the same dilemma as the State of Kansas. Those in the line of work of firefighting are looking at suppression, EMS, hazardous materials and inspection, and codes enforcement. Citizens demand optimum service in these areas. To deliver optimum service, firefighters must have the best training available. Two things which determine availability of training are the cost of training and accessibility.

Budgets at present in fire service run 90 to 95 percent in personnel and hardware costs, which does not leave much for training. Therefore, any program that is mandated should include a mechanism for delivery. Secondly, if the program is not accessible to the volunteer department as well as the paid department, it is not practical.

Effective training programs in other states indicate that there must be a balance of off site training and on site training. At present the establishment of a state fire academy is being considered and a questionnaire is being developed to determine what type of deliveries will be needed. Therefore, the Committee needs to look at other emergency responses than just hazardous materials training to prevent duplication of services, administration, and delivery. A good form of coordination of all emergency response training needs to be formulated.

Representative Brown began a discussion as to possibly mandating training for fire departments. It was determined that this would be a detriment with regard to volunteer firefighters who would not serve if required to attend training at an academy which would involve loss of time from their jobs. As to funding for a fire academy, it would be tied to what the training needs are, and that would involve determining staff and how much training is on site and how much off site. Another issue involved is mileage and boarding for firefighters attending the academy, and the funding issue should cover these items. As to the possibility of utilizing funding available at present instead of finding new funds in the form of new taxation, Mr. Simpson said that it is too early in the concept to answer this.

Jim Woydzick, Emporia Fire Chief, spoke on firefighter certification verses firefighter recognition as available through the State Fire Marshal's office. (See Attachment 19.)

Joe Thibodeau, President of the Kansas Firefighter's Association, stood to comment on testimony heard today. He noted that 75 percent of volunteer firefighters belong to his organization. At present, there are 350 member departments. The organization is involved in state training which they provide at no cost to the fire service. Most of their clients come from volunteer forces.

His organization does not offer certification type courses but rather more hands-on type courses or "save-your-life" courses. They have felt there is a need for all types of training, and when the subject of the possibility of one agency controlling training comes up, this causes concern for



them. His group supports training from any area and would not want to be tied into getting training from one entity. The KU firefighting school is a budget oriented organization which has to make money in order to offer its courses, which is fine, however, there are some agencies that are able to provide training at a lower cost, and his organization does not want to see them eliminated.

Mr. Thibodeau said his organization would recommend that separate entities be able to work together through some type of state board such as recommended by the Fire Marshal's Council on which he serves. This board is a forum for all of the organizations within the state that represent fire service to come together to air concerns and work towards a common goal. One of the common goals is the recognition program. Mr. Thibodeau noted that every member at this hearing had a representative on the Fire Marshal's Council, and they endorsed the recognition program. Therefore, the Fire Marshal's Council proceeded to make the recognition program a reality. Since the recognition program came into existence, over 1,600 firefighters have enrolled in a training program that they were not enrolled in prior to this. Over 60 departments have enrolled to take advantage of training.

Mr. Thibodeau informed the Committee that the Post Audit Committee had an interim study of the recognition program recently, and there is a full report that is available through the Post Audit Committee if Committee members would like more information.

According to Mr. Thibodeau, the Department of Education has also given its blessing to the recognition program. It feels it is a good program on the leading edge of education because emphasis was not placed on a written test but rather on a skills test.

With regard to mandating, Mr. Thibodeau would not recommend a great deal of mandates because he feels it would result in the loss of part of the force of volunteer firefighters. There are ways of participation in training which are not necessarily through mandating or through one agency. Training should be made available from all sources, and it should be made accessible.

As to the academy concept, his organization is still studying this and, as yet, has not formed an opinion as to its merits. His organization is concerned, though, and is willing to work with the various agencies and the Legislature.

Representative Brown asked Mr. Thibodeau where the state funding for his organization comes from. He said it came from the Firefighters Relief Act, established in the 1800s, which is administered by the Insurance Commissioner's office. The money is to be used for training, but it is not in competition with the KU Fire School because certification is not offered by his group. Courses are mainly "hands-on" courses which are taught by certified instructors who were certified through the KU program. This year, around \$122,000.00 was received by the Firefighters Association. His organization administers these funds, and it is in no way connected to the Fire Marshal's office.

Mr. Thibodeau responded to the concern expressed by others that there is some confusion in receiving recognition as a Firefighter I as being the same as certification. He, too, feels that there is still some confusion in this regard even though a letter was sent to fire chiefs explaining this program. Also, he added that he feels too much emphasis is put on the KU Firefighters School because there are others that offer an equally qualified program. As to the recognition program, it gives an incentive for firefighters to get together for training.

Representative Brown pointed out that there are so many certifications offered that it will soon have the result that certification means nothing. Millions of federal dollars and hundreds

of thousands of state dollars are being spent in seven different training agencies. This was the reason for this meeting. She said the Committee has heard much information and now will be required to think about how to address this problem. She said she would write to members and ask for suggestions as to how to approach the problem. Her goal is to eliminate the state bureaucracy which has been created by past legislation.

Horace Hartley, Fire Chief of the City of Shawnee and also President of the Kansas State Fire Chief's Association, agrees that the training issue must be addressed but cautioned the Committee to carefully consider the cost as certification and recognition programs are discussed. He said that this is an area that needs attention and that the dialogue needs to be there to bring it to a central point and to a conclusion.

The meeting was adjourned.

Prepared by Mike Heim

Approved by Committee on:

November 29, 1993

(date)

# CHAPTER 1

## CERCLA/ KANSAS LAW ON HAZARDOUS SUBSTANCE RELEASES

By Charles P. Efflandt and Nancy M. Clifton

### §1.01 SCOPE

This chapter addresses both federal and state laws relating to the cleanup of hazardous substances which have been spilled, dumped, or otherwise released into the environment. Spills are addressed only in the context of these cleanup laws and not as may be regulated elsewhere, such as spill reporting requirements (*see* §1.73, *infra*, for a list of other federal laws concerning spills). This chapter does not address insurance coverage issues or the emergency planning and community right-to-know law (*see* Chapter 8, *infra*). These laws significantly impact many aspects of business and commerce. While a general overview of federal and state hazardous substance release laws will be provided in this chapter, their applicability to specific business transactions and issues will be discussed in greater detail in other chapters of this handbook (*see* Chapters 9, 10, and 13, *infra*).

### OVERVIEW

#### §1.02 Federal Law — CERCLA and SARA

The Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986), seeks to cause the identification and cleanup of the nation's hazardous waste sites. This goal is to be achieved through legislation enabling the federal government to nominate, score, and rank sites, to take cleanup action, and to cause other parties, both private and public, to participate in or pay for cleanup activity. This participation is made possible by imposing liability on broad categories of persons with a connection to the site and by the establishment of both civil and criminal penalties. Funding is obtained from private parties, through a federal tax on certain hazardous chemicals and petroleum, an environmental tax on corporations, \$1.25 billion from general appropriations, punitive damages and penalties, and earned interest. The total fund under SARA was \$8.5 billion for five years. The original "Superfund" was funded at \$1.6 billion for a period of five years. Funding from October 1, 1991 through September 30, 1994 is \$5.1 billion.

CERCLA addresses the cleanup of "hazardous substances." Hazardous substances include substances which are hazardous under the Clean Air Act, the Toxic Substances Control Act, and the Clean Water Act, and wastes which have a characteristic making them hazardous under RCRA. CERCLA §101(14), 42 U.S.C. §9601(14). The list of hazardous substances presently includes over 700 entries. *See* 40 C.F.R. Part 302.4(a) (1987). Petroleum and derived products are specifically excluded. CERCLA §101(14)(f), 42 U.S.C. §9601(14)(f). There is some question, however, when and if chemicals contained in the petroleum product make it hazardous. EPA's position on that question is that products containing indigenous hazardous substances, such as benzene, are exempt from CERCLA. Likewise, hazardous substances added during refining or increased by refining are exempt. However, hazardous substances added or increased in concentration solely as a result of contamination during use are *not* part of the petroleum and thus not excluded under CERCLA. EPA General Counsel Memorandum, "Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)," July 31, 1987. This position was supported and expanded in *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989) [hazardous materials found naturally in petroleum products and even additives do not render the material a hazardous substance] and *Washington v. Time Oil Co.*, 687 F. Supp. 529 (W.D. Wash. 1988) [contaminants found in excess of the quantity occurring naturally or not occurring due to the refining process are hazardous substances]. (*See* Chapter 12, *infra*, for further discussion of oil and gas industry activities and CERCLA.)

#### §1.03 State Hazardous Substance Cleanup Law

Strictly speaking, Kansas does not have a "mini" Superfund law. The state does become directly involved in the administration of CERCLA as the lead agency at certain federal CERCLA sites. In addition, Kansas has hazardous substance cleanup provisions in its hazardous waste law. Those cleanup provisions are codified at K.S.A. 1990 Supp. 65-3452a through 3457a. The generation, treatment, and disposal of hazardous wastes is also regulated under Kansas law. (*See* Chapter 2, *infra*.) The Kansas hazardous substance cleanup law supplements other related Kansas laws, such as

the environmental laws related to oil and gas activities (K.S.A. 1990 Supp. 65-3457a) and, at least arguably, general nuisance laws (K.S.A. 65-159 (1985).) The Kansas Department of Health and Environment (KDHE) introduced in the 1988 legislative session Senate Bill 455, which was to be the state's environmental contamination response act. Comparing that bill as introduced to the law which was eventually passed and made effective in July of 1988 provides insight as to what the state law does *not* address, and why it is not considered a mini Superfund law. Two examples will illustrate. First, Senate Bill 455 called for the compilation of a list of contaminated sites, a determination of which should become part of a site registry. The bill also required KDHE investigation of all suspected contaminated sites and corrective action in the presence of imminent risk to public health or the environment. The law which passed simply provides that the KDHE has authority to determine if cleanup of a site is necessary and grants powers necessary to effect a cleanup and recover moneys from responsible persons. Second, liability provisions were much more expansive in Senate Bill 455 than in the law passed. The proposed bill also included responsibility for natural resource damages, while the bill signed into law does not.

In summary, the streamlined state law provides that: (1) the definition of hazardous substances is the same as in CERCLA (K.S.A. 1990 Supp. 65-3452a), (2) the KDHE has authority to conduct cleanup activity (K.S.A. 1990 Supp. 65-3453a), (3) an environmental response fund is to be created (K.S.A. 1990 Supp. 65-3454a), and (4) the state may assess cleanup costs against those responsible for the condition and may institute cost-recovery actions (K.S.A. 1990 Supp. 65-3455). There have been no administrative regulations promulgated under the new law to date.

*Note:* The regulations found at K.A.R. 28-48-1 and 28-48-2, which relate to spill reporting, have broad application and include hazardous substance spills into both soil and water.

#### §1.04 Historical Development of CERCLA

CERCLA required owners, operators, and transporters to report to the Environmental Protection Agency (EPA) by June 9, 1981, certain information about sites where it was known or suspected that hazardous substances were deposited. This resulted in the reporting of thousands of sites to EPA and furnished a starting point for determining which sites were to warrant priority cleanup.

The enactment of CERCLA created a great deal of confusion with respect to liability standards, pre-enforcement review of administrative determinations, and the applicable cleanup standards (this latter question being referred to as "How clean is clean?"). What emerged from the initial wave of litigation was an understanding that liability under CERCLA is indeed strict, joint and several, and retroactive; that judicial pre-enforcement review is limited; and that many cleanup problems could be more expeditiously resolved if potentially responsible parties took an early and active role in site study and cleanup activity.

In 1986, Superfund was reauthorized with the passage of SARA. SARA's principal amendments to CERCLA were (1) increased funding of \$8.5 billion through September 30, 1991, (2) substantial new procedural requirements, and (3) new, stringent cleanup standards. The funding level authorized was notable for several reasons, among them the substantial increase (from \$1.6 billion) despite the fact that the EPA itself testified that it could not effectively utilize that amount and therefore requested only \$5.36 billion. The new procedural requirements included new settlement, state participation, and public participation provisions. The new, stringent cleanup standards answered the question of how clean is clean with, in popular jargon, "real clean." SARA emphasizes permanent cleanups (CERCLA §121, 42 U.S.C. §9621), requires health assessments for each site performed by the Agency for Toxic Substances and Disease Registry (CERCLA §110(4), 42 U.S.A. §9610(f)), calls for the application of federal standards, or of state standards where they are more stringent, if the federal or state standard is legally applicable or relevant and appropriate (an ARAR) (CERCLA §121(d)(2)(A), 42 U.S.A. §9621(d)(2)(A)), and makes applicable many stringent numerical standards. Those standards include recommended maximum contaminant levels (RMCLs) under the Safe Drinking Water Act (SDWA), water quality criteria established under the Clean Water Act (CWA), and for some activities the banning of land disposal of certain wastes under the Resource Conservation and Recovery Act (RCRA). SARA's onerous requirements have provided further incentive to potentially responsible parties to become involved early and actively in the cleanup of hazardous substance releases.

The latest reauthorization of CERCLA provides the same funding on an annualized basis — \$5.1 billion over three years. The program was authorized without revision through September 30, 1994, while federal taxing authority continues through December 31, 1995.

#### §1.05 NATIONAL PRIORITY LIST

The EPA enjoys its full CERCLA powers only at sites on the National Priority List (NPL). Some Superfund expenditures may be made at sites which may be placed on the NPL or for site investigation if a site appears to need emergency attention. The following two sections explain how sites are placed on the NPL and why activities may occur on sites not on the list.

#### §1.06 Site Nomination, Scoring, and Ranking

The EPA discovers the existence of hazardous waste sites through various means, including the notification process referenced in §1.04 above (CERCLA §103(a), 42 U.S.C. §9603(a)). If in EPA's judgment a site is potentially hazardous, it performs a preliminary site assessment using readily available data such as photographs, interviews, and known substance-handling practices. Then, if appropriate, a site investigation is performed, which may include soil and water sampling. The purpose of the site investigation is to apply the hazard-ranking system (HRS) and to give the site an HRS score. The score is intended to be an objective, mathematical

approach to determining if a site is sufficiently hazardous to human health and the environment to warrant listing on the NPL and expenditure of Superfund money. During the time that a site is proposed for inclusion on the NPL, a public-comment period is provided. The HRS is published as Appendix A and the NPL as Appendix B to the National Contingency Plan. 40 C.F.R. Part 300 (1987). See §1.09, *infra*, for a discussion of the National Contingency Plan.

### §1.07 Sites Not on the List

Parties potentially responsible for cleanup often take action even though a site is not yet on the NPL. As it is probable that a cleanup undertaken by EPA under CERCLA will cost more and/or take longer, potentially responsible parties have a substantial economic incentive to undertake immediate investigative and cleanup activities, many times under the direction of the appropriate state agency. Moreover, private action maximizes the control of the potentially responsible parties over the cleanup process. Finally, early action may be desirable because of an existing health hazard or to control costs by preventing further migration of contamination.

### §1.08 REMOVAL AND REMEDIATION

Removal, also called removal action or immediate removal, refers to actions taken in response to an immediate need to prevent or abate a release of hazardous substances into the environment or to protect human health or natural resources. Removal actions tend to be short-term responses to a release. CERCLA §101(23), 42 U.S.C. §9601(23). Removal may include many activities other than literally removing a substance. It might, for example, consist of the delivery of drinking water or putting a fence around the site. Remediation or remedial action is generally action of a long-term nature taken to abate or minimize a release of hazardous substance to the environment or to protect human health or the environment. CERCLA §101(24), 42 U.S.C. §9601(24). Remediation is the long-term activity required to neutralize, clean up, and restore contaminated sites. Both removal and remediation may occur at the same site. Removal actions must generally be consistent with and contribute to the efficient performance of any anticipated remedial action. CERCLA §104(a)(2), 42 U.S.C. §9604(a)(2). Either or both terms may be referred to as a "response." CERCLA §101(25), 42 U.S.C. §9601(25). Removal and remediation action may be taken by either parties liable under the Act or by the government.

### §1.09 National Contingency Plan

The National Contingency Plan (NCP) sets forth the rules for the assessment, ranking, and placement of sites on the NPL as well as the procedures for remediation and removal activities. CERCLA §105, 42 U.S.C. §9605; 40 C.F.R. §§300.61-.71 (1987). The NCP was originally created to outline responses to discharges of oil or hazardous substances to waters of the United States (Clean Water Act §311(c)(2), 33 U.S.C. §1321 (c)(2)). Compliance with the provisions of the NCP related to response actions is extremely important both with respect to satisfying CERCLA's mandate as well as to a

private party's ability to obtain cost recovery or contribution from other responsible parties. (See CERCLA §107(a), 42 U.S.C. §9607(a); CERCLA §113(f), 42 U.S.C. §9613(f).)

### §1.10 Site Studies and Investigations

A preliminary assessment (PA) and, if necessary, a site inspection (SI) are performed to help EPA determine whether a site should be on the National Priority List. Once a site is on the NPL, and occasionally while only proposed for inclusion, the remedial planning process typically begins with a remedial investigation and feasibility study (RI/FS). The purpose of the remedial investigation is to identify the nature, extent, and sources of contamination and the threat posed to human health or to the environment. It usually involves soil and water sampling, testing, and monitoring. Following the completion of the RI, a feasibility study is performed to identify and evaluate alternative cleanup actions. The RI/FS may be conducted by the government or by a potentially responsible party. Following publication of the RI/FS and a public-comment period, the EPA issues its record of decision (ROD) setting forth and explaining the selected remedy.

### §1.11 PARTIES LIABLE

CERCLA §107(a) (42 U.S.C. §9607(a)) provides that, subject to certain defenses, the following parties are liable for response costs incurred as a result of a release of hazardous substances at a facility:

- (1) an owner or operator of a vessel or facility from which there has been a release;
- (2) any person who owned or operated a facility at the time of disposal of a hazardous substance at the facility;
- (3) any person who arranged with another for the disposal or treatment (or for transport for disposal or treatment) of hazardous substances owned or possessed by the person, at a facility owned or operated by another party; and
- (4) any person who accepts hazardous substances for transport to vessels, facilities, or sites selected by such person.

Parties who are identified as being potentially liable under CERCLA are commonly referred to as potentially responsible parties (PRPs). The first two categories of PRPs listed above are owners and operators of facilities from which there has been a release of hazardous substances into the environment. The third category of PRP is the "generator" or "arranger." The fourth category of PRP is referred to as the "transporter."

### §1.12 Owners and Operators

An owner or operator of a facility from which a release has occurred is liable if it is the present owner or operator, or if it was the owner or operator at the time of disposal of hazardous substances. CERCLA §107(a), 42 U.S.C. §9607(a). A "facility" is broadly defined as any building, structure, equipment, pipeline, well, pit, lagoon, landfill, container, motor vehicle, aircraft, or any site or area where a hazardous

substance has been deposited, stored, disposed of, placed, or otherwise come to be located. CERCLA §101(9), 42 U.S.C. §9601(9). A release means a movement into the environment and includes not only the initial disposal (dumping, spilling, leaking, etc.) but also later movement (leaching, escaping, etc.). CERCLA §101(22), 42 U.S.C. §9601(22). "Disposal" has the meaning as defined in RCRA (CERCLA §101(29), 42 U.S.C. §9601(29), RCRA §1004(3), 42 U.S.C. §6903(3)).

Participation in management is not necessary to find an owner liable. *United States v. Argent Corp.*, 21 Env't. Rep. Cas. (BNA) 1354 (D.N.M. 1984) [passive landlord]. Various indicia of ownership without actual ownership may be sufficient to incur liability. See §§1.16 Lenders, 1.18 Shareholders, 1.20 Lessees, and 1.21 Trustees, *infra*.

There is presently a split in cases addressing the liability of past owners and operators which did not dispose of the wastes (in the common sense) but were owners or operators during the time the waste was there, presumably migrating. See *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989).

An operator has been construed broadly. For example, an operator may include a joint venture partner vicariously liable, one who has authority to direct disposal even if not exercised, and one involved in waste disposal business which deposits some waste on the site. *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

### §1.13 Generators

Under CERCLA §107(a), a generator is liable regardless of ownership of the disposal site, how the waste got into the site (*United States v. Ward*, 618 F. Supp. 884 (E.D. N.C. 1985)), or whether the disposal was legal and even approved by the government.

### §1.14 Transporters

Transporter liability extends only to those who selected the site or facility. CERCLA §107(a)(4), 42 U.S.C. §9607(a)(4), *United States v. New Castle County*, 727 F. Supp. 854 (D. Del. 1989).

### §1.15 Specific Categories of PRPs

CERCLA's identification of potentially responsible parties has been broadly interpreted. Many different parties involved in some way with a Superfund site may be liable for response costs under CERCLA §107. In addition to the obvious owners, operators, generators, and transporters, other less obvious persons deemed to have potential liability under CERCLA §107(a) include lenders, successor corporations, shareholders, employees, officers, directors, lessees, trustees, states, and remedial action contractors.

#### §1.16 Lenders

A secured creditor whose interest in a facility goes beyond the mere taking of a security interest in the facility to protect its loan may become a PRP. CERCLA §101(20)(A), 42 U.S.C. §9601(20)(A). See, e.g., *United States v. Maryland*

*Bank & Trust Company*, 632 F. Supp. 572 (D. Md. 1986) (bank foreclosed and took possession); *United States v. Mirabile*, 15 Env't. L. Rep. (Env't. L. Inst.) 20994 (E.D. Pa. 1985) (bank participated in day-to-day operations at site); *United States v. Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752, (1991) (creditor's participation in management inferred authority to influence hazardous waste decisions). In contrast with *Fleet Factors*, the court in *In re Bergsoe Metal Corporation*, 910 F.2d 668 (9th Cir. 1990), held that authority to control is not enough to create liability. Under an EPA proposed rule, a lender would not lose its secured creditor exemption under CERCLA §101(20)(A) if it had only the authority to participate in business operations. 2 Banker L. Rep. 1015 (Sept. 14, 1990), 21 Env't. Rep. (BNA) Current Dev. No. 43, at 1908 (Feb. 22, 1991). See Chapter 10, *infra*, for further discussion of the potential environmental liability of lenders.

#### §1.17 Successor Corporations

Successor corporations have been held liable under CERCLA §107, whether they came to be the successor in a merger, consolidation, or asset-purchase transaction, under theories of *de facto* merger (*Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990); *Anspec Co. v. Johnson Controls, Inc.*, No. 89-2392, slip op. (6th Cir. 1991); *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, No. 4-88-692, slip op. (D. Minn. 1990)), and continuing enterprise (*United States v. Distler*, 741 F. Supp. 637 (W.D. Ky. 1990); *United States v. Western Processing Co.*, 751 F. Supp. 902 (W.D. Wash. 1990)).

#### §1.18 Shareholders

Shareholders may be liable if the shareholder and corporation are not distinct entities; that is, if the requirements for piercing the corporate veil are met. *State of Idaho v. Bunker Hill Corporation*, 635 F. Supp. 665 (D. Idaho 1986) (parent required approval of pollution expenses over \$500 and was intimately familiar with subsidiary activities); *State of New York v. Shore Realty Corporation*, 759 F.2d 1032 (2nd Cir. 1985) (shareholder owned majority of stock and was active in management). But see *Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80 (5th Cir. 1990) (complete domination required). A shareholder may also be liable if directly involved in the corporate activity resulting in or related to a disposal of hazardous substances.

#### §1.19 Employees, Officers, and Directors

Employees, officers, and directors are at risk if they have personally participated in conduct resulting in the disposal of hazardous substances or have responsibility or authority for such disposal. *United States v. Carolawn Co.*, 21 Env't. Rep. Cas. (BNA) 2124 (D.S.C. 1984); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *United States v. Mottolo*, 605 F. Supp. 898, 913-14 (D.N.H. 1985). But c.f. *United States v. Wade*, 577 F. Supp. 1326, 1341-42 (E.D. Pa. 1983) (corporate officer not personally liable because he negotiated the disposal of hazardous waste).

**§1.20 Lessees**

A lessee of a facility may be construed as an owner under CERCLA §107(a)(1) if it controls and is responsible for the property. *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

**§1.21 Trustees**

Trustees may face liability as owners or operators, particularly if trust assets are insufficient to fund cleanup (*U.S. v. Burns*, 1988 U.S. Dist. LEXIS 17340 (D.N.H. September 12, 1988)); *Quadion Corp. v. Mache*, 738 F. Supp. 270 (N.D. Ill. 1990). A bankruptcy trustee's personal assets, however, probably may not be reached. *In re: T.P. Long Chemical, Inc.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985). See Chapters 9 and 13, *infra*, for further discussion of trustee liability.

**§1.22 States and Local Units of Government**

A unit of state or local government is not deemed to be an owner or operator under CERCLA with respect to property acquired through tax foreclosure, abandonment, or "similar means" provided it did not cause or contribute to a release from the facility. CERCLA §101(20)(d), 42 U.S.C. §9601(20)(D). However, upon a showing of substantial involvement by a state at a facility, a state may be liable. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273 (1989); *U.S. v. Stringfellow*, No. CV-83-2501 JMI, slip op. (C.D. Cal. Jan. 9, 1990); *U.S. v. New Castle County*, 727 F. Supp. 854 (D. Del. 1989) (facts did not support liability).

*Commentary:* Local government units, primarily counties and cities or towns, often become involved in CERCLA sites as PRPs. They are not exempt from CERCLA liability.

The potential liability often results from involvement with an "ordinary" sanitary landfill. The landfill may not have been intended to be the repository of hazardous waste, but it may have become a Superfund site due to the release of a substance which is now categorized as hazardous. It was not too many years ago when just about any waste could be placed in a sanitary landfill. In addition, most, if not all, landfills continue to receive small quantities of hazardous wastes — often substances such as paints, solvents, and pesticides from homes and commercial and manufacturing operations. Finally, some units discover that they have had one or more customers sending hazardous waste to the landfill without the units' knowledge or permission.

This may result in liability in several situations, including the following:

1. It may own or operate the landfill and face liability as an owner or operator.
2. It may transport its customers' waste to a landfill owned/operated by another and face liability as an arranger of disposal since it selected the disposal site.

3. It may dispose of its own waste (possibly including paint waste, solvents, hazardous sludges, or spent chemicals from wastewater treatment or drinking water treatment, etc.) and incur liability as a generator.

4. It may arrange for the disposal of its citizens' waste at a landfill even though not the transporter or the owner/operator and possibly be liable as an arranger since it selected the facility or as a generator since it accepted the waste and was the party entering into contracts for transportation and disposal.

As a practical matter, local units of government faced with a situation similar to those described above generally use the PRP forum to make their equitable arguments. EPA's enforcement policy is set forth in "EPA Interim Municipal Settlement Policy," 54 Fed. Reg. 51071, 41 Env't. Rptr. 3551 (BNA) (December 12, 1989).

**§1.23 Remedial Action Contractors**

Remedial action contractors are potentially liable under CERCLA as operators (*Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988)), but generally minimize their financial risk through contractual indemnification provisions.

**§1.24 Liability Under State Law**

Kansas law provides that persons *responsible* for a health or environmental hazard created by the release of a hazardous substance are liable for the costs of investigation and cleanup. K.S.A. 1990 Supp. 65-3454(a)(3) provides that the secretary may issue cleanup orders to such persons, while subsection (a)(4) allows the secretary to recover response costs. "Person" is not defined in the cleanup law, but the definition in the hazardous waste disposal law, K.S.A. 65-3430(o) may apply:

"Person" means an individual, trust, firm joint stock company, federal agency, corporation, including a government corporation, partnership, state, municipality, commission, political subdivision of a state or any interstate body.

There is not any elaboration of what constitutes the creation of a health or environmental hazard by a hazardous substance. K.S.A. 1990 Supp. 65-3455 imposes liability for a necessary cleanup under K.S.A. 65-3453 to any person "responsible" for the discharge, abandonment, or disposal of hazardous substances. Further, the "responsible person" is to bear the costs of remedial action, if required to protect the public health and environment, and must repay the secretary for costs or funds expended for such activities. The term "responsible" is not statutorily defined.

*Commentary:* The common meaning of "responsible" would suggest that, unlike CERCLA, some element of culpability or fault is required to establish response cost liability under the Kansas Environmental Response Act.



## NATURE OF AND DEFENSES TO LIABILITY

### §1.25 Liability Provisions

CERCLA §107(a) provides that a PRP (see Sections 1.11 through 1.14, *supra*, for a discussion of responsible parties) is liable for four items:

- (A) all cost of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) damages for injury to, destruction of, or loss of natural resources including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- (D) the costs of any health assessment or health effects study carried out under section 104(i).

CERCLA §107(a), 42 U.S.C. §9607(a). Interest is included in the amounts recoverable. CERCLA §107(a), 42 U.S.C. §9607(a). In addition, if a liable person, without sufficient cause, fails to properly provide removal or remedial action upon order of the president under §§104 or 106, punitive damages may be assessed by the United States in an amount of up to three times the amount of any costs incurred by the Fund as a result of the failure to take proper action. CERCLA §107(c)(3), 42 U.S.C. §9607(c)(3).

Liability cannot exceed: (1) for any vessel (except an incineration vessel), the greater of \$300 per gross ton or \$5 million (\$5 million if the vessel carries a hazardous substance), (2) for any motor vehicle, aircraft, pipeline, or rolling stock \$50 million (or lesser amount as the president may establish, limited to not less than \$5 million or \$8 million, depending on the type of release), or (3) for any other facility or incineration vessel, the total of all costs of response plus \$50 million for any damages. That liability restriction does not apply, however, if (1) the release or threat of release was the result of willful misconduct, willful negligence, or a violation of a safety, construction, or operating standard or regulation within the privity or knowledge of such person, or (2) the person failed or refused to provide reasonable cooperation and assistance. CERCLA §107(c)(2), 42 U.S.C. §9607(c)(2).

Under CERCLA §106(a), if the president determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he has the authority to issue an order as may be necessary to protect public health and welfare and the environment. CERCLA §106(a), 42 U.S.C. §9606(a).

CERCLA §104 is indirectly a cleanup liability section. It grants the president authority to take removal and remedial action whenever there is a release or substantial threat of release of a hazardous substance or a release or substantial

threat of release of any pollutant or contaminant which may present an imminent or substantial endangerment to the public health or welfare. Further, the president may allow a PRP to take this action. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1). If that action is not provided properly, then liability accrues under CERCLA §107 as described above.

### §1.26 Joint and Several Liability

Liability in government actions under CERCLA is joint and several, meaning that any one responsible party is technically responsible for all cleanup costs where the responsible party's contribution cannot be separated; *i.e.*, where a "plume" or area of contamination is indivisible with respect to contributing parties. The burden of proof is on a defendant to prove that response costs can and should be apportioned. *U.S. v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983). Parties held liable to the government under a joint and several theory, however, may have a right of contribution against other PRPs. (See §1.32, *infra*, Contribution.) There have been a variety of approaches to apportionment of liability in contribution actions, including degree of involvement, degree of care exercised, the amount of waste, the degree of toxicity, and the nature of a defendant's activities. *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). See also *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991), for a thorough discussion of the so-called Gore amendment factors from CERCLA's legislative history and a court's broad discretion in applying such equitable factors as the court determines are appropriate. In addition, as a practical matter, the EPA generally allows parties who contributed a small quantity of waste to a site (normally 1 percent or less) or who may have an "innocent landowner" defense to settle early in the litigation as a "*de minimis* party." See §1.51, *infra*, for further discussion of *de minimis* settlement.

### §1.27 Retroactive and Strict Liability

Liability under CERCLA has been held to be retroactive, extending to acts occurring before its enactment. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 732-37 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). Liability is also strict—meaning that liability is not dependent on fault. CERCLA §101(32), 42 U.S.C. §9601(32); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

### §1.28 Statutory Defenses

There are three statutory defenses to liability under CERCLA. CERCLA §107(b), 42 U.S.C. §9607(b) declares that no liability shall result where the release is caused *solely* by an act of God, an act of war, or, under certain circumstances, an act or omission of a third party. An act of God is defined by CERCLA §101(1), 42 U.S.C. §9601(1) as "[A]n unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care and foresight." An act of war is not defined. To successfully

establish an act of a third-party defense it must be proven by the defendant that the act of the third party causing the release did not occur "in connection with a contractual relationship" with defendant; that defendant exercised due care with respect to the hazardous substance; and that defendant took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result. CERCLA §107(b)(3), 42 U.S.C. §9607(b)(3). (See Chapter 15, *infra*, for further discussion of CERCLA defenses.)

### §1.29 Innocent Landowner Exception

One of the more important exceptions to liability under CERCLA is that created for the so-called "innocent landowner." (Others include the lender security interest exception, permitted releases, pesticide application, and damages resulting from assistance provided in cleanup actions.) The innocent landowner exception is derived from CERCLA §§107(b)(3) and 101(35) (42 U.S.C. §§9607(b)(3) and 9601(35)) and was added to CERCLA by the SARA amendments. The innocent landowner exception is actually a corollary of the third-party statutory defense addressed above, namely an act or omission of a third party in connection with a contractual relationship. CERCLA §107(b)(3), 42 U.S.C. §9607(b)(3). CERCLA §101(35)(A) provides that for the purpose of §107(b)(3), the term "contractual relationship" includes land contracts, deeds, or other instruments transferring title or possession. To avoid liability under circumstances where such a contractual relationship exists, defendant must prove by a preponderance of the evidence that it satisfies one or more of three listed criteria.

The first category of excepted landowners is most commonly referred to as the "innocent landowner"; i.e., the landowner which proves that "(i) At the time defendant acquired the facility, the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release, was disposed of on, in or at the facility." To establish that it had no reason to know of any hazardous substance release, the defendant must prove that it undertook at the time of acquisition all appropriate inquiry into previous ownership and uses. CERCLA §101(35)(A), 42 U.S.C. §9601(35)(A). Appropriateness of the inquiry is to be "consistent with good commercial or customary practice in an effort to minimize liability." CERCLA §101(35)(B), 42 U.S.C. §9601(35)(B). The court is required to take into account:

[A]ny specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if contaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination of the property, and the ability to detect such contamination by appropriate inspection. CERCLA §101(35)(B), 42 U.S.C. §9601(35)(B).

This defense is unavailable to an owner who obtains actual knowledge of a release at the facility and subsequently transfers ownership without disclosing that knowledge to the purchaser. CERCLA §101(35)(C), 42 U.S.C. §9601(35)(C). An EPA guidance document on the innocent landowner's exception may be found at 54 Fed. Reg. 34,235 (Aug. 18, 1989).

While there is no way of knowing with certainty what level of inquiry will be deemed to be appropriate, most prospective buyers engage in a two-step approach. First a paper and walk-through assessment is performed of the property (Phase I Audit). If that assessment should cause a potential buyer to suspect contamination, then a second phase review is performed and would include groundwater and soil sampling (Phase II Audit). See Chapter 9 and Chapter 15, *infra*, for further discussion of the innocent purchaser defense.

Similar "innocent landowner" defenses exist for governmental entities acquiring property through escheat or eminent domain and for an individual who acquires a facility by bequest or inheritance. CERCLA §101(35)(A)(ii), (iii), 42 U.S.C. §9601(35)(A)(ii), (iii).

### §1.30 Security Interest Exception

The security interest exception to CERCLA liability is found in CERCLA §101(20)(A), which defines owner or operator. Under that subsection, "owner or operator" does not include a person who, without participating in the management of a vessel or facility, holds *indicia* of ownership primarily to protect his security interest in the vessel or facility. CERCLA §101(20)(A)(iii), 42 U.S.C. §9601(20)(A)(iii). This exception has been greatly limited through judicial decision. See §1.16, *supra* and Chapter 10, *infra*, for further discussion of lender liability.

### §1.31 Statute of Limitations

CERCLA §113(g) specifies the time period within which actions for response cost damages may be brought. Generally, actions for natural resource damages must be brought within three years after completion of the remedial action for NPL-listed sites and three years after the later of "discovery of the loss and its connection with the release in question" or promulgation of natural resource damage regulations under CERCLA §301(c) for other facilities. CERCLA §113(g)(1), 42 U.S.C. §9613(g)(1). Section 107 actions to recover the costs of a removal activity must generally be brought within three years after completion of the removal. Actions to recover the cost of a remedial activity must be brought within six years after initiation of physical on-site construction of the remedial action. CERCLA §9613(g)(2), 42 U.S.C. §9613(g)(2). Subsequent action to recover response costs may be brought no later than three years after completion of all response actions. CERCLA §113(g)(2), 42 U.S.C. §9613(g)(2). Action for contribution for response costs must be brought not later than three years after the date of judgment, administrative order, or judicially approved settlement for such costs, CERCLA §113(g)(3), 42 U.S.C. §9613(g)(3). See Chapter 15, *infra*, for further discussion of the statute of limitations defense.

### §1.32 Contribution

Prior to amendment by SARA, CERCLA did not expressly provide for a right of contribution between PRPs, although generally courts held that contribution rights could be inferred through a reading of CERCLA §§107 and 112. Now under CERCLA §107, a PRP is liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." CERCLA §107(a)(4)(B), 42 U.S.C. §9607(a)(4)(B) (emphasis added). CERCLA §113(f) further provides that "any person may seek contribution from any other person who is liable or potentially liable under §9607(a)." Such a contribution action may be brought during or following a civil action under §106 or §107. CERCLA §113(f)(1), 42 U.S.C. §9613(f)(1). A PRP which enters into an administratively or judicially approved settlement with the EPA or a state is not liable for claims for contribution regarding matters addressed in the settlement. CERCLA §113(f)(2), 42 U.S.C. §9613(f)(2).

### §1.33 State Law

Liability under the Kansas environmental response law extends to persons who are responsible for the condition. Aside from the exception for oil and gas pollution noted in §1.02, *supra*, the Kansas law does not enumerate any statutory defenses. This is presumably because the liability provisions are predicated on causation and responsibility rather than on status as in CERCLA. No separate statute of limitations for actions to recover response costs is provided by the Act. For a discussion of the Kansas toxic tort statute of limitations, refer to §15.\_\_, *infra*.

### §1.34 GOVERNMENT RESPONSES

The president, through the EPA, has discretion in responding to hazardous substance releases. CERCLA enables EPA to respond to releases or threatened releases of hazardous substances from a facility in the environment. EPA can initiate removal action, remedial action, or any other appropriate response measure when a release or threatened release may cause an imminent and substantial endangerment to public health. EPA actions must, however, be consistent with the National Contingency Plan. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1). "Release" and "facility" are also quite broadly defined. Hazardous substance refers to substances designated as hazardous under §311(b)(2)(a) of the Clean Water Act, §3001 of the Resource Conservation Recovery Act, §307(a) of the Clean Water Act, §112 of the Clean Air Act, and §7 of the Toxic Substances Control Act—without regard to concentration or quantity.

### §1.35 Removal Action

As described in §1.08, *supra*, a removal action is a limited response to an immediate need to prevent or abate a release of hazardous substances or to protect human health or the environment. They tend to be temporary or preliminary in nature. CERCLA §101(23), 42 U.S.C. §9601(23). Removal actions may be initiated by the president whenever there is a

release or threatened release of hazardous substance, pollutant, or contaminant into the environment, but there must be presented an imminent and substantial danger to the public health or welfare. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1). Subject to specified qualifications, the removal must be consistent with the National Contingency Plan and may at the government's option be performed by a PRP if the government is satisfied that the action will be done properly and promptly. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1). Further, any government-initiated removal action must, to the extent practicable, contribute to the efficient performance of any long-term remedial action. CERCLA §104(a)(2), 42 U.S.C. §9604(a)(2). A removal action is generally limited to actions costing no more than \$2 million and lasting no longer than 12 months. CERCLA §104(c)(1), 42 U.S.C. §9604(c)(1).

### §1.36 Remedial Action

A remedial action is a long-term response to permanently remedy a release of a hazardous substance into the environment. CERCLA §101(24), 42 U.S.C. §9601(24). Remedial action may be taken by the government under the same circumstances which justify a removal action. As with a removal action, the EPA may allow a PRP to conduct an RI/FS if qualified to do so and if the PRP has retained a contractor to assist in overseeing the conduct of the RI/FS. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1). Once the EPA or a PRP has commenced an RI/FS, no other PRP may undertake any remedial action at the same facility without EPA approval. CERCLA §122(e)(6), 42 U.S.C. §9622(e)(6).

### §1.37 State Participation

CERCLA provides for direct and substantial involvement by the states in the hazardous substance cleanup process. The EPA is required to consult with the state before determining any appropriate remedial action to be taken at a site. CERCLA §121(f)(1), 42 U.S.C. §9621(f)(1). Moreover, before the EPA may take any remedial actions under §104, the state must agree to assure all future maintenance for response actions, assure availability of hazardous waste disposal facilities for waste taken off-site, and either pay or assure payment of 10 percent of all remedial costs or 50 percent of response costs if the facility was operated by the state. CERCLA §104(c)(3), 42 U.S.C. §9604(c)(3). The 50 percent state contribution toward response costs may be increased as appropriate depending on the degree of responsibility of the state or political subdivision for the hazardous substance release.

### §1.38 Private Party Cleanup

Cleanup actions may be undertaken by private parties if in compliance with the National Contingency Plan and if the EPA determines that such action will be done promptly and properly. CERCLA §104(a), 42 U.S.C. §9604(a). There are many reasons why private party performance of cleanup activity might be advisable. Among those reasons are: (1) EPA cleanups generally cost more, costs which eventually will be sought from the PRPs in any event; (2) CERCLA pre-enforcement review limitations make it difficult for PRP's to

challenge government cleanup actions; (3) it is to the PRPs advantage to maintain control over the cleanup process; (4) a private party cleanup generally does not take as long as an EPA cleanup; and (5) the private party, in conducting cleanup operations itself, may gain positive publicity or at least avoid negative publicity. Private party cleanup may be conducted individually or as a "PRP group." See §§1.53 through 1.64, *infra*, for a discussion of PRP group activities.

### §1.39 State Law

Under K.S.A. 1990 Supp. 65-3453 and 65-3455, the state has the authority to issue cleanup orders, recover moneys from responsible persons, have cleanup operations performed and enter onto any property or premises to gather data, conduct investigations or take remedial action. The state also has the authority, under K.S.A. 1990 Supp. 65-3453(b), to issue an order for compliance if entry onto property is refused.

### §1.40 ENFORCEMENT ACTIONS

CERCLA's enforcement provisions provide EPA with the ability to either compel private parties to perform (and thus pay for) remedial actions or obtain reimbursement of response costs from responsible parties. These enforcement mechanisms are set forth in CERCLA §106 (abatement orders) and CERCLA §107 (cost recovery actions). 42 U.S.C. §§9606, 9607. The enforcement scheme also provides for both civil and criminal penalties. (See §1.47 *infra*.)

### §1.41 Abatement Orders and Actions Under §106

Under CERCLA §106, the EPA may issue such administrative orders as necessary to protect public health and the environment where there is imminent and substantial endangerment due to the release or threatened release of a hazardous substance. CERCLA §106(a), 42 U.S.C. §9606(a). The order may compel abatement of the danger or threat or other appropriate response actions. Similarly, the EPA may require the attorney general to file an action for abatement in the United States District Court in the district in which the threat exists. The United States District Court has broad authority to "grant such relief as the public interest and the equities of the case may require." CERCLA §106(a), 42 U.S.C. §9606(a). A person who receives a §106 order and complies with the terms thereof may, after completion of the required action, petition for reimbursement from the Superfund for the reasonable costs of that action plus interest. A condition precedent to receiving reimbursement under the fund is that the party seeking reimbursement prove by a preponderance of the evidence that it was not liable for response costs under CERCLA §107(a) and that the costs for which it seeks reimbursement are reasonable. CERCLA §106(b)(2), 42 U.S.C. §9606(b)(2). In addition, response costs may be recovered if the party seeking reimbursement can demonstrate, on the administrative record, that the government's decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with the law. CERCLA §106(b)(2), 42 U.S.C. §9606(b)(2).

### §1.42 Government Cost-Recovery Actions Under §107

Rather than issue an abatement order or initiate an abatement action, both of which seek to compel a responsible party to undertake remediation of a release, the EPA may instead clean up the site in accordance with the National Contingency Plan and seek to recover those response costs and any damages for injury to natural resources from responsible parties. CERCLA §107(a), 42 U.S.C. §9607(a). Courts are split as to whether the government's indirect costs, such as overhead costs for rent, cleanup staff, supplies, etc., are in whole or in part reasonable. See, e.g., *United States v. Ottati & Goss*, 694 F. Supp. 977 (D.N.H. 1988) (indirect costs are reasonable); *contra United States v. Northernair Plating Co.*, 685 F. Supp. 1410, 1418 (W.D. Mich. 1988), *aff'd sub. nom.*, *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989). Other costs which have been determined by at least some courts to be recoverable under §107 include the cost of site evaluations and investigations (*Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988)); costs associated with site administration and supervision (*United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985)); and, health effects study costs (CERCLA §107(a)(4)(D), 42 U.S.C. §9607(a)(4)(D)). The burden is on defendants to show that the government's response costs are inconsistent with the NCP. *United States v. Northernair Plating Co.*, 685 F. Supp. at 1417.

### §1.43 Private Party Cost-Recovery Actions Under §107

CERCLA §107 also provides for the recovery of response costs from responsible persons by private parties who have incurred those costs either voluntarily or involuntarily. As with a governmental cost-recovery action, only costs consistent with the NCP are recoverable. CERCLA §107(a)(4)(B), 42 U.S.C. §9607(a)(4)(B). Unlike the government, however, the private party plaintiff bears the burden of proving that response costs are consistent with the NCP—no presumption of consistency exists. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984). Also, it has been held that attorney fees and litigation costs are not recoverable by private parties, although clearly recoverable by the government. CERCLA §104(b)(1), 42 U.S.C. §9604(b)(1); *T & E Industries, Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 707 (D.N.S. 1988); but see *Lykins v. Westinghouse Elec. Corp.*, 27 Env't. Rep. Cas. (BNA) 1590, 1594 (E.D.K., 1988).

### §1.44 Comparison of Contribution and Cost Recovery Actions By Private Parties

The distinction between the private right of contribution under CERCLA §113 and private cost recovery actions under §107 is not clear, either from the statute itself or the interpretive case law. Both claims seek the recovery of an alleged "overpayment" of response costs by one private party against another. Unlike a §107 claim, however, a contribution action may be brought before any response costs are incurred.

CERCLA §113(f)(1), 42 U.S.C. §9613(f)(1). CERCLA's contribution provision is thus often relied upon by a litigation defendant in asserting a third-party complaint. On the other hand, §107 appears to apply to the recovery of response costs that the plaintiff has directly incurred rather than costs for which it is or may be derivatively or potentially liable.

#### §1.45 Effects of Bankruptcy on Enforcement

The effect of bankruptcy law on CERCLA enforcement is complicated and unpredictable. On one hand, CERCLA attempts to place the financial responsibility for hazardous substance remediation on potentially responsible parties. On the other hand, bankruptcy law attempts to provide debtors with a fresh start. *In re Smith-Douglass, Inc.*, 842 F.2d 729 (4th Cir. 1988). These are clearly conflicting priorities. Questions are not limited to whether an environmental liability would be a dischargeable debt, but also include whether contaminated property may be abandoned, whether government cleanup orders may be enforced, what protection may be provided for post-petition financing and whether a post-petition release cleanup is an administrative expense. See Chapter 13, *infra*, for further discussion on environmental issues in bankruptcy.

#### §1.46 Federal Liens

SARA amendments to CERCLA §107 created a lien in favor of the United States on all real property belonging to a party liable for response costs and subject to or affected by a removal or remedial action. CERCLA §107(l), 42 U.S.C. §9607(l). The lien arises at the later of the time costs are first incurred by the government or the time that the PRP is provided written notice of potential liability. The lien continues until the liability is satisfied or becomes unenforceable. The lien is in an amount of all costs and damages for which the PRP is liable to the government under CERCLA §107(a). In order to be effective, the lien must be recorded at the places designated by state law in which the real property is located. If state law has not designated one such office for filing, then filing will be made in the United States District Court for the district in which the property is located. The EPA lien is subordinate to those of other creditors whose interests were perfected under applicable state law before the recording of the lien. After EPA records the lien, the government has priority over purchasers, holders of security interests, and judgment lien creditors that have not perfected their interests. CERCLA §107(l)(3)(4), 42 U.S.C. §9607(l)(3). See §9.\_\_\_\_, *infra*, for a discussion of state superlien statutes.

#### §1.47 Civil and Criminal Penalties

Civil penalties provided by CERCLA include:

(1) CERCLA §107(c)(3) (42 U.S.C. §9607(c)(3)) provides that any person who fails without sufficient cause to properly provide removal or remedial action under a §104 or §106 order may be liable to the United States for punitive damages in an amount at least equal to and not more than three times the amount of any costs incurred by the Fund as a result of such failure to take proper action;

(2) A person who without sufficient cause, willfully violates or fails to comply with a §106 order to abate may be liable for the payment of a fine of up to \$25,000 per day. CERCLA §106(b)(1), 42 U.S.C. §9606(b)(1);

(3) A PRP will lose the "protection" of the §107(c)(1) limitations of liability (*see* §1.25, *supra*) if the release or threat of release was the result of willful misconduct or willful negligence within privity or knowledge of such person or the cause was a violation of applicable safety construction or operational standards within privity or knowledge of such person or the person failed or refused to cooperate or assist. CERCLA §107(c)(2), 42 U.S.C. §9607(c)(2).

(4) Class I and II administrative penalties of up to \$25,000 per violation may be assessed by the EPA for violations of §103(a) or (b) [notices], §103(d)(2) [destruction of records], §108 or regulations thereunder [financial responsibility], §122(d)(3) [§104(b) settlement agreements], §122(1) [violation of administrative orders, consent decrees, or agreements]. CERCLA §109(a), 42 U.S.C. §9609(a).

(5) An action may be brought in federal district court to assess and collect a penalty of \$25,000 per day (\$75,000 for repeat violations) for violation of the requirements listed above. CERCLA §109(c), 42 U.S.C. §9609(c).

CERCLA criminal penalties include the following:

(1) A failure to notify the EPA of a site under CERCLA §103 may result in the imposition of a fine of \$10,000 and/or imprisonment of up to one year and the loss of certain rights to assert defenses. CERCLA §103(c), 42 U.S.C. §9603(c). (*See* §1.04, *supra*, for discussion of the §103 notification requirement.)

(2) A failure to provide notification of a reportable release or submission of a false report regarding a reportable release may result in imprisonment for no more than three years or no more than five years for a repeat offense. CERCLA §103(b)(3), 42 U.S.C. §9603(b)(3) (*See* §1.74, *infra*, for a discussion of reportable release notification requirements.)

(3) A violation of CERCLA's records compliance requirements allows imposition of a fine under Title 18 of the U.S. Code and/or imprisonment for up to three years, five years for repeat offenders. CERCLA §103(d)(2), 42 U.S.C. §9603(d)(2).

#### §1.48 State Law

In the event KDHE entry onto property under K.S.A. 1990 Supp. §65-3453(b) is refused, the state may ask the attorney general to commence a civil action to compel compliance with its request or order. The court may enjoin interference or direct compliance. If a party fails to pay for cleanup costs assessed under 1990 Supp. K.S.A. §65-3455, the moneys are recoverable in an action brought by the Secretary of the KDHE in the district court of Shawnee County. *See* §9.\_\_\_\_, *infra*, for a discussion of state superlien statutes.

## §1.49 SETTLEMENT

CERCLA's settlement procedures and concepts are of substantial importance as most site cleanups are the result of settlement rather than litigation and because PRPs believe that their liability will generally be less if remediation is achieved through cooperation and settlement rather than litigation. CERCLA §122, added by SARA, provides that the president shall facilitate agreements in the public interest and that are consistent with the NCP in order to expedite remedial action and minimize litigation. CERCLA §122(a), 42 U.S.C. §9622(a). Notably, if the §122 settlement procedures are not used, the president must give written notice to the PRPs explaining why use of the procedures is inappropriate. CERCLA §122(a), 42 U.S.C. §9622(a). That decision is not, however, subject to judicial review. CERCLA §122(a), 42 U.S.C. §9622(a).

Generally, CERCLA provides as follows with respect to settlement agreements:

1. The agreement may provide for the PRP to perform the response action, rather than the government, if it is determined it will be done properly. CERCLA §122(a), 42 U.S.C. §9622(a).

2. The agreement is to be entered as a consent decree in the appropriate United States District Court but such submission will not be considered an admission of liability. There is an opportunity for comment before entry as a final judgment. CERCLA §122(d), 42 U.S.C. §9622(d).

3. The EPA is to facilitate settlement of site remediation responsibilities by providing PRPs with PRP names and addresses, and, if possible, hazardous substance volume and nature at the site. The government may not begin a §104(a) action or take action under §106 for 120 days after this information is provided and may not commence a RI/FS for 90 days following notification. CERCLA §122(e), 42 U.S.C. §9622(e). (Please refer to §§1.26, 1.40, and 1.41, *supra*, for a description of §104(a) and §106 actions.)

4. When it will expedite settlement, EPA is to provide nonbinding preliminary allocations of responsibility (NBARs) which allocate by percentage each PRP's responsibility for the response costs of the site. Factors which may be considered in determining PRP shares are volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest, precedential values, inequities, and aggravating factors. CERCLA §122(e)(3), 42 U.S.C. §9622(e)(3). NBARs are prepared after the RI/FS and are not admissible as evidence in any proceeding. CERCLA §122(e)(3)(A), (C), 42 U.S.C. §9622(e)(3)(A), (C).

## §1.50 Mixed Funding

As part of a settlement agreement, CERCLA §122(b) authorizes the EPA to pay certain of the response costs and reimburse PRPs from the Fund (*see* §1.71, *infra*, for a discussion of the CERCLA Superfund) for the costs of certain actions performed. The EPA is then required to exercise reasonable efforts to recover those funds from other responsible parties. CERCLA §122(b)(1), 42 U.S.C. §9622(b)(1). The purpose of mixed funding is to encourage

PRP settlement where not all responsible parties are participating. Because this concept is at odds with joint and several liability, and EPA's desire to recover all costs, EPA is reluctant to use mixed funding unless the reluctant PRP is substantial and solvent.

Mixed funding occurs in one of three ways. First, the EPA and the settling PRPs may each perform separate portions of the response action ("mixed work"). Second, the settling PRPs may pay their agreed-upon portion of response costs to EPA, and EPA performs the response action ("cash-out"). Finally, under "preauthorization," the settling PRPs agree to perform a response action and the EPA agrees to reimburse them for a portion of the costs.

## §1.51 De Minimis Settlement

If practicable and in the public interest, the EPA is required to reach a final settlement with PRPs who are potentially liable for only a "minor portion" of the response costs. In addition, to qualify for such a *de minimis* settlement, the PRP must meet one of two conditions: (1) the amount and toxicity of the PRP's waste must be minimal as compared to other hazardous substances at the site, or (2) the PRP is an owner who bought without actual or constructive knowledge, did not conduct or permit the disposal, and did not contribute to the release. CERCLA §122(g)(1), 42 U.S.C. §9622(g)(1). A settling *de minimis* party is not liable for contribution claims brought by other PRPs. CERCLA §122(g)(4), 42 U.S.C. §9622(g)(4). For information on EPA's *de minimis* policy, see "EPA Guidance on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA," 52 Fed. Reg. 24,333 (June 30, 1987) and "Interim Model CERCLA Section 122(g)(4) *De Minimis* Waste Contributor Consent Decree and Administrative Order on Consent," 52 Fed. Reg. 43,393 (November 12, 1987).

## §1.52 Covenant Not to Sue

EPA has the authority to provide a PRP with a "discretionary" covenant not to sue concerning liability to the United States under CERCLA if: (1) the covenant is in the public interest, (2) the covenant would expedite response action, (3) the PRP is in full compliance with a consent decree, and (4) the response action has been approved. CERCLA §122(f)(1), 42 U.S.C. §9622(f)(1).

"Special" covenants not to sue are available, in EPA's discretion, for that portion of remedial action which involves either (1) transport and off-site disposition of hazardous waste if EPA requires such a disposal after rejecting a proposed remedial action which was consistent with the NCP and which did not require such off-site disposition, or (2) treatment of hazardous substances to render them harmless. The special covenant not to sue releases the party from liability to the United States for a *future* release of hazardous substances from the facility. CERCLA §122(f)(2), 42 U.S.C. §9622(f)(2).

Except in extraordinary circumstances, EPA will not release settling PRPs from future liability where such liability arises out of conditions unknown at the time the covenant not to sue becomes effective. CERCLA §122(f)(6), 42 U.S.C. §9622(f)(6).



A covenant not to sue may provide that future liability to the United States is limited to the same proportion as that established in the settlement agreement. CERCLA §122(c)(1), 42 U.S.C. §9622(c)(1).

There is also a separate authority for a covenant not to sue for *de minimis* settlers. CERCLA §122(g)(2), 42 U.S.C. §9622(g)(2).

A separate covenant not to sue may be obtained for natural resource damages. CERCLA §122(j)(2), 42 U.S.C. §9622(j)(2).

A covenant not to sue is subject to satisfactory performance by the party of its obligations under the settlement agreement. CERCLA §122(f)(5), 42 U.S.C. §9622(f)(5).

### §1.53 Potentially Responsible Party Groups

As explained in §1.49, *supra*, it is generally believed that the most cost-efficient way in which to clean up a Superfund site is for the PRPs to voluntarily take action in agreement with the lead agency (EPA or state agency). CERCLA and EPA settlement policy contemplate the formation of PRP groups, but aside from NBARs (*see* §1.49, *supra*, for an explanation of NBARs), there is little authority to guide PRPs. For that reason, this section is based on the accumulation of various practice experiences of the author and should be considered by the practitioner in the spirit of a "practice tip."

With the passage of a number of years since the earliest CERCLA cleanups such as Seymour and Berlin and Farro and with the participation of some industrial PRPs in dozens of PRP groups, some common patterns and themes have emerged in the life of PRP groups.

Following is a brief discussion of some of the more common elements of PRP participation, namely, composition of the group, leadership, group participation agreements, *de minimis* buyouts, selection and retention of consultants, entering into agreements with the lead agency, relationship with the lead agency, public relations, handling recalcitrants (contribution actions), and long-term activity.

#### §1.54 Composition of the Group

The formation of a PRP group often begins rather informally. A PRP usually first learns of its potential involvement in a Superfund site upon the receipt of a letter from the EPA requesting certain information about waste disposal at the site (a "104 letter"). The lead agency may at the same time provide the names and addresses and hazardous substance volume and nature of other PRPs. If not, the PRP should request the information. Depending on the site, the PRP may immediately know whether its role is major or minor: Is it the site up the road used by only three businesses? Or is it the site in the next state to which the PRP sent one drum of hazardous waste? The major players (usually those contributing large volumes of waste or the site owner or operator) may step forward and form a PRP group. It is essential that some party or parties take this role to prevent the EPA from going forward. The group is at first rather informal with some actively participating and others

remaining on the fringe, sometimes hoping not to be noticed or to appear to be too concerned.

The PRP group organizers usually poll other known PRPs for the names of other parties to include. They also obtain all available site disposal and ownership records to identify other PRPs. Sometimes knowledge of the community and its businesses is helpful in identifying PRPs when records are sketchy or nonexistent. Sometimes legal tracking of corporations (such as finding parent corporations or individual shareholders) or skip tracing is necessary. Finally, private investigators may be useful to identify or locate PRPs.

#### §1.55 Leadership

In a Superfund site with few players, leadership is rather taken for granted and may not be much of an issue. Many sites are, however, more complicated and PRPs may find themselves in the midst of a PRP tangle—either a group hopelessly drifting, or one in which PRPs are competing for the leadership role. Parties which know they will pay a large share of cleanup costs generally voluntarily take the reins. There is often, however, more than one PRP in this category. Each may wish to maintain some control, but at the same time not needlessly spend money and not appear to be the most culpable (and therefore the one who should contribute the largest share of the cleanup). A small group of leaders generally emerges and is often referred to as the steering committee. That group usually divides the various group tasks among themselves and their counsel. Some are inexperienced but willing to help, while others are very experienced. Tasks should be apportioned accordingly.

#### §1.56 Group Participation Agreements

One of the first orders of business is to reach agreement among the PRP group members on various issues. In addition to deciding what percentage each PRP will contribute to the initial investigation of the site (this agreement may, in fact, come later), the PRPs must decide how group decisions will be made (voting rights), how group expenses will be shared, what confidentiality will be observed, what information will be exchanged, what powers the steering committee should have, etc. This type of document is called a PRP group agreement.

If the PRP group is to share counsel, they may enter into a joint defense agreement. Sometimes counsel is shared on some but not all issues.

Some cost-sharing issues may be covered in the PRP group agreement, while others may be the subject of separate agreements. For example, there might be an RI/FS participation agreement for cost sharing for the site study. One reason this might be separate from the final cleanup allocation is that until the study is completed, it may not be clear how costs should be allocated.

Keep in mind that endless variety is possible. A useful reference for group agreements is 2 Environmental Law Forms Guide, Ch. 8, "CERCLA PRP Agreements" (R. Steinberg and R. Mays 1991).



### §1.57 *Cost Allocation*

Cost allocation is almost always difficult because the law is not clear on how allocation is to be determined. See §1.25, *supra*, for a discussion of factors to be considered in apportionment of liability. PRPs negotiate their shares in a number of ways, including: (1) selecting one or more factors, such as total volume or volume of liquid waste, to be used in a formula, (2) creating "tiers" where each PRP in a tier pays the same amount or a percentage of their tier's percentage, and (3) apportioning the cost based on contribution to a particular unit (such as drum removal or soil flushing). Sometimes a PRP's negotiating posture will be based on arguably nonrelevant factors, such as a refusal to contribute more than X percent until completion of the site study regardless of what the facts appear to be. Interim measure allocations (such as for expenses or a site study) may not necessarily be consistent with later allocations. Some may be subject to revision based on new information or to be consistent with a final allocation formula. In any event, the allocations are normally the subject of one or more group agreements.

### §1.58 *De Minimis Buyouts*

The PRP group may want small-volume waste contributors or others with minimal connection to the site to have the opportunity to cash out early in the process (usually at a premium of some sort). This is of course attractive to the small player because it no longer has to bear the transactional costs of dealing with the problem.

### §1.59 *Agreements With the Lead Agency*

The settling parties will enter into one or more agreements with the lead agency for site studies and/or clean up activities. These agreements are usually negotiated by the PRP group steering committee or its counsel. All the PRP group members sign the agreement and rely on their side agreement for determining individual members' shares. One of the major PRPs or a committee usually forms a treasury function with a bank account and an interest-bearing investment and makes payments and collects contributions from the PRPs. A trust arrangement may or may not be established by the group, depending on PRP capabilities, trust, and other factors.

### §1.60 *Selection and Retention of Consultants*

Usually one or more of the PRPs or their counsel have had contacts with a variety of engineering consulting firms. There tend to be preferences for some firms based on factors such as the strength of a particular office's personnel, expertise in a particular area (such as soil, groundwater, or a particular remedy), satisfaction with previous work, price, timeliness of services performed, etc. Usually three or four firms are asked to furnish a quote for whatever task is at hand. A decision is then reached regarding which firm to use based on consensus or whatever other method of selection was agreed upon. An agreement between the consultant and the PRP group is then negotiated and executed.

A common practice is to hire another consultant to visit the site, oversee the principal firm's work, and review invoices. This is wise when the project is large or the work very technical in nature such that it is difficult for anyone not a consulting engineer to evaluate the services being performed.

### §1.61 *Relationship With the Lead Agency*

Communication with the lead agency is usually confined to one or two PRP representatives. Usually only one technical person and one attorney communicate with the agency, although sometimes that work is divided into issues, such as one PRP communicating with the agency on remedy issues and another on PRP identification issues. The purpose of limiting communication is to maintain consistency, develop a pattern of communication, develop rapport, and create a single source of information within the PRP group.

### §1.62 *Public Relations*

Sometimes it is advantageous for the PRP group to disseminate information to the media in the interest of getting accurate information out or to help an image-conscious PRP maintain a good public image. The group usually selects one PRP representative to perform this function. That person prepares statements and makes all contacts with and fields all questions from the media.

### §1.63 *Handling Recalcitrants*

There are oftentimes parties which are viewed by the PRP group as additional PRPs, but which decline to participate in the group or pay their "fair" share of costs. Some take this position because they are convinced (rightly or wrongly) that they are not legally liable and others stonewall in hopes of saving transaction costs, delaying payment, or being forgotten. The PRP group may save time and money if it makes some attempt to include the recalcitrants short of litigation, at least for a period of time. Some recalcitrants or their attorneys may simply need to be educated as to the law. Superfund is a most complicated and difficult subject. Some may need more facts—such as information on their known contribution or that of others. Some may simply need to be made aware of what the consequences will be if they do not participate. Finally, if informal discussions, more formal demand letters, and other persuasive devices are not effective, then the PRP group files suit against the recalcitrant.

### §1.64 *Long-Term Activity*

Some Superfund site activities last a number of years. The study and cleanup may last several years, and monitoring activity may last almost indefinitely. In addition, it is often desirable for the PRP group to purchase the Superfund property. All of which means that the PRP group must plan for a long-term commitment to the site. Sufficient funding from PRPs should be obtained during the early years, as collection of additional funds in later years may be more difficult.

## **§1.65 NATURAL RESOURCE DAMAGES**

In addition to response costs for removal or remedial actions, liability under CERCLA extends to injury to, destruction of, or loss of natural resources, including the costs of assessment. CERCLA §107(a)(4)(c), 42 U.S.C. §9607(a)(4)(c). Liability may be to a state or to the United States or in some situations to an Indian tribe. Recovery may not be retroactive—damages which occurred wholly before CERCLA are not recoverable. CERCLA §107(f)(1), 42 U.S.C. §9607(f)(1).

Under CERCLA §122(j), 42 U.S.C. §9622(j), the federal natural resource trustee must be notified of negotiations and encouraged to participate in negotiations when a release or threatened release may have resulted in damages to natural resources under the trusteeship of the United States.

## **§1.66 JUDICIAL REVIEW**

Because of the high cost of most Superfund site cleanups, PRPs have attempted to obtain judicial review of EPA decisions, orders, and remedial plans before these decisions, orders, and plans are implemented. The SARA amendments to CERCLA §113 were intended to limit a PRP's ability to delay the remediation process through pre-enforcement judicial review.

### **§1.67 Federal Judicial Review**

Judicial review of EPA orders and decisions is not allowed except in the five circumstances set forth in CERCLA §113(h):

- (1) a §107 action to recover response acts or damages or for contribution;
- (2) an action to enforce a §106(a) order or to recover a penalty for violation of such order;
- (3) a §106(b)(2) reimbursement action;
- (4) a §310 citizens suit alleging that §104 or §106 response action was in violation of the Act (but may not be brought with regard to a removal where a remedial action is to be taken); and
- (5) a §106 action where the United States has moved to compel a remedial action. CERCLA §113(h), 42 U.S.C. §9613(h).

Judicial review is limited to the record (CERCLA §113(j)(1), 42 U.S.C. §9613(j)(1)); and the standard of review for EPA-selected response actions is arbitrary and capricious (CERCLA §113(j)(2), 42 U.S.C. §9613(j)(2)). If the court finds the selected remedy was arbitrary and capricious or otherwise not in accordance with law, the remedy is the response costs and damages that are not inconsistent with the NCP and other relief consistent with the NCP.

### **§1.68 State Judicial Review**

Under K.S.A. 1990 Supp. §65-3456a, any person adversely affected by an order or decision may, within 15 days of service of that order or decision, request a hearing in writing. Further, any person adversely affected by any action of the

KDHE may obtain review in accordance with the act for judicial review and civil enforcement of agency actions, K.S.A. §§77-601 *et seq.*

## **§1.69 CITIZENS' SUITS**

Any person may commence a civil action against any person (including the United States) who is alleged to be in violation of any requirement, order, or agreement under CERCLA or against the president or other officer of the U.S. who is alleged to have failed to perform a nondiscretionary act or duty under CERCLA. CERCLA §310(a)(1), (2), 42 U.S.C. §9659(a)(1), (2). Actions for violations of CERCLA requirements or agreements must be brought in federal district court in the district in which the violation occurred, while actions for failure to perform a duty must be brought in the United States District Court for the District of Columbia. CERCLA §310(b)(1), (2), 42 U.S.C. §9659(b)(1), (2). The district court may, under §310(c), enforce the requirement or order action as may be necessary to correct the violation and impose any penalty provided. A citizens' suit may not be commenced, however, if an action has been commenced or is being diligently prosecuted by the United States to require compliance (§310(d)(2), 42 U.S.C. §9659(d)(2)), or until 60-day notice of the violation and of intent to commence an action have been provided (CERCLA §310(d)(1), 42 U.S.C. §9659(d)(1)). The court may award the "prevailing or substantially prevailing party" the costs of litigation, including attorney fees and expert witness fees. CERCLA §310(f), 42 U.S.C. §9659(f).

## **GOVERNMENT TRUST FUNDS**

### **§1.70 Federal Taxation**

Title II of CERCLA amended the Internal Revenue Code. It imposes taxes and creates a fund for response actions.

Under Title II of CERCLA, taxes are imposed on petroleum products and on certain specified chemical feedstocks and chemical derivatives. In addition, SARA imposed for the first time an "environmental tax" on corporations. (Internal Revenue Code §§4611 and 4661.)

### **§1.71 Hazardous Substance Response Trust Fund**

The Hazardous Substance Response Trust Fund consists of monies obtained from the taxes referenced above, together with CERCLA cost recoveries, penalties, and punitive damages received under CERCLA, monies collected under §311(b)(6)(B) of the Clean Water Act, and specified appropriations. The Fund may be used for §104 response costs, costs of carrying out the NCP, technical assistance grants, payment of natural resource claims, assessments and rehabilitation, costs related to ATSDR (Agency for Toxic Substances and Disease Registry) services, cost of overhead for damage assessment under the NCP, etc. CERCLA §111(a), 42 U.S.C. §9661(a). Restrictions in the use of the Fund include payment for destruction of natural resources which occurred wholly before the passage of CERCLA. CERCLA §111(d), 42

U.S.C. §9661(d). The state or federal agency making a claim against the Fund for natural resource damage must first exhaust all administrative and judicial remedies to recover the amount of the claim from the person liable under §107. CERCLA §111(b)(2), 42 U.S.C. §9661(b)(2).

### **§1.72 State Environmental Response Fund**

An environmental response fund was created by K.S.A. 1990 Supp. §65-3454a. The fund is authorized to receive money from:

(1) the federal government or any private or governmental source, any funds made available under laws, rules, and regulations for remedial action where a threat to health or environment is created or threatened and,

(2) grants, gifts, bequests, or appropriations to carry out remediation action.

Separate accounts are maintained for:

- (1) specific state lead sites for remedial activities,
- (2) state appropriations or other funds designated as state match for remedial activities at an NPL site,
- (3) state appropriations or other funds designated for emergency or environmental response at nonspecific sites, and
- (4) state appropriations or other funds designated as state match for federal leaking underground storage tank trust fund resources used to conduct remedial action.

The fund may be used for:

- (1) the design and review of remedial action plans,
- (2) contracting for "outside" expert consultation with respect to both site investigation and remediation,
- (3) mitigation of adverse environmental impacts,
- (4) remedial activity,
- (5) legal costs,
- (6) state matching costs for CERCLA, and
- (7) state matching costs for the federal leaking underground storage tank trust fund.

### **§1.73 HAZARDOUS SUBSTANCE SPILLS**

Requirements concerning releases from facilities are a product of both CERCLA §102 and §311(b)(4) of the Clean Water Act. Other state and federal laws, as well as individual permit requirements, may apply. Federal laws concerning spills include the Occupational Safety and Health Administration Act, the Resource Conservation and Recovery Act (*see* Chapter 2, *infra*), the Emergency Planning and Community Right-to-Know Act (*see* Chapter 8, *infra*), the Hazardous Materials Transportation Act (*see* Chapter \_\_, *infra*), the Toxic Substances Control Act and the Oil Pollution Act of 1990.

### **§1.74 Notification Requirements**

Hazardous substance releases from facilities and vessels must be reported to the National Response Center established by the Clean Water Act if the quantity released is equal to or greater than those established under CERCLA §102. CERCLA §103(a), 42 U.S.C. §9603(a). Section 102 provides that the EPA is to establish by regulation the quantities of the various substances that will trigger the spill-reporting requirement. These quantities are called "reportable quantities" or "RQs." EPA-reportable-quantity regulations are found at 40 C.F.R. §302.4(a) (1987). The reportable quantity applies to the quantity of hazardous substance released during a 24-hour period. 40 C.F.R. §302.6(a) (1987). For any substances for which a volume has not been specified, the reportable quantity is one pound or that quantity established under §311(b)(4) of the Clean Water Act. CERCLA §102(b), 42 U.S.C. §9602(b). A continuous release, stable in quantity and rate, generally need only be reported annually. CERCLA §103(f), 42 U.S.C. §9603(f). Exceptions from the reporting requirement under §103 include 11 categories of federally permitted releases (such as under a water discharge permit) (CERCLA §101(10), 42 U.S.C. §9601(10)), releases required to be reported which are exempted under RCRA (which are reported to the National Response Center) (CERCLA §103(f), 42 U.S.C. §9603(f)), and pesticide releases (CERCLA §103(e), 42 U.S.C. §9603(e)). Other exceptions found in CERCLA §101(22) defining "release" include releases with workplace exposure only and nuclear releases.

### **§1.75 Emergency Response Plans**

The Emergency Planning and Community Right-to-Know Act, the Clean Water Act, and the Resource Conservation and Recovery Act should be consulted with respect to emergency response and contingency plans. *See* Chapters 8, 4, and 2, *infra*.

### **§1.76 EMPLOYEE PROTECTION**

Employee protection is provided by CERCLA §110, 42 U.S.C. §9610. Subsection (a), a "whistleblower" provision, prohibits termination of or discrimination against an employee who has provided information to the government, started a proceeding under the Act, or has or will testify in a proceeding. An employee alleging such termination or discrimination has 30 days to apply for a review and has the opportunity for a hearing. The remedy is not available to employees who deliberately violate a Superfund requirement. CERCLA §110(d), 42 U.S.C. §9610(d).

# CHAPTER 2

## RCRA/KANSAS

### LAW ON

### HAZARDOUS

### WASTE

By Rosemary Podrebarac and  
Clifford K. Stubbs

#### INTRODUCTION TO THE RESOURCE CONSERVATION AND RECOVERY ACT

##### §2.1 History and Enactment

The Resource Conservation and Recovery Act (RCRA) was promulgated by the federal government in 1976 as an amendment to the Solid Waste Disposal Act of 1965, as amended in 1970. Resource Conservation & Recovery Act, 42 U.S.C.A. §§6901-6992K (1983 and Supp. 1991). The Act has since been substantively amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499. This chapter cites to RCRA sections as they appear in the United States Code Annotated.<sup>1</sup>

RCRA regulates "solid waste" generation, transportation, treatment, storage, and disposal and has accordingly been described as legislation regulating waste from "the cradle to the grave." The broad definition of "solid waste" means that RCRA regulates most forms of waste, including contained gaseous material, liquids, semisolids, and solids. See 42 U.S.C.A. §6903(27) (1983).

RCRA establishes a comprehensive waste management program. This program is prospective in nature and must be distinguished from the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund"), which is primarily concerned with cleanup of and compensation for hazardous substance releases. CERCLA, 42 U.S.C.A. §§9601-9675 (1983 and Supp. 1991). Frequently, these releases occur as a result of violations of RCRA standards. Environmental Protection Agency, *RCRA Orientation Manual*, VI-8 (1990) [hereinafter *Orientation Manual*]. When such a release occurs, the available remedies under RCRA and CERCLA overlap.

##### §2.2 Purpose

Congress adopted RCRA to combat the hazards resulting from the increasing amount of solid waste generated in this country. 42 U.S.C.A. §6901(a)(1)-(2) (1983). These increases are the result of technological advances in American industry, as well as the demolition and modernization of commercial and residential structures. *Id.*

The migration of our population to metropolitan and urban areas has also magnified and concentrated the disposal problems of both residential and commercial waste. 42 U.S.C.A. §6902(a)(3) (Supp. 1991).

Congress also determined that, while the collection and disposal of solid waste should continue to be primarily governed by state, regional, and local authorities, the current problems of solid waste disposal mandate federal action. 42 U.S.C.A. §6902(a)(4) (Supp. 1991). This federal action takes the form of regulation, financial assistance, and technical assistance, as well as leadership in the development of new methods to reduce waste generation, to increase reuse of waste produced, and to increase the safety of waste disposal. *Id.*

##### §2.3 State Authorization

RCRA establishes minimum federal standards which may be supplemented by any authorized state plan. 42 U.S.C.A. §6926 (Supp. 1991). To gain EPA approval, a state plan must be at least as stringent as the federal plan. *Id.* The Base Kansas Hazardous Waste Management Plan gained EPA approval in October 1985. Kansas Department of Health and Environment, *Generator's Handbook*, 1 (January 1991) [hereinafter *Generator's Handbook*]. The Kansas Department of Health and Environment (KDHE) administers the Kansas Hazardous Waste Management Plan. *Id.* The Kansas Solid and Hazardous Waste Act and the regulations adopted under it are not presently in total conformity with current federal requirements. See K.S.A. 65-3401-34,127 (1985 and Supp. 1991); K.A.R. 28-31-1 - 14 (1989 and Supp. 1991).

The EPA has developed a method of grouping its rules and regulations for state adoption. This method, known as the "cluster" system, categorizes federal rules and regulations in a chronological manner. For all regulations adopted through June 30, 1990, the EPA has designated the various clusters as Non-HSWA Clusters I - VI and HSWA Clusters I - II. The HSWA Clusters contain rules and regulations arising from the RCRA sections amended by HSWA, and the Non-HSWA Clusters contain all other rules and regulations. Effective July 1, 1990, the EPA has abandoned the distinction between HSWA and Non-HSWA Clusters and now combines all rules and regulations in the newly designated RCRA Clusters. A summary of the cluster system appears as Appendix II.

Kansas has obtained EPA authorization for the Base Hazardous Waste Management Plan, Non-HSWA Clusters I and II, and a portion of the regulations contained in Non-HSWA Cluster III. Additionally, Kansas has submitted a draft application to the EPA for its approval. This draft application covers the remainder of the regulations contained in Non-HSWA Cluster III, all of the regulations contained in Non-HSWA Clusters IV and V, most of the regulations contained in HSWA Cluster I, and a portion of the regulations contained in HSWA Cluster II. The EPA has reviewed this draft application and has returned it to the state for revision and comment.

Upon being granted formal EPA authorization for these clusters, or portions thereof, the KDHE has the sole authority to enforce them. Non-HSWA Clusters are enforced by the KDHE if the Kansas legislature enacts the requisite legislation. These Non-HSWA provisions will not be subject to EPA enforcement. HSWA Clusters, however, are enforced by the EPA until EPA formally approves the state's authorization application. Once a state has obtained EPA approval for enforcement of a cluster, or a portion thereof, the EPA delegates its enforcement authority to the state, subject to the state's effective implementation and continued enforcement of its hazardous waste management plan. Only after public hearing may the EPA withdraw a state's authorization to administer its approved hazardous waste management plan. 42 U.S.C.A. §6926(e) (1983).

## OVERVIEW OF ACT

### §2.4 Ten Subtitles

RCRA is divided into ten subchapters, commonly referred to as "subtitles." These subtitles are organized as follows:

Subtitle A	General Provisions
Subtitle B	Office of Solid Waste; Authorities of the Administrator
Subtitle C	Hazardous Waste Management
Subtitle D	State or Regional Solid Waste Plans
Subtitle E	Duties of the Secretary of Commerce in Resource and Recovery
Subtitle F	Federal Responsibilities
Subtitle G	Miscellaneous Provisions
Subtitle H	Research, Development, Demonstration, and Information
Subtitle I	Regulation of Underground Storage Tanks
Subtitle J	Standards for the Tracking and Management of Medical Waste

Subtitles A, B, E, F, G, and H contain the general provisions. Subtitles C, D, I, and J outline the four main programs of RCRA. The EPA regulations, which flesh in the statutory skeleton constructed by Congress in RCRA, can be found in the *Code of Federal Regulations*. Solid Wastes, 40 C.F.R. Parts 240-280 (1991).

### §2.5 RCRA Programs

Three of RCRA's four main programs are individually covered in depth by this and other chapters of this handbook. The fourth program governing medical waste, however, will not be the subject of its own chapter. This particular chapter will provide an overview of the regulations and standards which govern all four of these programs and will concentrate primarily on those statutes and regulations applicable to hazardous waste.

#### §2.6 Hazardous Waste

Subtitle C of RCRA establishes the federal hazardous waste program. This program is the main focus of a later Section of this chapter. *See infra* §2.10 *et seq.* Subtitle C regulates only certain types of hazardous waste, which is defined as a specific type of solid waste. 42 U.S.C.A. §6903(27) (1983) (defining solid waste); 42 U.S.C.A. §6903(5) (1983) (defining hazardous waste). Although a waste may satisfy the definitions of solid and hazardous waste, it may still be excluded from RCRA regulation. 40 C.F.R. §261.4(b) (1991) (exclusions); 40 C.F.R. §§261.20-33 (1991) (not listed); 40 C.F.R. §260.22 (1991) (de-listed).

Once a waste is determined to be a Subtitle C hazardous waste, RCRA regulates the waste from "cradle to grave." Consequently, RCRA divides waste handlers into three categories and then independently regulates each category. These categories of waste handlers are (1) generators; (2) transporters; and (3) treatment, storage, and disposal facilities (TSD facilities). 42 U.S.C.A. §§6922-6924 (Supp. 1991). RCRA devotes substantial attention to the proper creation, management, and testing of these TSD facilities. *See* 42 U.S.C.A. §§6925, 6927, and 6933-6937 (Supp. 1991). Each TSD facility must have obtained a special permit or be in the process of obtaining one. 42 U.S.C.A. §6925 (1983 and Supp. 1991) *as promulgated in* 40 C.F.R. Part 270 *et seq.* (1991). All waste handlers are also subject to EPA and state inspection. 42 U.S.C.A. §6927 (Supp. 1991).

#### §2.7 Solid Waste

Subtitle D of RCRA encourages and assists states in developing solid waste management plans. 42 U.S.C.A. §6941 *et seq.* (Supp. 1991); 40 C.F.R. Parts 256-257 (1991). This subtitle also establishes certain minimum standards governing solid waste. *Id.* The rules and regulations governing solid waste are covered in depth in Chapter 7 of this Handbook. Although this program is primarily implemented by state and local governments, recent amendments to RCRA have increased federal government involvement in the area of solid waste management. *Orientation Manual, supra*, at II-1. The Kansas Solid Waste Management Program was originally adopted in 1970, prior to RCRA's adoption. *See* K.S.A. 65-3401-3424h (1985 and Supp. 1991). While the state program has been updated since 1970, these amendments do not comply with any federal regulations passed after July 1, 1989.

RCRA initially defines "solid waste" broadly in 42 U.S.C.A. §6903(27) but then exempts certain wastes from this definition and thus from any RCRA regulation. *See* 42

U.S.C.A. §6903(27) (1983). These exemptions are significant and include domestic sewage applied to the land, industrial wastewater discharges (regulated by the Clean Water Act), and nuclear byproduct material. *Id.* Nuclear byproduct material is individually regulated by the Atomic Energy Act of 1954, as amended. 42 U.S.C.A. §2111 *et seq.* (1973 and Supp. 1991). The existence of Subtitle C-Hazardous Waste Regulation means that Subtitle D predominantly regulates nonhazardous waste. Certain hazardous wastes excluded from Subtitle C coverage, however, remain subject to Subtitle D regulation, but with some additional protections. *Orientation Manual, supra*, at II-6-7. These wastes include hazardous household waste and hazardous small quantity generator wastes. 42 U.S.C.A. §6949a (Supp. 1991).

Subtitle D creates a two-step solid waste management framework. Initially, Subtitle D establishes criteria for classification of solid waste disposal facilities and practices. 42 U.S.C.A. §6944 (1983 and Supp. 1991) *as promulgated in* 40 C.F.R. §257.1 *et seq.* (1991). These criteria, referred to as Subtitle D Criteria, determine which facilities and practices pose a reasonable probability of adverse effects on health or the environment. *Id.* Additionally, these criteria establish which facilities fail to satisfy the requirements of 42 U.S.C.A. §6944(a) and are considered "open dumps" and which practices fail to satisfy the requirements of 42 U.S.C.A. §6945 and constitute "open dumping." *Id.*

While 40 C.F.R. Part 257 provides extensive solid waste labeling criteria, these criteria are in the process of being overhauled and expanded to cover problems missed by the original Part 257. *Orientation Manual, supra*, at II-8. In August, 1988, EPA unveiled its proposed revisions of Subtitle D Criteria. *Id.* These revisions will supplement Part 257 and will be published under 40 C.F.R. Part 258. *Id.* The revisions will be primarily concerned with municipal solid waste landfills (MSWLFs) because the EPA believes that current overuse and mismanagement of MSWLFs pose a significant threat to the environment. *Id.* Originally, these revisions were expected to be finalized during 1990, and as a result they should be complete soon. *Id.*

The second step of the Subtitle D framework establishes guidelines for the development and implementation of state waste management plans. 42 U.S.C.A. §6942 (1983) *as promulgated in* 40 C.F.R. Part 256 *et seq.* (1991). These guidelines contain "methods for achieving the objectives of environmentally sound management and disposal of solid and hazardous waste, resource conservation, and maximum utilization of valuable resources." 40 C.F.R. §256.01(a) (1991).

## §2.8 Underground Storage Tanks

Subtitle I of RCRA regulates underground storage tanks (USTs) containing petroleum and hazardous substances. Chapter 6 of this Handbook will cover Underground Storage Tank regulation in depth. In order to be subject to RCRA regulation, storage tanks do not have to be completely or even mostly underground. 42 U.S.C.A. §6991(1) (Supp. 1991); K.S.A. 1991 Supp. 65-34,102(a)-(y). The Act provides that any tank, combination of tanks, or attached pipes, containing "regulated substances" (petroleum and

hazardous substances as defined in CERCLA with some exceptions) with at least 10% of the tank's volume below the surface of the ground is subject to regulation. *Id.* For purposes of RCRA, the pipes attached to the tank are included in the calculation of the percentage of the volume of the tank lying underground. 42 U.S.C.A. §6991(1), however, exempts eight different types of tanks, many of which are likely to exist in Kansas. See 42 U.S.C.A. §§6991(1)(A)-(F) (Supp. 1991); K.S.A. 1991 Supp. 65-34,103. The EPA estimates that 1.4 million tanks are currently subject to Subtitle I regulation and that 80% of these tanks are made of bare steel, which can be expected to corrode and leak. *Orientation Manual, supra*, at IV-1-2.

This subtitle governs all facets of underground storage tank development, ownership, use, and disposal. Most notably, this subtitle requires all UST owners to notify their state regarding certain characteristics of their tanks. 42 U.S.C.A. §6991a (Supp. 1991); 40 C.F.R. §280.22 (1991); K.A.R. 1991 Supp. 28-44-16(a). Subtitle I also establishes updated design, construction, and installation requirements for all future tanks. 42 U.S.C.A. §6991b(e) (Supp. 1991); 40 C.F.R. Part 280, Subpart B (1991); K.A.R. 1991 Supp. 28-44-16. By December 22, 1998, all existing USTs must be in compliance with Subtitle I regulations. *Orientation Manual, supra*, at IV-4. Any UST that fails to meet this deadline must be closed or removed. *Id.*

Subtitle I also requires the adoption of a closure procedure. 42 U.S.C.A. §6991b(5) (Supp. 1991); 40 C.F.R. Part 280, Subpart G (1991); K.A.R. 1991 Supp. 28-44-26. The subtitle mandates additional release prevention, detection, notification, and correction regulations for existing and future tanks. 42 U.S.C.A. §6991b (Supp. 1991). In addition to providing for inspection of USTs, the statute also creates enforcement mechanisms for correcting violations and establishes a state program approval procedure. 42 U.S.C.A. §§6991c-e (Supp. 1991). The Kansas Storage Tank Act also provides that the owner or operator of a UST is liable for all corrective action costs incurred as a result of a release. K.S.A. 1991 Supp. 65-34,115.

When Congress amended the Superfund Program, it established the Leaking Underground Storage Tank Trust Fund to aid in the cleanup of petroleum releases. *Orientation Manual, supra*, at IV-11. Use of the trust fund requires individual states to enter into cooperative agreements with the EPA. *Id.* at IV-12. Kansas has established a similar trust fund. K.S.A. 1991 Supp. 65-34,114.

## §2.9 Medical Waste

The fourth RCRA program, Subtitle J, creates a two-year medical waste tracking program. This subtitle only regulates certain states, and Kansas is not among them. 42 U.S.C.A. §6992 (Supp. 1991). The statute does, however, allow state governors to petition the EPA for Subtitle J coverage. 42 U.S.C.A. §6992(c) (Supp. 1991). As yet, Kansas has not petitioned for coverage. Subtitle J became effective on June 22, 1989, and its sunset provision is triggered on June 22, 1991. 40 C.F.R. §259.2 (1991). It is doubtful that any Kansas practitioner will be greatly affected by this subtitle.

Kansas regulates "medical services waste" as part of the state's solid waste management program. K.A.R. 28-29-27 (1989). Chapter 7 of this Handbook will cover "medical services waste" in depth. In general, the Kansas regulations govern the segregation, storage, collection, transportation, processing, and disposal of medical services waste. K.A.R. 28-29-27(b)-(g) (1989).

## **§2.10 HAZARDOUS WASTE (SUBTITLE C OF RCRA)**

RCRA §§6921 to 6939b impose duties upon the EPA Administrator to develop and promulgate regulations regarding hazardous waste management. As a result, most important provisions implementing Subtitle C are found in the *Code of Federal Regulations*. See 40 C.F.R. Parts 260-272 (1991). The Kansas companion regulations are found in the *Kansas Administrative Regulations*. See K.A.R. 28-31-1 *et seq.* (1989 and Supp. 1991).

### **§2.11 Definition of Hazardous Waste**

"Hazardous waste" is defined as a subset of solid waste; therefore, the first step under Subtitle C is to determine whether the waste in question is actually an RCRA-regulated "solid waste." The Act defines "solid waste" as:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. §2011 *et seq.*].

42 U.S.C.A. §6903(27) (1983). The definition of "solid waste" is further refined by the EPA in the regulations. 40 C.F.R. §261.2(a)(1) (1991). This regulation states, "[A] solid waste is any discarded material that is not excluded by §261.4(a) or that is not excluded by variance granted under §§260.30 and 260.31." 40 C.F.R. §261.2(a)(1) (1991). "Discarded material" is any material which is (1) abandoned; (2) recycled; or (3) inherently waste-like. 40 C.F.R. §261.2(a)(2) (1991). See Figure 1 of Appendix III.

Once the material at issue is determined to be a "solid waste," the second step is to determine whether the substance is a "hazardous waste." RCRA provides a general definition of "hazardous waste," 42 U.S.C.A. §6903(5) (1983), which states:

[t]he term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may -

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible,

or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed

*Id.* The *Code of Federal Regulations* also provides more specific guidelines to determine which solid wastes are hazardous. Initially, certain solid wastes are excluded from hazardous waste regulation. 40 C.F.R. §261.4(b) (1991); K.A.R. 1991 Supp. 28-31-4(b). These excluded solid wastes include (1) certain household wastes; (2) certain agricultural and animal wastes which are returned to the soil; (3) mining overburden returned to the mine site; (4) certain ash, slag, and flue gas emission control wastes associated with the combustion of coal and other fossil fuels; (5) certain wastes associated with the development and production of crude oil, natural gas, or geothermal energy; (6) certain wastes which do not qualify as toxic because of the presence of chromium; (7) certain solid wastes resulting from the extraction and processing of specified minerals; (8) cement kiln dust waste; (9) certain wood and wood product waste which does not qualify as toxic; and (10) certain petroleum-contaminated waste. *Id.* These excluded solid wastes are deemed not hazardous and are regulated under the solid waste provisions located in Subtitle D of RCRA. See Figures 1 and 2 of Appendix III. RCRA authorizes the EPA to conduct studies of these excluded wastes. 42 U.S.C.A. 6921(b)(3) (1983). These studies may result in future federal regulatory modifications.

If the solid waste is not excluded from Subtitle C regulation, the practitioner must still consult 40 C.F.R. Part 261, Subpart D to determine whether the nonexcluded solid waste is composed of listed hazardous wastes or is itself a listed hazardous waste. See 40 C.F.R. §§261.30-33 (1991). Actual use of this lengthy, complex list will probably require the assistance of the client or his chief chemist. Although a solid waste may be listed, the waste is still subject to later exclusion from the list by "delisting." 40 C.F.R. §261.30(a) (1991); 40 C.F.R. §260.20 (1991); 40 C.F.R. §260.22 (1991). If the solid waste was not excluded, was listed, and was not de-listed, then the waste qualifies as a "hazardous waste." See Figure 2 of Appendix III.

If, however, the nonexcluded solid waste was not specifically listed, or was listed and de-listed, then the waste still qualifies as a "hazardous waste" if it exhibits any of the four characteristics specified in Subpart C of Part 261. 40 C.F.R. §§261.20-24 (1991). These characteristics include ignitability (§261.21), corrosivity (§261.22), reactivity (§261.23), or toxicity (§261.24).<sup>2</sup> *Id.* See Figure 2 of Appendix III.

Therefore, if the solid waste was excluded by 40 C.F.R. §261.4(b), or was not listed by 40 C.F.R. Part 261, Subpart D, or was listed but later de-listed, and the solid waste does not have any of the characteristics of ignitability, corrosivity, reactivity, or toxicity, then the solid waste is not "hazardous waste" subject to Subtitle C. The nonhazardous solid waste is, however, still subject to Subtitle D of RCRA if the waste is disposed on land. See Figure 2 of Appendix III.



If the previous analysis labels the material in question as "hazardous waste," then that material is subject to Subtitle C regulation with one exception. This exception applies to hazardous waste which (1) is not generated by a conditionally exempt small-quantity generator; (2) is intended to be legitimately and beneficially used, reused, recycled, or reclaimed; and (3) is neither a sludge nor a mixture containing a listed hazardous waste as specified in Part 261, Subpart D. See Figure 3 of Appendix III. If the substance in question qualifies as a hazardous waste under the previous analysis but has been produced by a conditionally exempt small-quantity generator, the hazardous waste is subject only to the special requirements of 40 C.F.R. §261.5. These special requirements are discussed further below. See *infra* §2.12.

### Special Provisions for Certain Hazardous Waste

#### § 2.12 Hazardous Waste Generated by Conditionally Exempt Small Quantity Generator

Initially, hazardous waste which is generated by a conditionally exempt small-quantity generator is subject to individualized RCRA regulation. 40 C.F.R. §261.5 (1991). According to RCRA, one qualifies as a small-quantity generator for a particular month if he generates no more than 100 kilograms of hazardous waste during that month. See 40 C.F.R. §261.5(a) (1991). Certain types of hazardous waste are excluded from this calculation. See 40 C.F.R. §261.5(d) (1991). The remaining subsections of §261.5 establish the standards applicable to this unique type of hazardous waste generator. Kansas, however, has not adopted 40 C.F.R. §261.5. K.A.R. 1991 Supp. 28-31-3(a). As a result, this type of hazardous waste generator should comply with the Kansas law, because it is the more stringent.

#### § 2.13 Hazardous Waste Intended to be Discarded

Hazardous waste which is not intended to be legitimately and beneficially used, reused, recycled, or reclaimed is considered to be intended for discard. This type of discarded hazardous waste becomes subject to additional RCRA regulation. See Figures 3 and 4 of Appendix III.

#### § 2.14 Hazardous Waste Intended to be Recycled

Specific regulations also apply to hazardous waste that is subjected to certain recycling or recovery methods. 40 C.F.R. Part 266 (1991); K.A.R. 1991 Supp. 28-31-8b. Kansas adopted Part 266, as in effect on July 1, 1989, *in toto*. K.A.R. 1991 Supp. 28-31-8b, as authorized by K.S.A. 1991 Supp. 65-3431. The recycling or recovery methods warranting special treatment are:

1. Recyclable materials used in a manner constituting disposal (Subpart C);
2. Hazardous waste burned for energy recovery (Subpart D);
3. Used oil burned for energy recovery (Subpart E);
4. Recyclable materials utilized for precious metal recovery (Subpart F); and

5. Spent lead-acid batteries being reclaimed (Subpart G).

*Id.* These additional regulations should be consulted by practitioners representing clients involved in these activities.

#### §2.15 Restricted Hazardous Waste — "Land Ban"

Specific prohibitions or limitations also apply to the land disposal of certain restricted hazardous wastes. 42 U.S.C.A. §6924 (Supp. 1991); 40 C.F.R. Part 268 (1991). Kansas adopted Part 268, as in effect on July 1, 1989, *in toto*. K.A.R. 1991 Supp. 28-31-14; K.S.A. 1991 Supp. 65-3458. As a general rule, these restricted wastes may not be disposed of in or on land. This "land ban" extends to the following restricted wastes:

1. Solvent wastes (§268.30);
2. Dioxin containing wastes (§268.31);
3. California list wastes (§268.32);
4. First-third wastes (§268.33);
5. Second-third wastes (§268.34);
6. Third-third wastes (§268.35); and
7. Other hazardous wastes, designated as such after November 8, 1984, and determined to be subject to the land ban by the EPA. (§268.13)

40 C.F.R. §§268.30-35 (1991). The designations of "first third," "second third," and "third third" are references to the location of the specific restricted waste on EPA's list of hazardous wastes as of November 8, 1984. The individual wastes became subject to the land ban in approximately yearly increments, with the first third subject to the land ban on August 8, 1988, the second third subject to the ban on June 8, 1989, and the third third subject to the ban on August 8, 1990.

Although a hazardous waste may be considered a restricted waste that is potentially subject to the land ban, 40 C.F.R. §268.1(e) provides an absolute exemption from the land ban for certain types of restricted wastes. These exempted hazardous wastes include waste generated by a small-quantity generator of nonacute hazardous waste (less than 25 kilograms per month (as limited by K.S.A. 1991 Supp. 65-3458)), waste generated by a small-quantity generator of acute hazardous waste (less than one kilogram per month), waste pesticides disposed of by a farmer in accordance with 40 C.F.R. §262.70, and hazardous wastes for which the EPA has not yet imposed the land ban. 40 C.F.R. §268.1(e) (1991).

In certain limited situations, however, land disposal of restricted wastes may be allowed. These situations include disposal of restricted wastes after such wastes have been successfully treated in accordance with 40 C.F.R. Part 268, Subpart D standards, disposal of restricted wastes in accordance with 40 C.F.R. §268.6 exemptions, and disposal of restricted wastes in underground injection control wells. 40 C.F.R. §268.1(c) (1991). The design, construction, and operation of underground injection control wells is specifically regulated by both state and federal law. K.A.R. 1991 Supp. 28-31-8(e) and K.A.R. 28-46-1 through 42 (1989), as authorized by K.S.A. 1991 Supp. 65-3431; Safe

Drinking Water Act (Public Health Service Act), 42 U.S.C.A. §§300f to 300j-26 (1983); 40 C.F.R. Parts 144, 145, and 146, as applicable (1991).

These wastes designated as restricted wastes may not even be stored without complying with 40 C.F.R. §268.50 (1991). Subpart D of Part 268 regulates the treatment and land disposal of "certain restricted wastes." 40 C.F.R. §§268.40-44 (1991). The land disposal of these restricted wastes is based upon the constituent concentration present in the waste extract or in the waste itself. Another exception to the land disposal prohibition allows land disposal of certain restricted wastes which have been treated using an approved treatment technology. 40 C.F.R. §268.42 (1991).

## §2.16 Regulations Common to All Hazardous Waste Handlers

Initially, all persons who handle hazardous waste subject to Subtitle C, which waste is not covered by the special provisions for certain hazardous waste, must comply with two paperwork formalities. These persons, whether generators, transporters, or owner/operators of TSD facilities, must notify the EPA (or the state agency if appropriate) of the location, general nature of their activity, and the identified or listed hazardous wastes handled by them. 42 U.S.C.A. §6930(a) (Supp. 1991). Additional notification requirements are imposed on persons handling petroleum-based hazardous waste. See 42 U.S.C.A. §§6930(a)(1)-(3) (Supp. 1991). All persons handling hazardous waste must also obtain EPA identification numbers. 40 C.F.R. §§262.12, 263.11, and 265.11 (1991); K.A.R. 1991 Supp. 28-31-4(c). Failure to obtain this identification number prohibits certain generators from delivering the hazardous waste to transporters, prohibits transporters from accepting the waste, and prohibits disposal facilities from disposing it. K.A.R. 1991 Supp. 28-31-4(c)(2) and 28-31-6(f).

Hazardous waste handlers in Kansas are also required to pay annual hazardous waste monitoring fees, which are designed to reimburse the state for its costs incurred in monitoring waste handlers. K.A.R. 28-31-10 (1989). The annual fees are:

Storage Facilities .....	\$ 1,500
Treatment Facilities .....	\$ 2,500
Disposal Facilities	
Landfills and Injection Wells .....	\$10,000 minimum
Others .....	\$ 5,000
Transporters .....	\$ 250
Generators.....	Varies on the amount generated.

K.A.R. 28-31-10(a)-(e) (1989). Although none of these fees approach the previous statutory ceiling of \$25,000, the Kansas legislature raised this ceiling to \$50,000 in 1991. K.S.A. 1991 Supp. 65-3431(u). As a result, it seems likely that the KDHE will raise these fees in the near future.

Kansas regulations, however, authorize the KDHE to grant variances from any hazardous waste rule or regulation. K.A.R. 28-31-13(a) (1989). The regulations detail the process whereby a variance may be granted. K.A.R. 28-31-13(a) (1989); K.A.R. 28-31-13(e) (1989). The variance may be extended or terminated upon the occurrence of certain situations. K.A.R. 28-31-13(c)-(d) (1989). One must note, however, that KDHE does not have the power to grant a variance to any hazardous waste handler, if granting that variance would subject that waste handler to less stringent regulation than that provided by RCRA. See 42 U.S.C.A. §6926 (Supp. 1991).

## §2.17 Generators of Hazardous Waste

The regulations applicable to hazardous waste generators can be viewed as the "cradle" portion of the program regulating hazardous waste from "cradle to grave." Many different types of businesses and operations generate hazardous waste. As a result, no one easy label is applicable to all hazardous waste generators. The following is a noninclusive list of potential hazardous waste generating processes:

Chemical Manufacture	Sandblasting Operations
Metal Fabrication	Pesticide Application
Fiberglass Fabrication	Laboratories
Chemical Formulation	Vehicle Repair and Maintenance
Dry Cleaning	Furniture Refinishing
Wood Products Manufacture	Printing and Related Industries
Textile Manufacture	
Metal Plating and Finishing	

*Generator's Handbook, supra*, at 2. As an additional complication in this area, the EPA and KDHE have attributed different meanings to the same terms and have developed different standards which apply to these terms. As a result, the Kansas and federal regulations applicable to hazardous waste generators are discussed separately.

## §2.18 RCRA

40 C.F.R. Part 262 establishes the RCRA standards applicable to hazardous waste generators. 40 C.F.R. §§262.10(b)-(f) establish different individualized requirements for certain types of generators, ranging from farmer-generators to importer-generators.

The normal (non-§§262.10(b)-(f)) hazardous waste generator must prepare a manifest. 40 C.F.R. §262.20 (1991). This manifest is to be prepared pursuant to EPA Form 8700-22 and, if necessary, EPA Form 8700-22A. See Appendix to Part 262; 40 C.F.R. §262.20 (1991). The manifest includes the names and EPA identification numbers of all transporters and TSD facilities which will later handle the hazardous waste. The manifest serves as a paper trail which will follow the hazardous waste. Certain medium-sized hazardous waste generators, those generating 100-1000 kilograms per month, are exempt from the manifest preparation requirement, provided that the medium-sized generator enters into a reclamation agreement. 40 C.F.R. §262.20(e) (1991).

These generators who are not regulated individually pursuant to §§262.10(b)-(f) must also comply with other protective measures. These generators are subject to numerous pretransport requirements, including packaging (§262.30); labeling (§262.31); marking (§262.32); placarding (§262.33); and recordkeeping (§§262.40-44). Generators are only allowed to accumulate hazardous waste on site for a certain period of time, which period is dependent upon the generator's status. 40 C.F.R. §262.34 (1991). If a generator allows its hazardous waste to accumulate for longer than the allotted time, then the generator will also be subject to the morass of TSD facility regulation. *Id.*

Additional requirements are imposed on hazardous waste generators who intend to import or export hazardous waste to or from a foreign country. 40 C.F.R. §§262.50-57 (1991); 40 C.F.R. §262.60 (1991). These requirements include EPA notification of export intent, special manifest information identifying the recipient of the hazardous waste shipment, and modified annual reporting and recordkeeping requirements. *Id.*

A farmer disposing of leftover pesticides on his own farm may be exempt from the generator requirements imposed by 40 C.F.R. Part 262. 40 C.F.R. §262.70 (1991). This exemption is available to a farmer who adheres to specific pesticide disposal methods. *Id.*; See also *infra* Chapter 11.

## §2.19 Kansas

Initially Kansas law erects a paperwork hurdle for hazardous waste handlers seeking to dispose of the hazardous waste off-site. The regulation provides:

[a] person shall not transport a hazardous waste for off-site disposal or offer a hazardous waste for transport for off-site disposal in Kansas without first obtaining disposal authorization from the department (KDHE). A hazardous waste disposal facility permitted in Kansas shall not accept any hazardous waste for disposal without evidence of a disposal authorization issued by the department.

K.A.R. 1991 Supp. 28-31-5(a). The regulations detail the manner and requirements for obtaining hazardous waste disposal authorization from the KDHE. K.A.R. 1991 Supp. 28-31-5(b)-(c). The regulations also provide for authorization-exception requests. K.A.R. 1991 Supp. 28-31-5(d)-(g).

Kansas regulations identify three types of hazardous waste generators and impose different regulations upon them. These three types of generators are (1) "small-quantity generators," (2) "Kansas generators," and (3) "EPA generators." K.A.R. 1991 Supp. 28-31-2. The distinguishing factors among these types of generators are hazardous waste generation rates and accumulation quantities. See K.A.R. 1991 Supp. 28-31-4(o) (method of calculation).

In Kansas, a small-quantity generator is any person who (1) generates less than 25 kilograms of hazardous waste in a calendar month; (2) generates less than one kilogram of acutely hazardous waste in a calendar month; (3) accumulates no more than 1,000 kilograms of hazardous waste at any one

time; or (4) accumulates no more than one kilogram of acutely hazardous waste at any one time. K.A.R. 1991 Supp. 28-31-2(f).

Small-quantity generators are subject to comparatively few regulations. Initially, they are not required to comply with any notification or reporting requirements. These small-quantity generators may accumulate up to 1000 kilograms of normal hazardous waste and up to one kilogram of acutely hazardous waste without being subject to additional regulation. K.A.R. 1991 Supp. 28-31-4(m)(1)(A). A small-quantity generator who accumulates less than 25 kilograms of hazardous waste may treat or dispose of hazardous waste at an on-site facility or ship it to an off-site facility. K.A.R. 1991 Supp. 28-31-4(m)(1)(C). In either case, the facility must (1) have obtained a permit; (2) have obtained interim status; or (3) beneficially treat or recycle its waste. *Id.* A small-quantity generator who accumulates 25 kilograms or more of hazardous waste is required to recycle, treat, or dispose of the waste in a certified hazardous waste management facility. K.A.R. 1991 Supp. 28-31-4(m)(1)(B). This type of small-quantity generator is also required to comply with numerous pretransport requirements, including packaging (K.A.R. 1991 Supp. 28-31-4(e)(1)); labeling (K.A.R. 1991 Supp. 28-31-4(e)(2)); marking (K.A.R. 1991 Supp. 28-31-4(e)(3)); and placarding (K.A.R. 1991 Supp. 28-31-4(e)(4)).

The second type of generator in Kansas is referred to as a "Kansas generator." A Kansas generator is "any person who generates a minimum of 25 kilograms, but less than 1,000 kilograms, of hazardous waste in a calendar month and who does not accumulate quantities greater than 1,000 kilograms at any one time." K.A.R. 1991 Supp. 28-31-2(e).

The Kansas generator is subject to much more regulation than the small-quantity generator. Initially, the Kansas generator is subject to manifest requirements similar to those imposed on hazardous waste generators by RCRA. K.A.R. 1991 Supp. 28-31-4(d). The Kansas generator is also eligible for an exemption from the state manifest requirements if the generator executes a reclamation agreement. K.A.R. 1991 Supp. 28-31-4(d)(7). All Kansas generators must comply with the numerous pretransport requirements mentioned above. K.A.R. 1991 Supp. 28-31-4(e). Additionally, the Kansas generator must prepare and/or maintain the following records: (1) a signed copy of all manifests initiated; (2) the biennial reports; (3) waste analyses; (4) monitoring fee reports; (5) exception reports; and (6) weekly inspection reports. K.A.R. 1991 Supp. 28-31-4(f); K.A.R. 1991 Supp. 28-31-4(k). The Kansas generator may accumulate hazardous waste on-site without satisfying permit, interim status, or other time restrictions if certain other requirements are met. K.A.R. 1991 Supp. 28-31-4(h)(1). These requirements include compliance with maximum accumulation amounts, proper containment of the waste, proper labeling of the waste, proper emergency precautions, and other similar requirements. *Id.* The Kansas generator is also subject to satellite accumulation area regulations and transportation restrictions. K.A.R. 1991 Supp. 28-31-4(j); K.A.R. 1991 Supp. 28-31-4(l).

The third type of generator in Kansas is referred to as an "EPA generator." An EPA generator is:

any person who generates 1,000 kilograms or more of hazardous waste in a calendar month or who accumulates quantities greater than 1,000 kilograms at any time. An EPA generator also includes any person who generates one kilogram or more of acutely hazardous waste in a calendar month or who accumulates quantities greater than one kilogram of acutely hazardous waste at any time.

K.A.R. 1991 Supp. 28-31-2(c).

Of all Kansas hazardous waste generators, the EPA generator is subject to the most extensive regulation. The EPA generator is subject to the same manifest, pretransport, and recording regulations imposed on the Kansas generator. K.A.R. 1991 Supp. 28-31-4(d)-(f). The accumulation regulations applicable to EPA generators, however, vary from those applicable to the Kansas generators. *See* K.A.R. 1991 Supp. 28-31-4(y). The EPA generator may accumulate hazardous waste on-site for a maximum of 90 days without obtaining a permit or interim status provided that certain requirements are met. *Id.* These requirements include proper containment of the waste, proper labeling of the waste, and proper emergency precautions. *Id.*

Kansas law also imposes additional requirements on hazardous waste generators who intend to import or export hazardous waste to or from a foreign country. K.A.R. 1991 Supp. 28-31-4(q)-(r). These requirements are identical to the federal requirements.

## Transporters of Hazardous Waste

### §2.20 RCRA

If the transportation of a hazardous waste requires a manifest (as explained in §2.18), then any person who transports that hazardous waste must comply with the standards established by 40 C.F.R. Part 263. 40 C.F.R. §263.10 (1991). If this transporter stores the manifested hazardous waste for more than ten days before delivering it to another transporter or to a TSD facility, then the transporter must also comply with Parts 264, 265, 268, and 270 of C.F.R. Chapter 40. *See* 40 C.F.R. §263.12 (1991).

The primary emphasis of 40 C.F.R. Part 263 is on the continuation of the manifest system which originated when the hazardous waste was generated. In order to comply with federal law, a transporter may not even accept nonmanifested hazardous waste. 40 C.F.R. §263.20(a) (1991). Upon receipt of the waste for transport, the transporter must sign and date the manifest. 40 C.F.R. §263.20(b) (1991). The transporter is also required to ensure that a copy of the manifest accompanies the hazardous waste. 40 C.F.R. §263.20(c) (1991). Additionally, the transporter must comply with post-transport and recordkeeping requirements. 40 C.F.R. §263.20(d) (1991); 40 C.F.R. §263.22 (1991).

While these regulations explain the general manifest and recordkeeping provisions applicable to hazardous waste transporters, special provisions do apply to bulk shipment water transporters (§263.20(e)), rail transporters (§263.20(f)), exporter transporters (§263.20(g)), and transporters moving hazardous waste from a medium-quantity generator (§263.20(h)).<sup>3</sup>

Finally, the transporter also has a duty to deliver the hazardous waste in accordance with the manifest. 40 C.F.R. §263.21 (1991). If the hazardous waste is discharged during transport, then the transporter must take immediate action to protect human health and the environment. 40 C.F.R. §263.30 (1991). The transporter then has a duty to clean up the discharged hazardous waste and take such action as is required by federal, state, or local officials. 40 C.F.R. §263.31 (1991). If such a discharge occurs, the provisions of CERCLA come into play. *See infra* §2.33.

RCRA does not regulate the method of transportation or the geographic destination of any hazardous waste shipment. The Department of Transportation is, however, in the process of promulgating standards to be used in routing hazardous waste shipments. *See* Hazardous Material Transportation Act of 1990, 49 App. U.S.C.A. §1804 (Supp. 1991). Currently, states have no federal right to notification regarding the existence or destination of out-of-state shipments of hazardous waste entering the state.

### §2.21 Kansas

The Kansas regulations applicable to hazardous waste transporters are predominantly identical to those promulgated by the EPA. In fact, Kansas has incorporated all of 40 C.F.R. Part 263 by reference, with the exception of §263.20(h). K.A.R. 1991 Supp. 28-31-6(a). As previously noted, this regulation applies to transporters moving hazardous waste from a medium-quantity generator. The KDHE has, however, promulgated regulations applicable to hazardous waste transporters, which regulations are in addition to those promulgated by the EPA.

Any person transporting more than 25 kilograms of hazardous waste or more than one kilogram of acutely hazardous waste in Kansas is required to register with the KDHE and is prohibited from transporting the waste unless a written acknowledgement of registration is obtained. K.A.R. 1991 Supp. 28-31-6(b). This acknowledgement must be carried in all vehicles transporting the waste. *Id.* The KDHE retains the authority to deny, suspend, or revoke this acknowledgement of registration. K.A.R. 1991 Supp. 28-31-6(d).

Each hazardous waste transporter in Kansas must also maintain liability insurance on all vehicles transporting the waste. K.A.R. 1991 Supp. 28-31-6(c). The liability insurance limits must not be less than \$500,000 per person, \$500,000 per occurrence for bodily injury or death, and \$500,000 for all damages to the property of others. *Id.*

A transporter carrying hazardous waste from a Kansas generator (a party generating between 25 and 1,000 kilograms of hazardous waste during any calendar month) is not required to comply with the manifest and recordkeeping

provisions of 40 C.F.R. Part 263, Subpart B, if certain requirements are met. K.A.R. 1991 Supp. 28-31-6(e). These requirements include transport pursuant to a reclamation agreement, the recording of certain information in a travel log, and the retaining of this record for three years after expiration of the reclamation agreement. K.A.R. 1991 Supp. 28-31-6(e)(1)-(4).

Additionally, Kansas provides standards for determining the route to be taken by hazardous waste transporters within Kansas. K.A.R. 28-31-7 (1989), *as required by* K.S.A. 1991 Supp. 65-3431(o). This routing authority is designed to reduce risk to the public health and safety. *Id.* The transporters themselves are responsible for confining the transportation to the preferred route. *Id.* The regulations do, however, specify situations allowing deviation from the preferred route. *Id.*

### **Treatment, Storage, and Disposal Facilities**

#### **§2.22 RCRA**

The final phase of RCRA Subtitle C regulation governs certain owners and operators of TSD facilities. 40 C.F.R. §264.1(b) (1991). This area of regulation can be viewed as the "grave" portion of the program regulating hazardous waste from the "cradle to the grave". The *Code of Federal Regulations* defines treatment, storage, and disposal broadly. See 40 C.F.R. §260.10 (1991). The regulations define two types of TSD facilities. The first type operates under "interim" status. "Interim status" is the term used to describe a facility which is temporarily allowed to operate, but which has not satisfied the requirements necessary to obtain a more permanent permit. The second type operates under "permit" status. Interim-status TSD facilities are governed by 40 C.F.R. Part 265, and permit-status TSD facilities are governed by both 40 C.F.R. Part 264 and individually tailored working permits. 40 C.F.R. Parts 264-65 (1991); 40 C.F.R. §270.32 (1991). Both types of TSD facilities operate under two kinds of regulatory requirements. These requirements are first of an administrative and nontechnical nature, and second, of a technical and unit-specific nature. The administrative and nontechnical regulations are nearly identical for both interim and permitted facilities. The technical and unit-specific regulations, however, vary greatly between the two types of facilities and among separate TSD facilities.

#### **§2.23 Interim-Status TSD Facilities**

Most TSD facilities must at least obtain interim status in order to operate. Those exempted from the interim-status requirements include:

1. a farmer disposing of pesticides from his own use. 40 C.F.R. §265.1(c)(8) (1991);
2. the owner/operator of a totally enclosed treatment facility as defined in §260.10. 40 C.F.R. §265.1(c)(9) (1991);
3. the owner/operator of an elementary neutralization unit or a wastewater treatment unit. 40 C.F.R. §265.1(c)(10) (1991);

4. a person engaged in certain cleanup activities. 40 C.F.R. §265.4(c)(11) (1991);
5. a transporter storing manifested shipments of hazardous waste less than ten days. 40 C.F.R. §265.1(c)(12) (1991);
6. facilities that reuse, recycle, or reclaim hazardous waste (except those who produce, burn, and distribute waste-derived fuel and used oil recyclers). 40 C.F.R. §265.1(c)(6) (1991);
7. a generator accumulating waste on site in compliance with 40 C.F.R. §262.34. 40 C.F.R. §265.1(c)(7) (1991);
8. a facility regulated by a state to manage municipal or industrial solid waste, if the only hazardous waste which the facility manages is excluded by §261.5, concerning small-quantity generators. 40 C.F.R. §265.1(c)(5) (1991);
9. a facility regulated by an authorized state program. 40 C.F.R. §265.1(c)(4) (1991); and
10. a publicly owned treatment works (POTW) facility as defined in §260.10. 40 C.F.R. §265.1(c)(3) (1991).

Interim status may be achieved if (a) the facility was in existence on November 19, 1980, or was in existence at the time a statutory or regulatory change rendered the facility subject to regulation; (b) the facility complies with the preliminary notice requirements of 42 U.S.C.A. §6930; and (c) the facility has made an application for a permit. 42 U.S.C.A. §6925(e). A facility with interim status must comply with 40 C.F.R. Part 265. See Figure 4 of Appendix III. Subparts A through E of Part 265 establish the administrative and nontechnical standards for interim status facilities. Subparts F through BB establish technical and unit-specific standards for these facilities.

Interim-status facilities may not manage six specific types of hazardous waste unless additional safety requirements are satisfied. 40 C.F.R. §265.1(d) (1991). The chemical descriptions of these six listed hazardous wastes can be found at 40 C.F.R. Part 261, Appendix VII (1991).

Subpart B of Part 265 establishes "general facility standards." These standards require interim status TSD facilities to accomplish the following:

1. obtain an EPA identification number;
  2. satisfy certain notice provisions;
  3. conduct waste analyses;
  4. install security measures;
  5. conduct inspections;
  6. conduct training;
  7. properly manage ignitable, reactive, or incompatible wastes; and
  8. comply with location provisions.
- 40 C.F.R. §§265.11-18 (1991).

Subpart C of 40 C.F.R. Part 265 establishes regulations to prevent and minimize the impact of releases at interim-status TSD facilities. These regulations govern:

1. the operation of the facility;
2. the equipment used at the facility;
3. the maintenance and testing of equipment;
4. the access of personnel to communication systems;
5. the accessibility of personnel and emergency assistance to the hazardous waste; and
6. arrangements made with local authorities regarding emergency assistance.

40 C.F.R. §§265.31–37 (1991).

Subpart D of 40 C.F.R. Part 265 governs the management of emergency situations. This portion of the regulations requires that a contingency plan containing certain specified elements be developed and used whenever a fire, explosion, or hazardous substance release occurs at the TSD facility. 40 C.F.R. §§265.51–52 (1991). The contingency plan must be amended when regulatory, operational, or structural changes occur, and amended copies of the plan must be distributed to appropriate individuals. 40 C.F.R. §§265.53–54 (1991). In addition, the regulations mandate that the facility employ an emergency coordinator to carry out the contingency plan. 40 C.F.R. §265.55 (1991). This subpart also establishes some additional procedures to be followed in an emergency situation. 40 C.F.R. §265.56 (1991).

The manifest system and the compilation of certain reports are governed by Subpart E of 40 C.F.R. Part 265. This subpart requires the interim-status TSD facility to complete the manifest form and to return a copy of the manifest to the original generator of the hazardous waste. 40 C.F.R. §§265.71(a)(1) and (4) (1991). This process completes the paper trail which was initiated by the hazardous waste generator. A copy of the manifest must be kept on file at the TSD facility for at least three years from the date of delivery. 40 C.F.R. §265.71(c)(5) (1991). The owner/operator of the TSD facility must verify that the amount and type of hazardous waste actually delivered corresponds to the amount and type of hazardous waste listed on the manifest. 40 C.F.R. §265.71(a)(2) (1991). If a “manifest discrepancy” is discovered, then the facility must either reconcile the discrepancy with the waste generator or transporter or notify the EPA of the discrepancy within 15 days. 40 C.F.R. §265.72 (1991).

Additionally, the TSD facility must maintain an operating record containing explicit types of information. 40 C.F.R. §265.73 (1991). In conjunction with the operating record, a TSD facility owner/operator must also prepare a biennial report, an unmanifested waste report (if necessary), and certain other additional reports. 40 C.F.R. §§265.75–77 (1991). The TSD facility owner/operator must furnish these reports to EPA officials upon request. 40 C.F.R. §265.74 (1991).

Interim-status technical regulations establish both general standards applicable to all interim status TSD facilities and

specific standards applicable to particular waste management methods. The general standards govern (1) groundwater monitoring programs, (2) closure and postclosure procedures, and (3) financial assurance mechanisms. 40 C.F.R. Part 265, Subparts F, G, and H (1991). The specific standards govern the following:

1. the use of hazardous waste containers;
2. tank systems;
3. surface impoundments;
4. waste piles;
5. land treatment;
6. landfills;
7. incinerators;
8. thermal treatment;
9. chemical, physical, and biological treatment;
10. underground injection;
11. air-emission standards for process vents; and
12. air-emission standards for equipment leaks.

40 C.F.R. Part 265, Subparts I–BB (1991).

Any TSD facility with interim status must comply with the aforementioned standards until final administrative action on its permit application has been taken. 40 C.F.R. §264.3 (1991).

#### §2.24 *Permitted TDS Facilities*

In order for a TSD facility to operate, it must have a currently valid permit, be in the process of obtaining one (*i.e.* interim status), or be exempted from the permit requirements. *Orientation Manual, supra*, at III-71. The actual process of obtaining a permit is called “permitting” and is discussed in §2.26 of this chapter. The remaining analysis pertaining to permitted TSD facilities assumes that a permit is required and has been obtained.

The administrative and nontechnical standards applicable to permitted TSD facilities are nearly identical to the corresponding standards applicable to interim-status TSD facilities. Therefore, any questions regarding Subparts B through E of Part 264 should be referred to the discussion of Subparts B through E in the preceding subsection concerning interim-status TSD facilities.

The technical standards applicable to permitted TSD facilities (Subparts F through BB) are more extensive than those governing interim-status facilities because these standards also regulate the design of TSD facilities. These standards also differ from their corresponding interim standards because the permitted TSD facility standards only serve as a guideline for real permit standards. *Orientation Manual, supra*, at III-56. The standards which actually apply to a permitted TSD facility are created by “permit writers” based on their “best engineering judgment,” so as to comply with 40 C.F.R. Parts 264 and 266–68. 40 C.F.R. §270.32 (1991). These individually tailored standards are then incorporated into the particular facility’s working permit. *Id.*

The technical permitted-facility standard guidelines are divided into two categories, general standards applicable to all permitted facilities and specific standards applicable to particular waste-management methods. This division is similar to the division of the interim technical standards. The general standards concern:

1. releases from solid waste management units;
2. closure and postclosure requirements; and
3. financial requirements.

40 C.F.R. Part 264, Subparts F, G, and H (1991). The specific standards govern:

1. use of hazardous waste containers;
2. tank systems;
3. surface impoundments;
4. waste piles;
5. land treatment;
6. landfills;
7. incinerators;
8. miscellaneous units;
9. air-emission standards for process vents; and
10. air-emission standards for equipment leaks.

40 C.F.R. Part 265, Subparts I through BB (1991).

## §2.25 Kansas

Kansas adopted the RCRA regulations governing interim status and permitted TSD facilities, as in effect on July 1, 1989, *in toto*. K.A.R. 1991 Supp. 28-31-8(a) (incorporating 40 C.F.R. Parts 264-65, as in effect on July 1, 1989). As noted previously, subsequent RCRA amendments will be adopted by KDHE in the near future. Kansas also promulgated regulations applicable to owners and operators of TSD facilities in addition to those regulations specified in RCRA.

Initially, Kansas regulations consider any process used to recover energy from a hazardous waste as "hazardous waste treatment." K.A.R. 1991 Supp. 28-31-8a(a). As a result, the individual engaged in energy recovery must comply with the relevant Kansas hazardous waste treatment regulations. K.A.R. 1991 Supp. 28-31-8a(a) specifically requires compliance with K.A.R. 1991 Supp. 28-31-8 (regarding TSD facility standards) and K.A.R. 1991 Supp. 28-31-9 (regarding TSD facility permits), but only if the waste meets certain specifications. *Id.* Certain very-small-quantity generators are exempt from this regulation. K.A.R. 1991 Supp. 28-31-8a(b).

Operators of TSD facilities utilizing containers or other tank storage devices are required to mark all containers and tanks in the same manner as EPA hazardous waste generators. K.A.R. 1991 Supp. 28-31-8(b).

Owners of TSD facilities are required to record, with their respective county register of deeds, a statement or document noting "that the land has been used to manage hazardous waste and that all records regarding permits, closure, or both

are available for review" at the KDHE offices in Topeka. K.A.R. 1991 Supp. 28-31-8(c). TSD facility owners may also be required by the Secretary of the KDHE to execute and file restrictive covenants to run with the land. Such restrictive covenants would require subsequent land uses to be planned in a manner that would protect the environment. K.A.R. 1991 Supp. 28-31-8(d). Facility owners may also be required by the Secretary of the KDHE to execute an easement in gross in favor of the KDHE to allow for postclosure monitoring. K.A.R. 1991 Supp. 28-31-8(c).

In conjunction with the TSD facility regulations, Kansas also imposes individual requirements on the design, construction, and operation of hazardous waste injection wells. K.A.R. 1991 Supp. 28-31-8(e); K.A.R. 28-46-1 through 42 (1989). A primary use of these underground injection control wells is the disposal of restricted waste otherwise subject to the land ban. *See* §2.15. A notable regulation prohibits the movement of fluid into underground sources of drinking water. K.A.R. 28-46-27 (1989); 40 C.F.R. §144.12, as in effect on July 1, 1985; 40 C.F.R. §145.11, as in effect on July 1, 1985. The Kansas regulations also require that a KDHE-approved laboratory conduct all groundwater monitoring for Kansas TSD facilities. K.A.R. 1991 Supp. 28-31-8(f). These regulations are intended to implement portions of the Underground Injection Control (UIC) program established by the Safe Drinking Water Act. 42 U.S.C.A. §§300f to 300j-26 (1991). Further discussion of the UIC program is found in Chapter 4 (Water Pollution Control), and Chapter 12 (Oil and Gas), of this Handbook.

Permitted TSD facilities in Kansas are also required to contribute to a perpetual care trust fund. K.S.A. 1991 Supp. 65-3431(v). This mandatory contribution or fee, paid monthly, is based on the total weight of waste disposed and the type of waste disposed. *Id.* The KDHE will establish the revised rate of such contribution or fee in K.A.R. 28-31-11 (1989). Currently, this regulation is not in conformity with the 1991 statute. Use of the perpetual care trust fund is limited to the following three situations:

1. payment of extraordinary costs of monitoring a permitted disposal facility after the responsibility of the operator has terminated;
2. payment of costs of repairing a disposal facility, which are necessary because a postclosure occurrence poses a substantial hazard to the public health, safety, or the environment; and
3. payment for emergency investigation, engineering, and construction costs, which are related to the removal, treatment, and disposal of hazardous waste disposed of in any disposal facility, when such waste is found to pose an imminent and substantial risk to the public health, safety, or the environment.

K.S.A. 1991 Supp. 65-3431(v)(2).

Off-site treatment and disposal facilities in Kansas will be required to pay additional fees to the KDHE. K.S.A. 1991 Supp. 65-3431(x)(1). Currently, the KDHE has not adopted regulations establishing the amounts of these additional fees.



These fees will be based on the type and amount of hazardous waste treated per year, but shall not exceed \$200,000 per year, per facility. *Id.* This off-site TSD facility fee requirement was passed during the 1991 regular session of the Kansas Legislature.

## Procedures

### §2.26 Permitting

The permitting process enables qualified TSD facilities to obtain operating permits. The process is virtually identical under RCRA and the Kansas Solid and Hazardous Waste Act. *See* K.A.R. 1991 Supp. 28-31-9(a) (incorporating 40 C.F.R. Part 270 as in effect on July 1, 1989). A permit specifies the individualized regulatory standards applicable to a facility. Once obtained, the permit enables the facility to operate for ten years, subject to modification or termination of the permit. 40 C.F.R. §270.4 (1991) (as amended). The permitting process is regulated by 40 C.F.R. Part 270 *et seq.*, pursuant to the directives established in 42 U.S.C.A. §6925 (Supp. 1991). Owners or operators of future TSD facilities must submit a permit application a minimum of 180 days prior to beginning construction of the new facility. 40 C.F.R. §270.1(b) (1991).

While most TSD facilities must either obtain a permit or be in the process of obtaining a permit, RCRA specifically exempts some types of TSD facilities from the permit requirement. 40 C.F.R. §§270.1(c)(2)–(3) (1991). These RCRA-exempt TSD facilities include:

1. generators storing waste on site for less than the maximum time provided in §262.34;
2. farmers who dispose of hazardous waste pesticides from their own use pursuant to §262.70;
3. small-quantity hazardous waste generators as excluded by §261.4 or §261.5;
4. the owner/operator of a totally enclosed treatment facility as defined in §260.10;
5. the owner/operator of an elementary neutralization unit or wastewater treatment unit as defined in §260.10;
6. transporters storing manifested shipments of hazardous waste in appropriate containers for ten days or less; and
7. persons acting in immediate response to a discharge or threatened discharge of hazardous waste. Activity not in immediate response to this type of situation is not exempt.

*Id.* These exemptions closely parallel, but are not identical to, the exemptions applicable to interim-status facilities. *Compare* 40 C.F.R. §265.1(c) (1991) with 40 C.F.R. §§270.1(c)(2)–(3) (1991).

Kansas, however, does not allow any permit exemptions. K.S.A. 1991 Supp. 65-3437(a). The prohibitory language states, “[n]o person shall construct, modify or operate a hazardous waste facility or otherwise dispose of hazardous

waste within this state without a permit from the [KDHE] secretary.” *Id.*

Seven different types of permits may be issued pursuant to Subtitle C of RCRA. The types of permits are:

1. Treatment, Storage, and Disposal Permits (§270.1(c));
2. Research, Development, and Demonstration Permits (§270.65);
3. Postclosure Permits (§270.1(c));
4. Emergency Permits (§270.61);
5. Permit-by-Rule (§270.60);
6. Trial Burn and Land Treatment Demonstration Permits (§270.63); and
7. Hazardous Waste Incinerator Permits (§270.62).

As a prerequisite to submitting a permit application, Kansas regulations require interested applicants to file extensive background information with the KDHE. K.A.R. 1991 Supp. 28-31-9(c). Additionally, persons desiring permits in the future to construct, modify, or operate a hazardous waste facility in Kansas will be required to pay an application fee in an amount not greater than \$175,000. K.S.A. 1991 Supp. 65-3431(w)(1). This permit application fee requirement was passed during the 1991 regular session of the Kansas Legislature. *Id.*

Subpart B of C.F.R. Part 270 establishes the permit application procedure with which nonexempt TSD facilities must comply. 40 C.F.R. §270.10(a) (1991). This procedure is standard for all nonexempt TSD facilities, except those facilities which obtain a “permit-by-rule” or an emergency permit. The standard permit process consists of the following five steps:

1. submission of Part A and Part B of the permit application, 40 C.F.R. §270.11 (1991); 40 C.F.R. §§270.13-25 (1991);
2. review of the permit application;
3. preparation of a draft permit and an inspection report;
4. public comment on the draft permit and the inspection report; and
5. final approval or denial of the permit.

40 C.F.R. Part 124 (1991); K.S.A. 1991 Supp. 65-3437(d); K.A.R. 1991 Supp. 28-31-9.

In Kansas, an application may be denied without reference to the merits of the application if the KDHE Secretary finds any of the following:

1. the applicant, while holding a permit, has violated or is violating K.S.A. 65-3441(a), regarding unlawful acts (*See* § 2.31);
2. the applicant previously held a permit that was revoked;

3. the applicant has previously failed to comply with an environmental statute, license, or permit of any magnitude;
4. the applicant has shown a lack of intent or ability to comply with any environmental law, regulation, rule, permit, or license of any magnitude; or
5. the applicant is a corporation controlled, partially controlled, or even doing business with an individual or corporation that would be ineligible to receive a permit.

K.S.A. 1991 Supp. 65-3437(c).

Once issued, a permit is valid for ten years, unless the EPA modifies, revokes and reissues, or terminates the permit. 40 C.F.R. §270.4 (1991) (as amended). Land disposal permits, however, are reviewed every five years. 40 C.F.R. §270.50(d) (1991). Additionally, Kansas regulations require hazardous waste injection well permits to be reviewed every year. K.A.R. 1991 Supp. 28-31-9(b). Permit modification is regulated by §270.41 and §270.42. 40 C.F.R. §§270.41-42 (1991). Permit revocation and reissuance is governed by 40 C.F.R. §270.41 (1991), while permit termination is governed by 40 C.F.R. §270.43 (1991). In Kansas, grounds for permit modification, revocation and reissuance, or termination may apparently include a change in principal ownership. K.S.A. 1991 Supp. 65-3431(z). If a facility's permit is terminated, the facility must then implement its closure plan. 40 C.F.R. §264.113(a) (1991).

Permitted TSD facilities are also subject to corrective action requirements pursuant to permits. These requirements are triggered when a hazardous waste release has occurred. At such time, the provisions of CERCLA are also triggered.

#### §2.27 Inspections

The hazardous waste handler inspections authorized by Congress are designed to be the primary compliance monitoring tool for RCRA. Environmental Protection Agency, *RCRA Inspection Manual*, I-3 (1981) (OSWER Directive 9938.2) [hereinafter *Inspection Manual*]. The inspection regulations developed pursuant to RCRA and the Kansas Solid and Hazardous Waste Act are nearly identical. The inspection serves three important enforcement functions, namely (1) the detection and documentation of violations, and discovery of imminent hazards; (2) support for enforcement actions; and (3) the determination of conformance with compliance and other enforcement orders. *Id.* RCRA empowers the EPA or an authorized state plan administrator to conduct these inspections. 42 U.S.C.A. §6927(a) (1983); K.A.R. 28-31-12(a) (1989). The inspections may target anyone who "generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous waste." *Id.*

In general, any individual subject to inspection must grant the inspector access to the hazardous waste itself and to information relating to such waste (reports, files, etc.). *Id.* In *Marshall v. Barlow's, Inc.*, however, the Supreme Court held that an inspector is only entitled to enter public portions of

the work site, unless he obtains either a warrant or consent from an appropriate individual. 436 U.S. 307, 56 L. Ed. 2d 305, 98 S.Ct. 1816 (1978). Consent may be given explicitly, or implicitly by virtue of operating in a closely regulated industry. *United States v. Biswell*, 406 U.S. 311, 316, 32 L. Ed. 2d 87, 92 S.Ct. 1593 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77, 25 L. Ed. 2d 60, 90 S.Ct. 774 (1970). While a court has not determined whether operating within the hazardous waste industry satisfies the *Colonnade-Biswell* Test, this argument appears to be available to the EPA. Adoption of this theory could subject hazardous waste handlers to surprise inspection. The explicit consent may also be withdrawn at any time, and the owner/operator may not be penalized for insisting on a warrant. According to the *RCRA Inspection Manual*, the EPA may obtain any of three types of warrants. *Inspection Manual*, *supra*, at Appendix II. These types of warrants include: (1) a civil specific probable cause warrant; (2) a criminal probable cause warrant; and (3) a warrant based on a neutral administrative inspection scheme. *Id.*

RCRA does establish some guidelines governing the manner of the inspection. 42 U.S.C.A. §§6927(a)-(b) (1983 and Supp. 1991); K.A.R. 28-31-12 (1989). These guidelines require inspectors to:

1. request access;
2. enter at reasonable times;
3. conduct inspections with reasonable promptness;
4. give sample receipts and, if requested, sample portions equal in volume or weight to the portion obtained;
5. furnish analytical results; and
6. make inspection results available to the public, unless the results are confidential.

K.A.R. 28-31-12 (1989); *Inspection Manual*, *supra*, at I-2.

RCRA mandates thorough annual inspections of all federal and state-run TSD facilities, as well as thorough biennial inspections of all privately-run TSD facilities. 42 U.S.C.A. §§6927(c)-(e) (Supp. 1991).

The hazardous waste handler is subject to various types of inspections. In all likelihood, however, he or she will be informed of the kind of inspection to be conducted. *Inspection Manual*, *supra*, at IV-4-5. The types of inspections are:

1. Compliance Evaluation Inspection (CEI). This is a routine inspection of a generator, transporter, or TSD facility.
2. Case Development Inspection (CDI). This inspection occurs when a significant RCRA violation is known, suspected, or revealed.
3. Comprehensive Groundwater Monitoring Evaluation (CME). This inspection is conducted to ensure that land disposal facilities are not damaging surrounding groundwater flow.

4. Compliance Sampling Inspection (CSI). This inspection involves the collection of hazardous waste samples.
5. Operations and Maintenance Inspection (O & M). This inspection is designed to detect potential damage from closed TSD facilities.
6. Laboratory Audits. This is an inspection of the laboratory performing groundwater monitoring evaluations.

*Orientation Manual, supra*, at III-88.

After the inspection is complete, the EPA or authorized state agency will draft a post-inspection report. *Inspection Manual, supra*, at VI-2; K.A.R. 28-31-12(e) (1989). This report must detail all RCRA violations. *Id.* If necessary, the report will also provide recommendations to bring the activity or facility into compliance with RCRA. *Id.* at VI-4-6. If any enforcement action is to be taken, this report will serve as the cornerstone of the plaintiff's case. *Id.* at VI-2.

## §2.28 Enforcement

RCRA provides a broad spectrum of enforcement mechanisms, which includes administrative, civil, and criminal actions. Some of these actions may be instituted by private individuals; some actions may be initiated by the federal government; and some may be initiated by both. The goal of any federal "enforcement action against a violator is to return the facility to compliance as quickly as possible and detect potential violators through high visibility enforcement actions which impose economic sanctions to penalize violators." *Environmental Protection Agency, Enforcement Response Policy*, 2 (1988) (OSWER Directive 9900.0-1A) [hereinafter *Enforcement Policy*]. Private actions may be instituted in order to achieve these same goals or for any number of other reasons.

The EPA determines which type of enforcement mechanism is appropriate by its categorization of the violation and the violator. Violations are classified as either Class I (most serious) violations or Class II (less serious) violations. *Id.* at 4-5. The *Enforcement Policy* defines Class I violations as:

[d]eviations from regulations, or provisions of compliance orders, consent agreements, consent decrees, or permit conditions which could result in a failure to:

- (a) Assure that hazardous waste is destined for and delivered to authorized TSD facilities; or
- (b) Prevent releases of hazardous waste or constituents, both during the active and any applicable postclosure periods of the facility operation where appropriate; or
- (c) Assure early detection of such releases; or
- (d) Perform emergency cleanup operations or other corrective action for releases.

*Id.* Class II violations encompass any RCRA violation that does not satisfy the criteria listed for a Class I violation. *Id.* at 5.

Violators of RCRA standards and obligations are also divided into categories. The three categories of violators are High Priority Violator, Medium Priority Violator, and Low Priority Violator. *Id.* at 5-7. A High Priority Violator is defined as a handler who:

- (a) has caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous constituents; or
- (b) is a chronic or recalcitrant violator ...; or
- (c) deviates from terms of a permit, order, or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, or decrees; or
- (d) substantially deviates from RCRA statutory or regulatory requirements.

*Id.* at 5. High Priority Violators are the number one target for RCRA enforcement. *Id.* The *Enforcement Policy* provides an illustrative list of enforcement actions that may be brought against High Priority Violators. *Id.* at 10-11. This list includes the imposition of civil penalties against offending corporations and corporate officials, facility shutdown orders, contempt orders, and future permit bars. *Id.*

The *Enforcement Policy* defines a Medium Priority Violator as a "handler with one or more Class I violations who does not meet the criteria for a High Priority Violator." *Id.* at 6. A hazardous waste handler with only Class II violations may also be labeled as a Medium Priority Violator if the "compliance official believes an administrative order is the appropriate response." *Id.*

A Low Priority Violator is defined as a hazardous waste handler who has committed only Class II violations and has not been labeled as a Medium or High Priority Violator. *Id.* at 7. The *Enforcement Policy* provides an extensive list of how violations and violators are labeled. See *Id.* at Appendix 5-7.

## §2.29 Administrative Enforcement Actions

An administrative enforcement action may be by informal communication or by administrative order. *Orientation Manual, supra*, at III-91-92. Informal communications may be made by telephone or by mail. *Id.* at III-91. An informal letter may be called a "notice of violation" (NOV) or "notice of deficiency" (NOD). *Id.* Informal communications of this sort are most helpful in addressing minor RCRA violations. Administrative orders, however, are issued when more serious violations are detected. *Id.* at III-92. RCRA authorizes the issuance of four types of administrative orders. These orders are (1) Compliance Orders; (2) Corrective Action Orders; (3) Monitoring, Analysis, and Testing Orders; and (4) Imminent Hazard Orders. 42 U.S.C.A. §§6928(a), 6928(h), 6934, and 6973 (Supp. 1991).

A Compliance Order may be issued pursuant to 42 U.S.C.A. §6928(a) whenever anyone "has violated or is in violation of any requirement" of Subtitle C concerning

hazardous waste. 42 U.S.C.A. §6928(a) (Supp. 1991). The Compliance Order may require an individual to comply with RCRA immediately or within a specified time. *Id.* This order may also assess a civil penalty of up to \$25,000 per day for each violation. *Id.*

The second type of available administrative order is a Corrective Action Order. 42 U.S.C.A. §6928(h) (Supp. 1991). This order may be issued to an interim-status TSD facility, or to a facility which should have obtained interim status, whenever the facility is the source of a hazardous waste release. *Id.* The Corrective Action Order may suspend or revoke the facility's interim status and/or mandate an investigation or corrective action. *Id.* The initial order becomes final and effective 30 days after issuance, unless a hearing is requested. 40 C.F.R. §§24.02 and 24.05(a) (1991). The rules governing issuance of and administrative hearings on such Corrective Action Orders are set forth at 40 C.F.R. Part 24 (1991). The type of hearing procedure will be dependent on whether the Corrective Action Order directs only an investigation (a RCRA Facility Investigation or Corrective Measures Study) or the implementation of corrective measures. 40 C.F.R. §24.08 (1991). Failure to comply with a RCRA Corrective Action Order may result in a civil penalty of up to \$25,000 for each day of noncompliance. 42 U.S.C.A. §6928(h) (Supp. 1991).

The Section 3013 Order, or Monitoring, Analysis, and Testing Order, is another type of administrative order available to the EPA. 42 U.S.C.A. §6934 (1983). This type of order may be issued if "a substantial hazard to human health or the environment" exists which resulted from hazardous waste storage or a hazardous waste release. 42 U.S.C.A. §6934(a) (1983). The order may be issued to the present or to any previous owners or operators of the facility in question and may require such owner/operator to conduct a reasonable amount of "monitoring, testing, analysis, and reporting" in order to ascertain the nature and extent of the hazard. 42 U.S.C.A. §§6934(a)-(b) (1983). If the owner/operator is unable to complete these activities satisfactorily, then the EPA may step in to conduct the necessary monitoring, testing, and analysis and may bill the owner/operator for any attendant expenses. *Id.*

The Section 7003 Order, or the Imminent Hazard Order, is the final type of order available to the EPA. 42 U.S.C.A. §6973 (1983 and Supp. 1991). This type of order may be issued when an "imminent and substantial endangerment to health or the environment" is caused by the handling of hazardous waste. 42 U.S.C.A. §6973(a) (Supp. 1991). The order may restrain the handler's activity and require cleanup of the site. *Id.* Violation of this Imminent Hazard Order may result in a civil fine of up to \$5,000 per day for each day of noncompliance. 42 U.S.C.A. §6973(b) (1983).

### §2.30 Civil Enforcement Actions

In addition to administrative sanctions, the hazardous waste handler may be subject to five types of EPA- and KDHE-instituted civil suits and three types of civil suits instituted by private individuals. The EPA and/or the KDHE is empowered to file any of the following lawsuits: (1)

Compliance Action; (2) Corrective Action; (3) Monitoring & Analysis Action; (4) Imminent Hazard Action; and (5) Perpetual Care Trust Fund Action. 42 U.S.C.A. §§6928(a), 6928(h), 6934(e), and 6973(a)-(b) (1983 and Supp. 1991); K.S.A. 1991 Supp. 65-3431(v)(2). The EPA usually files these actions in situations which present repeated or substantial violations or which involve serious environmental concerns. *Orientation Manual, supra*, at III-93. Civil actions are preferred over administrative actions when publicity is desired, when continuous court supervision of the defendant may be necessary, and when administrative actions have not been sufficient. *Id.*

The EPA may file a lawsuit, as a type of compliance action, under 42 U.S.C.A. §6928 for any past or present violation of Subtitle C. 42 U.S.C.A. §6928(a)(1) (Supp. 1991). Any appropriate remedy is available to the EPA under this subsection. *Id.* The maximum civil penalty that may be imposed is \$25,000 per day, per violation. 42 U.S.C.A. §6928(a)(3) (Supp. 1991).

The EPA is also empowered to institute a civil action under 42 U.S.C.A. §6928(h)(1) whenever an interim-status TSD facility is the source of a hazardous waste release. 42 U.S.C.A. §6928(h)(1) (Supp. 1991). Again, any appropriate relief may be issued by the court under this type of corrective action. *Id.* The maximum civil penalty available under this subsection is \$25,000 per day for each day of noncompliance with the Corrective Action Order. 42 U.S.C.A. §6928(h)(2) (Supp. 1991).

Another type of civil action may be instituted by the EPA pursuant to 42 U.S.C.A. §6934(e) when there is a substantial hazard to human health or the environment. 42 U.S.C.A. §6934(e) (1983). Under this subsection, the EPA may institute a Monitoring and Analysis Action and sue for (1) reimbursement of its monitoring, testing, analysis, and reporting costs; (2) compliance with a Section 3013 Order; and (3) a civil penalty of up to \$5,000 per day. *Id.*

The EPA may also sue under its imminent-hazard authority granted by 42 U.S.C.A. §6973. 42 U.S.C.A. §6973 (Supp. 1991). The hazardous waste handler is liable for cleanup costs and civil penalties of up to \$5,000 per day of noncompliance if the handler is in violation of a Section 7003 Order ("Imminent Hazard Order"). 42 U.S.C.A. §§6973(a)-(b) (1983 and Supp. 1991).

In Kansas, if an expenditure was made from the perpetual care trust fund because of a postclosure occurrence which posed a substantial hazard to public health, safety, or the environment and such expenditure would not have been necessary if the person responsible for the long-term care of the facility had complied with the previously approved plan of operation, then a cause of action accrues in favor of the perpetual care trust fund, and the KDHE Secretary is empowered with the authority to pursue the cause of action. K.S.A. 1991 Supp. 65-3431(v)(2).

Private citizens may also sue under RCRA. 42 U.S.C.A. §6972 (Supp. 1991). Numerous conditions, requirements, and limitations exist, however, which severely burden the

private plaintiff and lessen the attractiveness of private party suits. See 42 U.S.C.A. §§6972(b)-(c) (1983 and Supp. 1991). If a citizen does navigate through these obstacles, he or she may sue:

- (1) any individual or governmental agency (to the extent allowed by the Eleventh Amendment) who is alleged to be in current violation of any permit, regulation, standard, etc. under RCRA; or
- (2) any individual or governmental hazardous waste handler (to the extent allowed by the Eleventh Amendment) who has contributed or is contributing to any activity which may present an imminent and substantial endangerment to health or the environment; or
- (3) the EPA Administrator who has failed to perform any nondiscretionary RCRA duty.

42 U.S.C.A. §6972(a) (1983). Causes of action of the type described as Type (1) above may be brought to enforce the applicable permit, regulation, standard, etc. *Id.* Type (2) claims may seek to restrain the impermissible activity and order necessary additional or corrective action. *Id.* Type (3) claims may be brought against the Administrator to compel the performance of a neglected duty. *Id.* Type (3) claims may also require the EPA Administrator to seek appropriate civil penalties from violators. *Id.*

While private citizens are not entitled to any damages under RCRA, subsection (f) preserves all other rights and remedies available to such individuals under statute or common law. 42 U.S.C.A. §6972(f) (1983). Therefore, private citizens may still sue under any of the theories of public nuisance, private nuisance, trespass to land, trespass to chattels, negligence, or any other applicable theory of damage recovery.

### §2.31 Criminal Enforcement Actions

In addition to administrative and civil sanctions, the hazardous waste handler is subject to criminal penalties. 42 U.S.C.A. §6928(d) (Supp. 1991). These penalties include monetary fines and/or jail terms. *Id.* Activities subject to criminal penalties include:

- (1) Knowingly transporting hazardous waste to a nonpermitted TSD facility;
- (2) Knowingly treating, storing, or disposing of hazardous waste without a permit, or in knowing violation of a material condition of a permit, or in knowing violation of a material requirement of an interim-status regulation;
- (3) Knowingly omitting material information or making false statements in any application, label, manifest, report, permit, or compliance document;
- (4) Knowingly handling any hazardous waste without complying with RCRA recordkeeping and recording requirements;
- (5) Knowingly transporting hazardous waste without a manifest;

- (6) Knowingly exporting a hazardous waste without the consent of the receiving country; and
- (7) Knowingly handling any used oil in knowing violation of any material condition of a permit or in knowing violation of a requirement of any applicable RCRA standards or regulations.

42 U.S.C.A. §6928(d) (Supp. 1991). Penalties for these activities may include a fine of up to \$50,000 per day of violation and/or imprisonment for up to two years (or up to five years for items (1) and (2) above). 42 U.S.C.A. §6928(d) (Supp. 1991).

Any person who commits any of the seven prohibited acts specified above and who, at the time of such violation, knows that he is placing another person in imminent danger of death or serious bodily injury may be subject to a fine in the maximum amount of \$250,000 (\$1,000,000 for corporations) and/or imprisonment for up to 15 years. 42 U.S.C.A. §6928(e) (Supp. 1991).

The criminal penalties set forth in 42 U.S.C.A. §§6928(d) and (e) may be imposed on persons acting on their own behalf as well as on individuals, such as managerial employees and officers or directors, acting on behalf of a corporation. See *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991) (individual found criminally liable for dumping drums of hazardous waste in rural area); *United States v. Dee*, 912 F.2d 741 (4th Cir. 1991), *cert. denied*, 113 L. Ed. 2d 242, 111 S. Ct. 1307 (1991) (employees of federal government were "persons" within meaning of 42 U.S.C.A. §6928 subject to criminal penalty provisions); and *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) (foreman and service manager in corporation's trucking department held personally liable for criminal penalties for knowingly violating RCRA).

Courts have interpreted the "knowing" element contained in 42 U.S.C.A. §§6928(d) and (e) to require a specific showing of knowledge or intent. *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *United States v. White*, 766 F. Supp. 873 (E.D.Wash. 1991). These cases rejected the application of the "reasonable corporate officer" doctrine and the "respondeat superior" doctrine to cases involving RCRA violations. *Id.* The government had utilized these theories in *United States v. Park* and *United States v. Dotterweich* to impose criminal liability on corporate agents under the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. §§301-392 (1972 and Supp. 1991), without proof of actual awareness of wrongdoing or conscious fraud. *Park*, 421 U.S. 658, 672-73, 44 L. Ed. 2d 489, 501, 95 S. Ct. 1903 (1975); *United States v. Dotterweich*, 320 U.S. 277, 88 L. Ed. 2d 48, 64 S. Ct. 134 (1943). Although the United States Supreme Court has not yet addressed this issue, the courts in the *MacDonald & Watson Waste Oil* and *White* cases have held that actual knowledge is an essential element of an RCRA criminal offense. *MacDonald & Watson Waste Oil*, 933 F.2d at 55; *White*, 766 F. Supp. at 895. Accordingly, these courts have minimized the possibility that the "reasonable corporate officer" and "respondeat superior" doctrines would be applicable to RCRA cases.

Kansas law also provides for criminal penalties for violations of the Kansas hazardous waste laws. K.S.A. 65-3441. The unlawful acts enumerated by the Kansas statute are:

- (1) Dumping or depositing, or permitting the dumping or depositing of, any hazardous waste with a facility not in compliance with the Kansas statutes;
- (2) Constructing, modifying, or operating a TSD facility without a permit;
- (3) Violating any condition of a permit issued by the KDHE;
- (4) Storing, collecting, treating, or disposing of any hazardous waste in contravention of the rules and regulations of the KDHE;
- (5) Interfering with a lawfully conducted inspection;
- (6) Knowingly making any false material statement or representation in any document filed or maintained regarding compliance with the Kansas hazardous waste laws;
- (7) Knowingly destroying or altering any record required to be maintained by KDHE's rules and regulations under the Kansas hazardous waste laws;
- (8) Failing to designate on a manifest an authorized TSD facility;
- (9) Transporting hazardous waste to an unauthorized TSD facility;
- (10) Mixing any hazardous waste with any fuel intended for residential consumer use or selling any such blended fuel to residential consumers; and
- (11) Transporting or disposing of, or causing the transport or disposal of, hazardous waste in a manner contrary to the rules, regulations, standards, or orders of the KDHE Secretary. The use of independent contractors shall not insulate a generator from liability under this subsection.

*Id.* Violators of the subparagraphs listed as numbers (1) through (10) above shall be guilty of a Class A misdemeanor. K.S.A. 65-3441(b). A violation of subparagraph (11) above will qualify as a Class E felony. *Id.* Additionally, any knowing violation of any of the subsections listed above will qualify as a Class C felony. K.S.A. 65-3441(c).

A Class A misdemeanor is punishable by imprisonment in the county jail for a definite term not to exceed one year and by a fine in an amount not to exceed \$2,500. K.S.A. 1991 Supp. 21-4502(1)(a) and (2); K.S.A. 1991 Supp. 21-4503(2)(a). A Class E felony is punishable by an indeterminate term of imprisonment in a minimum amount of one year and a maximum amount of two to five years and by a fine in an amount not to exceed \$10,000. K.S.A. 21-4501(e); K.S.A. 1991 Supp. 21-4503(1)(b). For a Class C felony, the indeterminate term of imprisonment will be in a minimum amount of three to five years and a maximum amount of 10 to 20 years, and the fine shall be in an amount not exceeding \$15,000. K.S.A. 21-4501(c); K.S.A. 1991 Supp. 21-4503(1)(a).

## §2.32 RELATIONSHIP OF RCRA TO OTHER FEDERAL ENVIRONMENTAL STATUTES

The environmental protection policy of the United States is composed of several compartmentalized acts of Congress. While these various acts are directed at specific problems, their singular focus on the protection of human health and the environment necessitates some degree of overlap. This section will concentrate on this overlap.

### §2.33 CERCLA

CERCLA and RCRA are the primary statutes concerned with environmental protection. As noted in §§2.1 and 2.2 of this chapter, RCRA establishes a waste management program designed to prevent current and future damage to health and the environment. CERCLA, however, primarily governs cleanup and financial responsibility concerns which arise when a hazardous substance has or will be released.

A key term of CERCLA is "hazardous substance." 42 U.S.C.A. §9601(14) (1983 and Supp. 1991). The term "hazardous substance" is defined broadly to encompass RCRA-regulated "hazardous waste." 42 U.S.C.A. §9601(14)(c) (1983 and Supp. 1991). "Hazardous substance" does not include nonhazardous solid waste, unless as "contaminants" or "pollutants" such nonhazardous solid waste presents "an imminent and substantial danger" to human health or the environment. *Orientation Manual, supra*, at VI-12.

Cleanups of hazardous wastes and CERCLA-regulated "contaminant" or "pollutant" solid wastes are subject to RCRA corrective actions and CERCLA responses. RCRA corrective action power has a narrower reach than CERCLA response authority because the RCRA provisions only apply to RCRA-regulated facilities, whereas the CERCLA provisions extend to all potentially responsible parties. *Orientation Manual, supra*, at VI-14-15. Additionally, CERCLA focuses on the "release" of a hazardous substance, and accordingly, most of its provisions are remedial in nature. As discussed previously, RCRA implements a program by which all hazardous waste, from generation through disposal, and all parties generating or handling such hazardous waste are monitored and regulated so as to prevent any environmental damage.

Imminent hazards present additional situations for RCRA and CERCLA overlap. The RCRA imminent hazard provision is triggered when any solid or hazardous waste presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C.A. §6973(a) (Supp. 1991). The CERCLA imminent hazard provision is triggered when a hazardous substance release presents an "imminent and substantial endangerment to the public health or welfare or the environment." 42 U.S.C.A. §9606(a) (1983). While the relevant language is not identical, the statutes clearly allow for situational overlap. *Orientation Manual, supra*, at VI-14.

CERCLA remedies require that on-site cleanups comply with any applicable or relevant and appropriate requirements (ARARs) that exist at law. 42 U.S.C.A. §9621(d)(2)(A) (Supp. 1991). Thus, CERCLA cleanup operations must comply with applicable RCRA standards. *Orientation*

*Manual, supra*, at VI-12. Although the EPA has interpreted the law to exempt cleanup sites from compliance with administrative requirements, RCRA's technical requirements do apply as ARARs to cleanup activities. *Id.* at 12-13.

CERCLA cleanup operations frequently involve the transport of hazardous waste from the release site. These initial transports are considered as having been "generated" at the cleanup site and are therefore subject to RCRA requirements. *Orientation Manual, supra*, at VI-13. This triggering of RCRA means that the hazardous waste must be accompanied by a manifest and delivery of the hazardous waste may only be to an authorized TSD facility.

### Other Federal Environmental Statutes

#### §2.34 Clean Air Act (CAA)

The Clean Air Act (CAA) limits the emission of hazardous air pollutants in order to promote the public health, welfare, and productive capacity of the population. 42 U.S.C.A. §7401 (1983). There are two major interactions between RCRA and the CAA. Initially, air emissions from RCRA-regulated TSD facilities must comply with CAA standards. 40 C.F.R. Part 264, Subparts AA-BB (1991). The second area of interaction results from CAA compliance. The extraction of pollutants from air emissions by utilizing "scrubbers," as required by the CAA, can create solid waste, hazardous waste, or sludge containing hazardous waste. *Orientation Manual, supra*, at VI-4. By virtue of complying with Clean Air Act standards, the pollutant extractor is then required to comply with RCRA regulations governing that solid waste generated by the air cleaning process.

#### §2.35 Clean Water Act (CWA)

Another federal environmental statute is the Clean Water Act (CWA), which regulates all discharges into U.S. waterways. 33 U.S.C.A. §§1251-1387 (1986 and Supp. 1991). The CWA and RCRA interact in two major situations. Initially, sludge created by a wastewater treatment plant is governed by RCRA as a solid waste. 42 U.S.C.A. §6903(27) (1983). Secondly, water discharged from an RCRA-regulated TSD facility must comply with CWA requirements. Thus, the wastes must meet CWA pretreatment standards and be transported to a publicly owned treatment works, or the TSD facility must obtain a National Pollution Discharge Elimination System (NPDES) permit. *Orientation Manual, supra*, at VI-5. The specific Clean Water guidelines will impact on RCRA whenever hazardous waste may come into contact with a waterway of the United States.

#### §2.36 Toxic Substances Control Act (TSCA)

The Toxic Substances Control Act (TSCA) regulates the manufacture, processing, distribution in commerce, and disposal of chemical substances and mixtures. 15 U.S.C.A. §§2601-2671 (1982 and Supp. 1991). TSCA regulations effectively reduce the generation of RCRA-regulated solid waste by limiting the types of chemical substances and mixtures which may be created. TSCA operates to regulate these chemical substances from "cradle to grave" in a similar fashion to RCRA. 15 U.S.C.A. §2605(a)(6)(A) (1982).

TSCA also specifically regulates the disposal of polychlorinated biphenyl (PCBs). 15 U.S.C.A. §2605(e)(1)(A) (1982). If any RCRA-regulated solid waste satisfies the chemical substance and mixture definition of TSCA, then that waste or substance will be subject to both RCRA and TSCA regulation.

#### §2.37 Safe Drinking Water Act (SDWA)

The Safe Drinking Water Act (SDWA) imposes national drinking water regulations to protect the public health. 42 U.S.C.A. §§300f to 300j-26 (1991). Congress preempted RCRA regulation in this area to the extent RCRA is inconsistent with the SDWA. 42 U.S.C.A. §6905(a) (1983). RCRA does, however, sometimes incorporate maximum contaminant level (MCL) standards developed pursuant to the SDWA into cleanup standards for a RCRA corrective action. *Orientation Manual, supra*, at VI-5. The SDWA also regulates the underground injection of any contaminant that would endanger public drinking water sources. 42 U.S.C.A. §300h(b) (1991); 42 U.S.C.A. §300h(d) (1991). RCRA contains parallel provisions which prohibit the underground injection of hazardous waste at 42 U.S.C.A. §6924 (Supp. 1991) (underground injection is included under the definition of land disposal at 42 U.S.C.A. §6924(k)).

#### §2.38 Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulates the production, sale, and use of pesticides. 7 U.S.C.A. §§136-136y (1980 and Supp. 1991). FIFRA has little interaction with RCRA. *Orientation Manual, supra*, at VI-6. FIFRA regulations do reduce the amount of waste to be regulated by RCRA by limiting the types and amounts of pesticides which may be produced. *Id.* Certain pesticides subject to the provisions of FIFRA may also fall within RCRA regulations concerning storage and disposal if the pesticide contains any of the substances defined as hazardous wastes under RCRA. See 42 U.S.C.A. §6903(5) (1983).

#### §2.39 Marine Protection, Research and Sanctuaries Act (MPRSA)

Another federal statute, the Marine Protection, Research and Sanctuaries Act (MPRSA), prohibits the transportation and dumping of any material transported from the U.S. or transported by a U.S. vessel or aircraft, except when done pursuant to a valid permit issued by the EPA. 33 U.S.C.A. §§1401-1445 (1983 and Supp. 1991). Thus, wastes regulated by RCRA may not be dumped at sea, unless a MPRSA permit has been obtained. *Orientation Manual, supra*, at VI-5.

### FOOTNOTES

1. Some commentators refer directly to sections of the original Solid Waste Disposal Act (SWDA) as amended and now known as RCRA. An SWDA or RCRA reference cannot be converted to its current U.S.C.A. section by use of a simple mathematical formula; therefore, a conversion table is provided in Appendix I. Sections cited throughout this chapter are to the current U.S.C.A. citation.
2. In 1990, the EPA expanded the scope of the "toxicity characteristic." See 40 C.F.R. §261.24 (1990). As a result, many more types of solid waste are now deemed hazardous and subject to Subtitle C regulation.
3. Kansas has expressly not adopted the special provisions established in 40 C.F.R. §263.20(h). K.A.R. 1991 Supp. 28-31-6(a).



# CHAPTER 8 COMMUNITY RIGHT-TO-KNOW

By Stephen Stark

## §8.01 INTRODUCTION

December 4, 1984 unmistakably marks the emergence of community right-to-know as a major part of the state and federal environmental legislative fabric. On that tragic day, a cloud of extremely toxic chemical gas escaped from a chemical plant in Bhopal, India. Several thousand citizens lost their lives and thousands more became permanently disabled. The real tragedy at Bhopal was that the enormous death, suffering, and disability might have been largely avoided had there been a greater, constant awareness of the potential for disaster. Prevention equipment had been installed at the plant, but plant personnel had allowed the equipment to lapse into a state of functioning disrepair. Community evacuation plans had been devised, but the citizenry was largely unaware of the plans.

Congress reacted to the tragic lessons learned from Bhopal by passing The Emergency Planning and Community Right-To-Know Act, 42 U.S.C. 11001 *et seq.*, as part of the 1986 Superfund Amendments and Reauthorization Act (SARA) amendments to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Although the Emergency Planning and Community Right-To-Know Act is commonly referred to as "Title III of SARA," or simply "Title III," it is a stand-alone law. *A. L. Laboratories, Inc. v. E.P.A.*, 826 F.2d 1123 (D.C. Cir. 1987).

Title III generally provides a framework for the inventory and periodic reporting of certain chemicals by producers and users. It also includes a scheme for the emergency planning, reporting, and handling of chemical spills. The notion underlying Title III is that parties involved in the manufacture, sale, use, or storage of hazardous chemicals should be obligated in the first instance to determine the attendant physical and health hazards associated with the substances handled. They, in turn, should notify others periodically of the type, relative toxicity, amounts, and other salient characteristics of such chemical substances on hand. In furtherance of the paramount public safety purpose, the users of the hazardous chemicals should also be required to immediately report spills or releases of the chemicals. On the public side, certain federal, state, and local officials are charged with the responsibility to process the reports, develop emergency plans and contingencies, and respond to spills or

releases. Realization of public safety is complete by allowing the general public easy access on demand to the chemical information, plans, and reports, and providing stiff penalties or sanctions against those who fail to comply with the Act.

In 1987 Kansas passed its own version of community right-to-know, K.S.A. 65-5701 *et seq.* This satisfied Title III's mandate that all states create a state and local system for processing the chemical reporting information and emergency planning requirements imposed under the federal Act. The Kansas Act was further amended in 1991 by H.B. 2472. Although the Kansas Act, as amended, generally implements and enforces Title III, a number of provisions were added by the Kansas Act which effectively enlarge the scope of Title III while further tightening some of the restrictions or requirements stated in Title III.

Fundamental to an understanding of the scope of Title III is the extent of chemicals covered by the Act. Coverage is primarily a function of both the type of chemical and the specific quantity present on a facility's site. Four categories of chemicals are covered under the Act: extremely hazardous substances (EHS), which include over 400 commonly used substances listed by the EPA; hazardous chemicals which are defined as such by OSHA; substances covered under CERCLA; and the list of certain toxic chemicals compiled by EPA. Many chemicals are common to two or more of these categories. The lists of specific chemicals in each category are not static, since the regulatory agencies generally have the discretion to add, or in some circumstances delete, substances to or from the lists of covered chemicals.

This chapter will begin with an outline of the structure of Title III, focusing primarily on the coverage of Title III in terms of chemical substances and facilities subject to the Act, the corresponding reporting and notification duties, and a discussion of selected issues implicated by community right-to-know. Variations or additional provisions supplied by the Kansas Act will be pointed out as appropriate. Finally, the Chapter will conclude with a discussion of the anticipated future of right-to-know enforcement in Kansas. At Appendix 1 appears for easy reference a chart summarizing the principal requirements of Title III in Kansas. Appendix 4 contains a suggested checklist to assist in determining whether a facility has a Title III reporting or disclosure obligation.

## STRUCTURE OF TITLE III

### Subchapter I - Emergency Planning And Notification

#### §8.02 Emergency Planning Structure (§301)

The emergency planning structure created by Title III consists of a network of federal, state, and local officials. At the federal level are the EPA and the National Response team. The state level consists of the SERC (State Emergency Response Commission) and the LEPC (Local Emergency Planning Committee). The planning duties of each such entity are summarized below.

At the federal level, the emergency planning structure consists of the EPA, which provides emergency training to federal, state and local personnel and reviews emergency systems. 42 U.S.C. §11005(a)(1), (b)(1). The federal administrative planning structure also includes the national and regional response teams established under the National Contingency Plan created by the Clean Water Act and CERCLA. See Chapters 1 and 4. The national response and regional response teams review emergency plans and publish guidance documents. 42 U.S.C. §11003(f), (g).

At the state level, §301 of Title III required each State governor to appoint a State Emergency Response Commission (SERC) by April 17, 1987. 42 U.S.C. §11001(a). SERCs in turn were required to establish emergency planning districts by July 17, 1987, and appoint a Local Emergency Planning Committee (LEPC) for each emergency planning district no later than August 17, 1987. 42 U.S.C. §11001(b), (c).

The SERC generally oversees and coordinates the activities of its LEPCs, and serves as a resource for the LEPCs. The SERC also serves as a link to both the state and federal enforcement authorities. The LEPCs are the local planning arm of the SERC. LEPCs identify, locate and assess the chemical hazards in their respective communities. That information is used to develop a local emergency response plan. See generally EPA, *When All Else Fails! Enforcement of the Emergency Planning and Community Right-To-Know Act*, (Sept. 1989).

The Kansas SERC consists of 17 appointed members, collectively drawn from public office, the general public, and the regulated industries. K.S.A. 1991 Supp. 65-5703(b). Each of the 105 Kansas counties were designated by the Kansas SERC as emergency planning districts. EPA, *Successful Practices In Title III Implementation*, at 2 (Jan. 1989). Thus, Kansas has 105 LEPCs. In addition, the Kansas adjutant general has the general duty to oversee and implement emergency planning. K.S.A. 1991 Supp. 65-5705. The Kansas Department of Health and Environment (KDHE) assists the Kansas SERC in the administration of right-to-know, and the Division of Emergency Preparedness (DEP) of the adjutant general's office is involved in the implementation and administration as well. See KDHE, *The Community's Right to Know: How Kansas' New Law on*

*Hazardous Chemicals Affects Public Institutions*. Title III specifies that each LEPC must have representation from certain segments of the community, such as elected officials, law enforcement, medical, health, the media, and covered businesses. 42 U.S.C. §11001(c). Kansas law does not further elaborate upon the required makeup of the LEPCs, leaving the identification and number of the representatives up to the SERC to appoint.

#### §8.03 Emergency Plan (§303)

Each LEPC is required under §303 to draft the emergency plan for its respective emergency planning district. Title III imposed an across-the-board deadline of October 17, 1988 for the completion of all emergency plans. The LEPC must review its plan annually and revise appropriately. 42 U.S.C. §11003(a). The LEPC has the right to require facilities subject to Title III to promptly provide information relevant to the emergency plan. *Id.* §11003(d).

Title III requires certain minimum detail in all emergency plans. Among the required detail is: identification of covered facilities and neighboring facilities subject to increased risk, location of access routes used to haul extremely toxic chemicals, procedures to be used by covered facility owners and EMS personnel to respond to spills, procedures for spreading the news in the event of spills to others involved in the plan as well as to the public, lists of available emergency equipment and personnel, specific evacuation plan details, training programs, and designation of official coordinators. 42 U.S.C. §11003(c). The emergency plan prepared by each LEPC is submitted to the SERC for its review. The national response team may also opt to review and comment on the emergency plan. *Id.* §11003(e), (g).

#### §8.04 Emergency Planning Notification (§302)

Section 302 is designed to help a community prepare for and respond to emergencies involving hazardous substances by providing a means to identify locations where extremely hazardous substances are present. See KDHE's *Guide To Community Right-To-Know Compliance Under Title III*, §302, (Rev. 3/90) (herein *KDHE Guide*). Section 302 imposes a one-time-only notice requirement. Once a facility becomes subject to §302 and duly reports, it has discharged its §302 obligation. Thereafter, the facility will presumably have reporting and notice obligations under other provisions of Title III, but need not further concern itself with §302 except for subsequent relevant changes at the facility.

#### §8.05 Extremely Hazardous Substances and Threshold Planning Quantities

Section 302 of Title III describes the type of facilities which are under a duty to identify themselves to the SERC as part of the emergency planning-notification scheme. Generally, a facility's obligation to self-report under §302 depends upon whether certain minimum amounts (called "threshold planning quantities" or TPQ) of listed extremely hazardous substances (or EHS) are located at the facility. The list of extremely hazardous substances is set forth at 40

C.F.R. Part 355, Appendices A, B. In determining the TPQ for any EHS onsite, the facility must take into account the total amount of that particular EHS present at the facility at any time. If the TPQ of any listed EHS was then present at the facility, the facility was obligated to identify itself to the SERC by May 17, 1987. 42 U.S.C. §11002(c). To the extent a facility was not initially subject to the emergency planning notifications of §302, but later becomes covered, it has 60 days to self-report to the SERC and LEPC. *Id.*

Three primary circumstances exist under which a facility not originally covered might nevertheless become subject to §302 notification. First, §302 coverage arises the instant a facility first acquires on-site one (or more) of the original listed EHS in a quantity that exceeds its corresponding TPQ. The second circumstance arises when an additional substance is added by the EPA to the original EHS list, and that newly listed substance is or later becomes located at the facility in excess of its corresponding TPQ. Finally, each state (through its SERC) is given the right to designate in its discretion additional facilities, upon public notice and comment. 42 U.S.C. §11002(c), (b)(2).

#### §8.06 *Mixtures*

Mixtures containing minor amounts of one or more extremely hazardous substances do not necessarily constitute an EHS for §302 notification purposes. Fairly complex rules govern the determination of an EHS contained in mixtures. Generally, an EHS contained in a mixture which constitutes less than 1% of the mixture can be ignored in considering the applicability of §302. 40 C.F.R. §355.30(e).

#### §8.07 *Notification*

Facilities subject to §302 emergency planning notification must also comply with the applicable provisions of §303. 42 U.S.C. §11002(c). Those provisions under §303 include the facility's obligation to notify the LEPC with the name of the facility contact person. Any "relevant" changes occurring at the facility must also be promptly reported to the LEPC. Finally, the facility must promptly furnish information requested by the LEPC that bears upon the LEPC's emergency plan. 42 U.S.C. §11003(d)(1),(2),(3).

A sample §302 Kansas notification form is included at Appendix 2. This form is not mandatory, as the KDHE will accept letter notification in lieu thereof for §302 purposes.

#### §8.08 *Comments on Scope of Coverage*

The scope of potential coverage under §302 is quite broad. The only requirement triggering coverage is the physical presence of a certain minimum amount of an extremely hazardous substance, albeit for an instant, at the facility. Since that certain minimum amount (the TPQ) can be as small as one pound, the breadth of §302 becomes apparent.

In addition, it should be noted that §302 is not limited to the obvious manufacturing and industrial operations which one would expect to be covered. For purposes of §302 (as well as for most of the other Title III provisions), the businesses or operations subject to its requirements are

defined as a "facility." 42 U.S.C. §11002(b)(1). The term "facility" is defined as all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are operated or owned by the same person (or by any person which controls, or is controlled by, or under common control with such person). 42 U.S.C. §11049(4). From this definition of facility it is apparent that the type of business use made at the facility is immaterial to coverage under §302. Small businesses such as garages, dry cleaners, even farmers, should be aware of the potential application of §302 in their daily activities.

#### §8.09 *Emergency Notification of Spills (§304)*

Section 304 of Title III generally provides for the immediate notification of accidental releases of certain hazardous substances, including extremely hazardous substances, from facilities that use, produce, or store OSHA hazardous chemicals. The §304 notice must be given to both the LEPC and the SERC. It should be noted that the facilities subject to §304 emergency release reporting are potentially broader and more numerous than those subject to §302 planning notification.

#### §8.10 *Covered Chemicals and Reportable Quantities*

The more expansive scope of coverage of §304 in comparison to §302 arises for the following two reasons. First, the relevant amounts of extremely hazardous substances triggering §304 notification are defined by a typically smaller amount (the "reportable quantity" or RQ) than §302's reportable quantities (the "Threshold Planning Quantities" or TPQ). The lower threshold for reporting under §304 thus tends to affect more facilities. The second reason is that §304 covers more substances than §302. The substances triggering §304 notification include not just the extremely hazardous substances (EHS) listed under §302, but also substances independently treated under CERCLA. Some substances are common to both the EHS and the CERCLA lists.

#### §8.11 *Release*

Of course, one should keep in mind that §304 notification does not arise until there is a "release" of a §304 substance (in excess of its reportable quantities) from the covered facility. A few limited exceptions do exist to that general rule. The most important exception is for releases that result in exposure to persons solely within the site or sites on which the facility is located. 42 U.S.C. §11004(a)(4). One should note, however, that the EPA narrowly construes this exception. If there is the potential for off-site exposure, the EPA will likely take the position that §304 notification is triggered.

#### §8.12 *Notification*

The notice required under §304 contemplates two phases. The initial notice must be given immediately (by phone, radio, or in person) to all LEPCs administering areas "likely" to be affected by the release, as well as to the corresponding

SERC(s). 42 U.S.C. §11004(b) (1). No guidance is provided in the federal or state statutes or regulations as to the temporal meaning of "immediate" notice. It is logical to assume that the relative seriousness of the spill in terms of health and safety risks should determine whether the initial notice be given within minutes, or hours, of the spill-event occurrence. The initial notice is to include as much of the following as is then known: the substance involved and whether it is an EHS, estimate of quantity spilled, time/duration of the release, the medium into which the release occurred, any known health risks, appropriate precautionary measures, and the name/telephone number of a contact person. *Id.* §11004 (b) (2). The second phase of the §304 notice is a follow-up written report outlining the responsive action taken and elaborating upon the health risks and appropriate medical advice. The follow-up notice must be sent "as soon as practicable." *Id.* §11004(c).

**PRACTICE TIP:** A facility subject to §304 will be in an optimum position to fully comply with §304 if it has planned for the prospect of a spill. It is recommended that a contingency plan be developed setting forth the known factual details required by the initial §304 notice and the telephone numbers of the SERC and LEPC contact personnel. The contingency plan should be discussed with the facility employees and a copy made readily available at all times.

#### §8.13 *CERCLA's Petroleum Exclusion*

Some confusion may result upon a quick reading of §304 as to whether a release of petroleum from the facility is nevertheless reportable under §304 of Title III. CERCLA excludes from its definition of regulated hazardous substances "petroleum" (including "crude oil" or "natural gas") (42 U.S.C. § 9601(14)), and thus a release of petroleum is not reportable under CERCLA. However, Title III does not contain a similar exclusion for petroleum. For Title III purposes, petroleum could be considered as a mixture of component chemical parts, such as benzene, toluene, and xylene. To the extent any of these component chemical substances constitute a §304 extremely hazardous substance, the petroleum spill would be reportable under §304 if the amount spilled exceeded the RQ for any of the component EHSs.

#### §8.14 *Hazardous Chemicals Exceptions*

As noted above, the precondition for potential applicability of §304 at a given facility is that the facility uses, produces, or stores a "hazardous chemical" at the facility. The term "hazardous chemical" is not defined within §304. Rather, it is defined under the definitional section of Title III (42 U.S.C. §11049(5)) by referring to §311(e)'s definition. Under §311(e), "hazardous chemical" is given the same meaning as provided under OSHA's Hazard Communication Standard (29 C.F.R. §1910.1200(c)), *but* with several important additional exceptions based upon the use of the chemical at the facility.

The exceptions are: (1) food, drugs, or cosmetics regulated by the FDA, (2) any substance present as a solid in a

manufactured item to the extent exposure does not occur under normal conditions of use, (3) any substance to the extent that it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public, (4) any substance to the extent that it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual, or (5) any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate consumer. 42 U.S.C. §11021(e).

Thus, for purposes of §304 emergency release notification, the usage, storage or production of any of the five excepted categories of substances described above would not, on its own, trigger §304. For example, if a farmer uses or stores a pesticide in his routine farming operations, the presence of that pesticide alone would not require §304 reporting. Note, however, that the presence of the pesticide might independently require the farmer to comply with §302 notification requirements. Whether §302 applies in that instance depends upon whether the pesticide is a listed EHS and the quantity at any one time on-site exceeds its corresponding TPQ. *See generally* §§8.04-8.08, *supra*.

### §8.15 **Subchapter II - Reporting Requirements**

Sections 311, 312, and 313 constitute Subchapter II of Title III. Sections 311 and 312 are commonly known as the community right-to-know provisions of Title III because those sections provide the community with detailed information concerning the nature, amounts, location, and potential health and hazard effects of the hazardous chemicals in the community. Section 313 informs government officials and the public as to certain toxic chemicals that are released into the environment from manufacturing industries.

#### §8.16 *Material Safety Data Sheets (§311)*

Section 311 of Title III is a one-time reporting requirement, although updates within three months of discovery are required for "significant new information" concerning the subject chemicals. 42 U.S.C. § 11021(d)(2). The applicability of §311 depends upon three criteria: (1) the type of chemical present at the facility, (2) the amount of such chemical, and (3) the category of the facility.

#### §8.17 *Hazardous Chemicals Covered*

With respect to the first qualifying criterion, §311 generally covers "hazardous chemicals" as defined by OSHA's Hazard Communication Standard, 29 C.F.R. §1910.1200(c). OSHA's Hazard Communication Standard defines a "hazardous chemical" as any chemical which is a physical or health hazard. A number of criteria are used to determine the physical or health hazards. *See Appendix 3, infra; see also* 29 C.F.R. §1910.1200, Appendices A,B,C. However, several exemptions are provided under §311 for chemicals which are otherwise covered under the OSHA standard. 42 U.S.C. §11021(e).

The exemptions or exclusions of OSHA hazardous chemicals for purposes of §311 reporting are identical to the five use-related exceptions described in §8.14, *infra*, with respect to §304. Thus, §311 reporting is not required for hazardous chemicals that come within the parameters of those five exceptions.

COMMENT: Crude oil may be an OSHA "hazardous chemical." Although not expressly defined as such by OSHA, most types of crude oil would probably meet one or more of the hazard criteria employed by OSHA. With respect to the physical hazard criteria, crude oil likely qualifies as an explosive and a flammable. With respect to the health hazard criteria, crude oil probably meets the toxic (acute or chronic) and irritant factors. However, the exact composition of crude oil can vary considerably to the effect that one or more of these hazard criteria may not be applicable to a particular batch of crude.

#### §8.18 Regulated Amount

The second qualifying criterion determining whether §311 reporting is required is the amount of "hazardous chemical" present at any time. Pursuant to the discretion authorized under §311(b), EPA established by final rule on July 26, 1990, certain threshold quantities for §311 hazardous chemical reporting purposes. If the hazardous chemical is a §302 extremely hazardous substance (EHS), the §311 threshold is the *lower* of 500 pounds (approximately 55 gallons) or the EHS's §302 TPQ. For all other hazardous chemicals (*i.e.*, which are not also an EHS), the §311 reporting threshold is 10,000 pounds per chemical (approximately 1,100 gallons). October 17, 1990 is the effective reporting date of this §311 threshold reporting rule. 40 C.F.R. § 370.20(b)(1).

#### §8.19 Covered Facility

The final criterion in determining whether §311 reporting is required depends upon the category of the facility. Covered facilities are those which are required to prepare or have available a material safety data sheet (MSDS) under OSHA's Hazard Communication Standard. 42 U.S.C. §11021(a)(1). The MSDS serves as the indicator of the hazardous chemicals present at the facility. Generally, OSHA's Hazard Communication Standard applies to manufacturers, importers, and distributors of "hazardous chemicals" (as defined by OSHA), as well as employers engaged in a business where their employees may be exposed to hazardous chemicals under normal operating conditions or foreseeable emergencies. 29 C.F.R. §1910.1200(b). All of those facilities are required to either prepare or have available a material safety data sheet with respect to each such "hazardous chemical" present. Accordingly, those are the facilities that are covered under §311 reporting rules.

An important point should be made as to the scope of coverage of the above three §311 criteria. If any one (or more) of those criteria does not apply to the facility, there is no §311 reporting obligation. All three criteria must exist in

order for a §311 reporting obligation to arise. See EPA, *Understanding Sections 311 and 312 of the Emergency Planning and Community Right-To-Know Act of 1986*, at 4-6 (Sept. 1988) (hereinafter EPA, §§311 and 312 Reporting).

#### §8.20 Reporting

The §311 reporting is made to the LEPC, the SERC, and the local fire department. 42 U.S.C. §11021(a)(1). Title III permits the report to be made either by submission of the applicable MSDS sheet for each covered hazardous chemical or by an inventory list of such chemicals. The minimum detail required in an inventory list of such chemicals submitted is prescribed in the statute. This includes the chemical or common name of each hazardous chemical shown on the MSDS, as well as any hazardous component as provided on the MSDS. *Id.* §11021(a)(2). Generally, chemicals reported by the inventory list method must be grouped under categories of certain health and physical hazard categories recognized by OSHA. Consult Appendix 3 to this chapter for assistance in determining the appropriate hazard category.

CAUTION: Under the Kansas Act, §311 reporting can no longer be satisfied by submittal of the MSDS form. The 1991 amendments to the Kansas Act now require §311 reporting by hazardous chemical list only. The SERC or LEPC may, however, require the facility to include an MSDS form in addition to the required list of hazardous chemicals. K.S.A. 1991 Supp. 65-5707.

#### §8.21 Mixtures

Hazardous chemicals in mixture form present the facility with several §311 reporting alternatives. The facility has the option of either (a) reporting each element or compound in the mixture that is a covered hazardous chemical, or (b) simply identifying the mixture itself. 42 U.S.C. §11021(a)(3). The facility can exclude hazardous chemicals contained in a mixture which constitutes less than 1% (by weight or volume) of the mixture. If the hazardous chemical in the mixture is an OSHA carcinogen, it may be excluded only if it constitutes less than 0.1% (by weight or volume) of the mixture. 40 C.F.R. §370.28(b).

#### §8.22 Annual Hazardous Chemical Inventory Reporting (§312)

Section 312 of Title III requires the submission of annual reports summarizing the information reflected on the facility's §311 report. The scope of coverage under §312 is identical to §311. In other words, §312 reporting arises only if a §311 "hazardous chemical" exists on site during the year, and the "hazardous chemical" exceeds its respective §311 threshold quantity, and the facility is a covered facility under §311. 42 U.S.C. §11022(a), (b), and (c).

The §312 inventory reporting is made to the same parties as described in §311 (*i.e.*, the SERC, LEPC, and local fire department). 42 U.S.C. §11022(a)(1). The inventory reporting obligation was first required on or before March 1, 1988, and is to be submitted annually thereafter by March 1

for data covering the preceding calendar year. *Id.* §11022(a)(2).

The hazardous chemical inventory form under §312 can be either of two types: Tier I or Tier II. The Tier I form permits the facility to aggregate its §312 reportable chemicals by OSHA health and physical hazard categories. Tier I requires certain additional information, again in aggregate form, for each hazardous chemical category. 42 U.S.C. §11022(d)(1). The Tier II form calls for treatment of each §312 reportable chemical as a separate entity, rather than by OSHA hazard category. The required Tier II information is the maximum and average daily amounts of each such chemical present during the preceding year, the manner of storage for each chemical, and its specific location. *Id.* §11022(d)(2). In addition, the Tier II form permits the facility to claim confidentiality as to the specific location of any of the reportable substances within the facility. *Id.* Consult the instructions to the Tier II form for guidance as to how to claim such locational confidentiality.

Title III allows the SERC, LEPC, or local fire department to demand the submittal of information on form Tier II rather than Tier I. *Id.* §11022(e)(1). Any citizen can require the SERC or LEPC to provide whatever Tier II information it has with respect to any facility. In fact, any citizen can even compel the submission of Tier II information for any hazardous chemical present at a facility during the preceding year in an amount exceeding 10,000 pounds. *Id.* §11022(e)(3)(B). In the event the hazardous chemical stored at the facility is less than 10,000 pounds, any citizen can still request form Tier II information by stating his or her general need for the information. It appears that the SERC or LEPC can then, in its discretion, determine whether to require the facility to submit form Tier II information. If the SERC or LEPC elects to require submittal, such information must be made available to the person who made the request. *Id.* §11022(e)(3)(C).

**CAUTION:** The 1991 amendments to the Kansas Act now require §312 submittal on the Tier II form only. K.S.A. 1991 Supp. 65-5705.

### §8.23 Annual Toxic Chemical Release Reporting (§313)

Section 313 of Title III calls for annual reporting of certain toxic chemicals released from certain businesses into the environment, whether routinely, as a result of accidents, or as transported waste to another location. A number of purposes are served by this reporting. The information can be used to evaluate the impact of the estimated emissions in a given geographical area upon the air, water, or land. The relative efficiency of emissions controls at any facility or area can be assessed. Chemical wastes can be tracked, and waste treatment methods can be compared. These and other purposes served by §313 reporting can assist the regulatory agencies or citizens groups in locating hot spots and taking additional steps to protect public health and the environment. *See generally* EPA, *Chemicals in Your Community; A Guide to the Emergency Planning and Community Right-To-Know Act*, at 9-10 (Sept. 1988) (hereinafter *EPA, Chemicals in Your Community*).

The application of §313 depends upon the existence of all four of the following criteria: (1) a covered facility, (2) with certain toxic chemicals, (3) which chemicals are manufactured, used, or processed at the facility, and (4) in amounts exceeding the threshold amount during the calendar year.

### §8.24 Covered Facility

For purposes of §313, covered facilities are defined as any facility that has ten or more full-time employees, is classified within Standard Industrial Classification (SIC) Codes 20 through 39 (*i.e.*, manufacturing), and manufactures, imports, processes, or otherwise uses certain listed toxic chemicals in excess of stated threshold amounts during the calendar year. 42 U.S.C. §11023(b)(1). EPA has the discretion to add to the list of covered SIC codes, or even designate other particular facilities that use, manufacture, process, or import the listed toxic chemicals. *Id.* *See* §8.28, *infra*, for further clarification on the employee criteria of §313, and §8.30, *infra*, for elaboration on the meaning of "manufacture, use, or produce."

### §8.25 Toxic Chemicals

The toxic chemicals covered by §313 are listed at 40 C.F.R. §372.65. EPA can add or delete chemicals in the list for purposes of §313, and any citizen may petition EPA to add or delete. The criteria used to assess whether a certain chemical's toxicity warrants inclusion or deletion from the §313 list is set forth at 42 U.S.C. §11023(d)(2).

### §8.26 Threshold Amount

The final criterion relevant to determining whether a facility is obligated to report under §313 for any given year is the threshold amount of the listed §313 toxic chemicals handled at the facility during the year. The following are the Threshold Amounts (TA) for §313 purposes for forms due after July 1, 1990:

§313 Toxic Chemicals <i>used</i> at the facility	10,000 lbs. in the calendar year
§313 Toxic Chemicals <i>manufactured, imported, or</i> <i>processed</i> at the facility	25,000 lbs. in the calendar year

42 U.S.C. §11023(f). The TA for any given §313 toxic chemical is separately calculated for each of the three stated activities (*i.e.*, manufacture/import, use, and process) performed at the facility. Some relief from reporting is allowed for *de minimis* concentrations of a toxic listed chemical contained in mixtures. A few other limited exemptions based upon the particular use made of the chemical exist as well. *See* §8.29, *infra*.

**CAUTION:** If the facility meets the above four criteria, it is obligated to report under §313, regardless of the quantity of §313 toxic chemicals actually released into the environment. This result holds true even if the estimated amount of toxic chemical release for the year was zero. *See* EPA, *Toxic Chemical Release Inventory Questions and Answers*, at 1, EPA Document No. 560/4-91-003 (Jan. 1991) (hereinafter *EPA, Toxic Chemical Release Q/A*).

**§8.27 Reporting**

The §313 reports are to be submitted on an EPA form, entitled "Toxic Chemical Release Inventory Form R" (herein Form R). Form R is due each July 1 for releases during the preceding calendar year. 42 U.S.C. §11023(a). Form R is submitted to EPA and to designated state officials. In Kansas, the designated state official is the Secretary of the KDHE. K.S.A. 1991 Supp. 65-5704(b).

The required contents of Form R are spelled out in §313(g). It is important to note that for purposes of both establishing the TA and the amount of emissions release, §313 does not independently require measurement or monitoring. Rather, the facility may use readily available data, or if none exists, the facility can make "reasonable estimates" of the amounts involved. 42 U.S.C. §11023(g)(2). In addition, one should note that the Federal Pollution Prevention Act of 1990 will require additional information to be submitted with the Form R.

The Federal Pollution Prevention Act provides that beginning with the Form R due July 1, 1992 (*i.e.*, relating to calendar year 1991), the facility must include a toxic chemical source-reduction and recycling report for each §313 reportable toxic chemical. The items to be included in the source-reduction/recycling report are itemized in the statute. Those items include:

- (1) quantity of the toxic chemical entering any waste stream (and percent change from the prior year);
- (2) amount of the chemical that is recycled (and percent change over prior year);
- (3) source-reduction practices;
- (4) amount of the chemical that is expected to be reduced in the next two years due to process, technology, or reformulation changes;
- (5) ratio of production of the chemical expressed in terms of the reporting year's experience compared to the prior year;
- (6) techniques used to identify source reduction;
- (7) amount of the chemical released from a one-time event; and
- (8) amount of the chemical that is treated (and percent change from the prior year).

42 U.S.C. §13106(a), (b).

NOTE: The duty to report chemical emissions under §313 apparently exists independently of any other environmental laws. The fact that a particular release may be properly reported under CERCLA, RCRA, the Clean Water Act, the Clean Air Act or even under §304 of Title III does not obviate the need to also report, if applicable, under §313. See *EPA, Chemicals in Your Community*, *supra*, at 10.

**§8.28 Ten or More Full-time Employees**

In determining whether §313's employee threshold has been exceeded for the applicable reporting year, §313

regulations count the "total labor hours worked" rather than the actual number of employees, and for this purpose one full-time employee is the equivalent of 2,000 labor hours per year. Thus the employee threshold under §313 is exceeded if the facility experienced 20,000 or more labor hours worked at the facility during the year. The labor hours of all employees at the facility, regardless of function, and of all contractor employees working at the facility are included. Vacation and sick leave are counted as well. 40 C.F.R. §372.3.

**§8.29 Quantity and Use Exemptions**

In determining whether a §313 threshold amount (TA) of a given §313-listed toxic chemical has been exceeded, the regulations provide certain exemptions, based either upon the quantity involved or the particular use made with the substance. To the extent any of the following exemptions apply, the quantity of listed toxic chemical subjected to the particular exempted activity or use is not counted toward the reportable TA for that chemical.

1. *DeMinimis Concentrations.* For mixtures containing less than 1.0% concentration of the listed toxic chemical, or containing less than 0.1% if the listed toxic chemical is a carcinogen according to OSHA's carcinogen standard, then in either event the facility is generally not required to count the amount of the listed toxic chemical contained in such mixture. 40 C.F.R. §372.38(a).
2. *Articles.* The facility need not count listed toxic chemicals contained in an "article" when that article is processed or used (but not manufactured) at the facility. An article is defined under the regulations as a manufactured item that is formed to a specific shape or design during manufacture, that has end-use functions dependent upon its shape or design, and does not release a toxic chemical under normal conditions of the processing or use of that item at the facility. 40 C.F.R. §372.3. Releases of the listed toxic chemical articles either in the form of a resulting waste that is wholly (*i.e.*, 100%) recycled or reused, or which result in a total release of less than 0.5 pound of the listed toxic chemical do not negate the chemical's exemption as an "article." See EPA, TRI Form R, at 7, *infra*.

An example of the article exemption is a transformer containing PCBs. So long as the PCBs (a §313 toxic chemical) contained in the transformer are not released, the transformer qualifies for the article exemption.

3. *Use Exemptions.* Use of listed toxic chemicals in any of the following manners are excluded from computation of the TA: (1) use as a structural component of the facility, (2) use in routine janitorial or facility grounds maintenance, (3) personal use by employees or others (*e.g.*, food, drugs, cosmetics), (4) use of products containing listed toxic chemicals in motor vehicle maintenance, and (5) listed toxic chemicals contained in "intake"



(as distinguished from discharge or blowdown) noncontact cooling or process water, or "intake" compressed air or air used for combustion. 40 C.F.R. §372.38(c)(1)–(5). Toxic chemicals manufactured, processed, or used in a laboratory at a covered facility under a technically qualified individual are also generally excluded. *Id.* §372.38(d).

4. **Reuse and Recycle Exemption.** A limited exemption exists for listed toxic chemicals which are reused or recycled. Quantities of listed toxic chemicals that are present in the recycle system at the beginning of the reporting year are not counted toward the TA for that year. However, the facility must count any additional listed toxic chemical that is *newly* introduced to the recycle or reuse operation during the course of the year. 40 C.F.R. §372.25(e). Newly introduced chemicals frequently result from replacement of contents or in startup operations during the course of the year.

#### §8.30 Manufacture, Use, or Produce

As noted in §8.26, *supra*, threshold amounts for §313-listed toxic chemicals are determined by the particular use made of the chemical by the facility. The TA varies depending upon whether the chemical is manufactured, imported, processed, or otherwise used.

1. **Manufacture.** For purposes of §313 reporting, the term "manufacture" means to produce, prepare, or compound a listed toxic chemical. It also includes coincidental production of a listed toxic chemical as a result of the manufacture, processing, use, or treatment of other chemical substances. 40 C.F.R. §372.3. Coincidental production can result in a by-product or an impurity (*i.e.*, a chemical that remains in the final product or mixture that is distributed in commerce). EPA, "Toxic Chemical Release Inventory Reporting Form R and Instructions, EPA Doc. 560/4-91-007, at 6 (Jan. 1991) [hereinafter *EPA, TRI Form R*].
2. **Import.** The term "import" under §313 is defined as causing the chemical to be imported into the customs territory of the U.S. 40 C.F.R. §372.3. To the extent a listed toxic chemical (or mixture containing the chemical) is ordered from a foreign supplier, then it has been "imported" at such time as the shipment arrives at the facility directly from a source outside of the U.S. *See EPA, TRI Form R, supra*, at 6.
3. **Process.** Under §313, the term "process" generally means the preparation of a listed toxic chemical (after its manufacture) for distribution in commerce. 40 C.F.R. §372.3. Usually processing within the meaning of §313 occurs by the intentional incorporation of a listed toxic chemical into a product. Processing includes making mixtures, repackaging (such as transferring material from a bulk container to smaller cans or bottles), use as a reactant in the manufacture of other substances (*e.g.*,

feedstocks, raw materials, intermediates, and starting material), and use as a performance enhancer to a product (such as additives, dyes, solvents, lubricants, flame retardants, and reaction dilutants.) *EPA, TRI Form R, supra*, at 7, 20.

4. **Otherwise Use.** The term "otherwise use" applies to any use of a listed toxic chemical that is not covered by the terms "manufacture, import or process." Simply relabeling or redistributing a container of toxic chemical without repackaging does not constitute "otherwise use" of the chemical. 40 C.F.R. §372.3. A listed toxic chemical that is "otherwise used" by a facility means that it is not intentionally incorporated into a product sold or distributed in commerce. Some examples are process solvents, catalysts, process lubricants, solvents, coolants, refrigerants, degreasers, fuels, hydraulic fluids, and cleaners. *EPA, TRI Form R, supra*, at 20.

#### §8.31 Subchapter III - General Provisions

This segment of the chapter will focus on the material "general" provisions of Title III, including trade secret protection, citizens' suits, enforcement sanctions, and public access.

#### §8.32 Trade Secret (§322)

Facilities may claim trade secret protection for the specific chemical identity of chemicals otherwise required to be disclosed under §§303 (emergency planning requests), 311, and 312 (hazard chemical reporting), and 313 (toxic chemical releases). The trade secret protection of §322 extends to the chemical name, Chemical Abstract Service (CAS) registry number, and trade name. 42 U.S.C. §11042(a)(1)(A),(c). Trade secret information under §313 is different from the confidential information contemplated in the Tier II form under §312. *See* §8.22, *supra*.

#### §8.33 Elements of Trade Secret

To claim trade secret, the facility must show sufficient facts to establish a *prima facie* case that the specific chemical identity is a trade secret. The term "trade secret" is not defined in Title III. The Title III regulations, however, define "trade secret" to be the following:

Any confidential formula, pattern, process, device, information or compilation of information that is used in a submitter's business, and that gives a submitter an opportunity to obtain an advantage over competitors who do not know or use it.

40 C.F.R. §350.1. This definition is rooted in the first Restatement of Torts, §757, Comment (b) (1939) definition of trade secrets. *Id.* The showing the person submitting the information otherwise required under Title III must make to support a claim of trade secret is as follows: (1) the person has not disclosed the information to others (except under confidentiality), (2) the person has taken reasonable measures to protect the confidentiality and intends to continue to do so,

(3) the information is not required to be disclosed under other laws, (4) disclosure would likely cause substantial competitive harm, and (5) the chemical identity cannot easily be discovered through reverse engineering. 42 U.S.C. §11042(b). See generally R. Fields and M. Naini, *EPCRA Trade Secrets: Who's Minding the Store?* 3 *Env'tl. Claims J.* 1, at 80 (Autumn 1990).

#### §8.34 Procedure to Claim Trade Secret

The procedure for claiming trade secret protection is detailed in the EPA's final regulation on trade secrets, 40 C.F.R. §350.5. Instructions are also provided in the §312 Tier II form. Generally, the facility's §312 report is made in two forms. The one that is furnished to the LEPC, SERC, and fire department is the "sanitized" version, including all required information *except* the specific chemical identity. In lieu of the specific chemical identity, the facility must provide the generic class or category of the specific chemical. The other version, the "unsanitized" form, is provided to the EPA. The "unsanitized" form must include the specific chemical information withheld in the "sanitized" version, the substantiating reasons for claiming trade secret protection, and a specific description of why the five factors mentioned above apply. 42 U.S.C. §11042(a)(2).

#### §8.35 Limitation on Trade Secret Protection

Trade secret protection for specific chemical identity does not extend to §304 emergency release notification. The §304 notice must include the specific chemical identity. 42 U.S.C. §11042(a)(1)(A); §11004(b)(2)(A). In addition, health care professionals can compel a facility to disclose the specific chemical identity upon good cause under §323. Treating physicians or nurses who in the case of a medical emergency need the chemical information to treat or diagnose a person exposed to it can make their demand orally to the facility's owner or operator. The facility is required to immediately provide the information directly to the physician or nurse. 42 U.S.C. §11043(b). For other health-related requests by health professionals, the request for information must be in writing with the reasons supporting the request. The facility is required to then promptly disclose the chemical information, although the facility can in that event condition its disclosure upon the health professional entering into a written confidentiality agreement. 42 U.S.C. §11043(a), (c), (d); 40 C.F.R. §350.40.

**CAUTION:** The need and merit of claiming trade secret protection should be carefully considered before submittal. If the EPA determines the trade secret claim is frivolous, a penalty of \$25,000 per claim can be assessed. 42 U.S.C. §11045(d)(1).

#### §8.36 Citizens' Suit (§326)

Section 326(a)(1)(A) provides for citizens' suits directly against the owner or operator of a facility for failure to notify or report under §304(c) (written follow-up emergency notice), §311 (hazardous chemical report), §312 (annual hazardous chemical inventory), and §313 (toxic chemical

release form). Venue and jurisdiction are provided under §326(b), (c).

Similar to several other federal environmental laws, a citizens' suit is preconditioned upon a 60-day notice to the EPA, the violating facility, and the State in which the alleged violation occurred. 42 U.S.C. §11046(d)(1). This 60-day period allows the facility some opportunity to correct the deficiency, or to permit the EPA or state to pursue enforcement against the violating facility. A citizens' suit under §326 cannot be maintained if the EPA commences and diligently pursues enforcement with respect to the alleged violation. *Id.* §11046(e).

Reasonable attorney and expert witness fees can be awarded, in the court's discretion, to the "substantially prevailing" party. 42 U.S.C. §11046(f).

In the event an action is brought by the U.S., state, or local government against a facility owner or operator because of Title III violations, private citizens may have the right to intervene. This right to intervene is dependent upon the citizen having a direct interest that is or may be adversely affected by the government's civil action, and the resolution of the action may harm his or her ability to protect that interest. 42 U.S.C. §11046(h)(2).

The citizens' suit provisions of §326 are not the exclusive remedy for violations of Title III reporting or notification. 42 U.S.C. §11046(g). However, unlike Title III, Kansas apparently does not provide statutorily for direct citizens' suits. Rather, the parties provided the right in state court to enforce the Federal Act or corresponding Kansas Act are limited to the KDHE, the adjutant general, or the attorney general. The lone exception is the health care professional under the circumstances provided in §323 of Title III. K.S.A. 1991 Supp. 65-5708.

#### §8.37 Enforcement (§325)

Section 325 of Title III provides for civil and administrative cash penalties as well as criminal fines and imprisonment. Facility owners or operators subject to Title III should be aware of the severity of the enforcement measures. Maximum civil penalties under Title III can be as much as \$75,000 each day a violation continues uncorrected, and criminal sanctions can be up to \$50,000 in fines and five years imprisonment. 42 U.S.C. §11045.

The structure of Title III penalties for violations are as follows:

- a. Section 302(c) (emergency plan notification) and §303(d) (emergency plan cooperation) civil penalties are \$25,000 for each day the violation continues. 42 U.S.C. §11045(a).
- b. Section 304 (emergency spill notification) civil penalties are \$25,000 for each day the violation continues. For a second or subsequent violation, the civil penalty is up to \$75,000 per day each such subsequent violation continues. *Id.* §11045 (b)(1), (2). Criminal penalties for a knowing and willful

failure to provide the §304 notice is \$25,000/two years for the first violation, and \$50,000/five years for each subsequent violation. *Id.* §11045(b)(4).

- c. Section 312 (annual hazardous chemical inventory) and §313 (toxic chemical release) civil penalties are \$25,000 for each day the violation continues. *Id.* §11045(c)(1),(3).
- d. Section 311 (MSDS report) and §323(b) (medical emergency response) civil penalties are \$10,000 for each day the violation continues. *Id.* §11045(c)(2),(3).
- e. In addition, as was pointed out earlier, a frivolous claim of trade secret can result in a \$25,000 civil penalty. *Id.* §11045(d)(1). Any person who knowingly and willfully divulges protected trade secret information is subject to a criminal fine of \$20,000 and one year imprisonment. *Id.* §11045(d)(2).

The Kansas Act penalties mirror the above-described Title III penalties for the most part. K.S.A. 1991 Supp. 65-5708, 65-5709. There are, however, no civil or criminal sanctions for frivolous trade secrets or knowing/willful disclosure of protected trade secrets.

#### §8.38 Public Access (§324)

An important aspect of Title III's right-to-know emphasis is the statutory right for the general public to obtain copies of the Title III reports, plans, and notifications. Section 324 provides that emergency plans (§303), emergency spill notices (§304), MSDS or hazard chemical lists (§311), annual toxic chemical releases (§313), and emergency spill follow-ups (§304(c)), shall be made available to the general public during normal working hours, at locations designated by the EPA, SERC, and LEPC. 42 U.S.C. §11044(a). The only limitations upon the availability of such information to the public is protected trade secret information (§322) and the extent to which a facility claims confidentiality as to the location of chemicals at the facility in its Tier II form (§312). *Id.*

In addition, several of the specific other Title III subsections provide additional public information access rights. For example, under §313 EPA administers a national computer data base compiling the §313 annual release reports. This data base, called the "Toxic Release Inventory," is accessible to the public on a cost-reimbursable basis. 42 U.S.C. §11023(j). Under the Pollution Prevention Act of 1990, EPA must add to the TRI the toxic chemical source reduction and recycling reports required under that Act. 42 U.S.C. §13106(e). TRI data can be obtained directly from the EPA. Alternatively, the data may be available at public libraries, the KDHE, and the LEPC. See EPA, *Chemicals in Your Community*, *supra*, at 9-10. TRI is now available through a computerized on-line data base, the National Library of Medicine's (NLM) TOXNET on-line system, 24 hours a day.

Under the Kansas Act, the KDHE is responsible to adopt rules and regulations to implement the §324-mandated public access. K.S.A. 1991 Supp. 65-5704(e). As of January 1, 1992, no final regulations have been published which cover such public access.

## §8.39 ADDITIONAL KANSAS PROVISIONS

A number of provisions from the Kansas Act were noted throughout in the above discussion of Title III's structure and issues. Those will not be repeated here. Instead, this section will focus on the remaining material variations or additions under the Kansas Act and corresponding regulations.

### KDHE

#### §8.40 Oversight

The Kansas Act makes the KDHE the responsible agency for administering the Kansas Act and the federal Act. Among its duties are to receive, process, and manage hazardous chemical information and notifications under Title III, and adopt rules and regulations. In addition, the 1991 amendments to the Kansas Act require the KDHE to establish a list of hazardous chemicals consistent with §§311 and 312 of Title III, and designate TPQs and reportable quantities for Kansas reportable chemicals. The KDHE now has the power to lower the threshold quantities triggering Kansas reporting beyond the federal Act. K.S.A. 1991 Supp. 65-5704(d).

#### §8.41 EPA Coordination

By agreement effective April 4, 1990 with Region VII of EPA, the KDHE's compliance and enforcement activities were clarified. Under the agreement, KDHE is the lead agency with primary enforcement responsibility for §§302(c), 303(d), 311, and 312 of Title III within Kansas. EPA retained primary responsibility for enforcing §313. Both agencies agreed to exchange information, reports, requests, and complaints regarding Title III.

#### §8.42 Access For Inspection

The 1991 amendments to the Kansas Act included a new §5. New §5 grants authority to the KDHE, adjutant general, attorney general, or their representatives to enter upon private or public property to inspect the premises and examine documents for purposes of determining compliance with the Kansas Right-To-Know Act. K.S.A. 1991 Supp. 65-5711.

#### §8.43 Penalties

The 1991 amendments to the enforcement provisions added civil penalties of \$25,000 for each day access to property for purposes of inspection is denied. K.S.A. 1991 Supp. 65-5708(c). In addition, the Kansas Act directs that any civil penalties recovered under K.S.A. 65-5708 are to go to the state general fund, except that in the case a county or district attorney sues and obtains a civil penalty under the enforcement section, one-half of the penalty may go to the county general fund. K.S.A. 1991 Supp. 65-5708(g),(h).

#### §8.44 Fees

K.A.R. 28-65-3 (1989) sets forth the following applicable filing or service fees for Title III reports filed in Kansas. All filing or service fees are due March 1 of each year, where applicable, except the §313 release report fee that is due July 1.

**CAUTION:** As of January 1, 1992, KDHE was in the process of revising several of the Kansas right-to-know filing fees. The agency should be consulted for the most recent revisions.

#### §8.45 Section 311

As of January 1, 1992, a \$2 annual service fee is due for each facility submitting reports under §311. K.A.R. 28-65-3(b) (1989). A \$23 filing fee is due for each facility submitting the required §311 list of hazardous chemicals. K.A.R. 28-65-3(d) (1989).

#### §8.46 Section 312

As of January 1, 1992, a \$2 annual service fee is due for each facility submitting reports under §312. K.A.R. 28-65-3(b) (1989). A filing fee of \$9 for each sheet of the Tier II report is also due. K.A.R. 28-65-3(e)(1) (1989). Up to three chemical entries can be submitted on a single Tier I report sheet if using the API generic form. **CAUTION:** Kansas now requires submittal on form Tier II only.

#### §8.47 Section 313

As of January 1, 1992, a \$2 annual service fee is due for each facility submitting a §313 toxic chemical release form. K.A.R. 28-65-3(b) (1989). The facility must also pay a \$187 annual fee. K.A.R. 28-65-3(f) (1989).

For multiple facilities filing or reporting under Title III, one should consult the KDHE Guide, *supra*. Examples and further instructions are provided as to the filing procedure and calculation of filing fees.

#### §8.48 Late Fee

The 1991 amendments to the Kansas Act now provide for a late fee. The KDHE can assess a late fee at the rate of 10% per annum on any outstanding Title III-type fee (including late fee) owed to the state. K.S.A. 1991 Supp. 65-5708(e).

### §8.49 Enforcement Policy

This chapter has reviewed in detail the Title III enforcement sanctions and pointed out the similarities of the Kansas Act. Although difficult to predict the future direction or emphasis of EPA enforcement under Title III, it is my belief that one should anticipate increased enforcement efforts on the part of the agency. Harsher sanctions designed to compel compliance should be expected, particularly in instances where the facility has not made good faith efforts to attain compliance.

State enforcement in Kansas may offer a contrast in enforcement attitude. It appears that the statutorily prescribed civil or criminal sanctions are rarely applied at the first instance in order to achieve compliance. Instead, the KDHE, in the exercise of its administrative discretion, has evidenced a tendency to opt to achieve compliance and enforcement through other less drastic means. KDHE's Bureau of Environmental Health Services has published a document confirming its general compliance and enforcement policy under right-to-know, dated March, 1990.

This section of the Chapter will examine the highlights of that document.

The KDHE's 1990 compliance policy document states as its goal the achievement of voluntary compliance through cooperation and understanding. The KDHE will make "every available effort" to inform and notify in furtherance of this goal. The use of personal contacts, notice of non-compliance, warning letters, and joint conferences are tools the KDHE will usually try before initiating statutory enforcement proceedings. The compliance document notes that the regulated industry has the option during any step of the enforcement process to request an opportunity for a hearing.

If the voluntary compliance efforts do not obtain results, the KDHE will resort to enforcement proceedings. Some of the procedures the KDHE might use include administrative orders, injunctions, civil penalties, and criminal penalties. In considering which enforcement mechanism to utilize, a number of considerations are evaluated: (1) impact of the violation upon the intention of the program, (2) severity of the violation as it relates to health or the environment, (3) past enforcement history of the facility, (4) relative priority of the facility violation in comparison to other facilities' existing violations, (5) reasonableness of the compliance requirement, (6) knowledge on the part of the facility owner or operator, (7) degree of control the facility had in preventing the violation, (8) availability of agency personnel, and (9) degree of cooperation anticipated with counsel for the facility.

The compliance document notes field inspections as one tool it will emphasize in the future as part of its compliance strategy. Field inspections might be performed on an unannounced, surprise basis or as part of scheduled implementation. In either event, the inspector will identify himself and deliver written notice of inspection as a prerequisite to the inspection.

If the enforcement proceeds to a notice of violation, an offer of settlement will be used prior to issuance of an administrative order with administrative penalty assessment. The compliance document includes a useful chart summarizing the formula used by the KDHE in determining an appropriate penalty settlement.

**CAUTION:** It should be noted the 1990 KDHE compliance policy document states that it is qualified. It is not intended to be a statement of fixed department policy, nor eliminate any discretion the agency otherwise enjoys under applicable laws.

### §8.50 THE FUTURE OF RIGHT-TO-KNOW ENFORCEMENT IN KANSAS

I would submit that enforcement efforts under Title III and the Kansas Act will materially increase in the future. In support of the contention, I would offer the following. Title III and the Kansas Act are relatively new (passed in 1986 and 1987, respectively). As with most new laws, it takes time for the regulated industry and administering agencies to familiarize themselves with and implement its terms. I believe that "lag" time has largely passed.

The provisions of right-to-know lend themselves to greater enforcement. As the regulated industry and administering public officials focus on the attendant strong civil and criminal sanctions, it is reasonable to conclude that both will react and adjust their actions accordingly. Also, the application of the laws is in some respects more readily determinable to a given facility than other environmental laws since right-to-know violations are keyed to fixed filing dates, required forms, and notices. The reports and forms themselves elicit quantifiable chemical information which is conducive to verification. Moreover, right-to-know's concept of LEPCs and SERCs expands the number of parties having official responsibility for implementing and enforcing the law beyond a single administrative agency. Active LEPCs and SERCs should assist in achieving overall compliance.

A shift in administrative priorities in the direction of right-to-know can be anticipated. To a great extent, the KDHE's environmental efforts have been consumed to date in other major programs like CERCLA and RCRA/State underground storage tanks. As the agency gets a handle on these problem areas, the KDHE may have more opportunity to commit more of its resources to other programs such as right-to-know. In addition, the anticipated increasing use of field inspections should lead to a broadening of the impact of right-to-know and lead to a greater agency awareness of the violators.

The involvement of the general public will no doubt also lead to heightened right-to-know enforcement. Right-to-know, more than any other environmental law, provides greater and freer public access to reported information. That information, together with the availability of citizens' suits (at least at the federal level) should result in more "whistle-blowing." Moreover, industry operations subject to right-to-know are generally more visible to the public than the subsurface impact felt by violations of other laws such as CERCLA.

In the final analysis, the tragic lessons learned from the Bhopal, India disaster are not easily forgotten. The general public will not let that page from history repeat itself. Right-to-know in some form is here to stay.

#2

# Training and education play vital roles in ensuring competent fire protection

While Pennsylvania does not require a minimum level of training or education for fire service personnel, townships nevertheless need to be sure their local fire departments are capable of providing an adequate level of service to the community.

Professional and volunteer firefighters are called upon every day throughout the commonwealth to exercise their expertise when responding to potentially hazardous and often life-threatening emergencies. Extensive training and education, therefore, are emphasized throughout the fire service as critical to the success and safety of every fire department.

Pennsylvania's fire service, recognized as the largest in the country, includes 2,850 separate volunteer and professional fire companies. These companies range from large, well-organized departments serving heavily populated urban areas to relatively small groups of concerned citizens united to protect their rural communities from the devastation of fire.

Estimates of the number of full- and part-time personnel involved in fire protection in the commonwealth range from a conservative 80,000 to figures as high as 200,000 men and women. Officials also estimate that around 20,000 personnel are employed full-time in the more than 60 fully paid or combination paid/volunteer fire departments that serve urban areas in the state such as Pittsburgh, Philadelphia, Erie, and Harrisburg.

## **'Townships have responsibility'**

Regardless of geographic location or population density, the need for a

dependable, competent and well-trained fire service in every community is unquestionable. Firefighter training and education involving both academic and hands-on exercises must be established as a priority for the department as well as the community, says Richard Wessel, acting administrator at the State Fire Academy in Lewistown and a 22-year veteran of the volunteer fire service.

"Fire departments have long since recognized the importance of a continuous training regimen," says Wessel. "But until recently, many municipalities have been reluctant to get involved with firefighter training for one reason or another. More townships must begin to realize that they do have a responsibility to exercise oversight to ensure that their fire departments are competent and able to provide a reasonable level of service."

Wessel says many municipalities have refrained from getting involved with training requirements because of the large number of volunteers traditionally associated with the fire service.

"Officials are understandably hesitant to impose minimum training requirements on firefighters when most of them are volunteers," explains Wessel. "However, I am not completely convinced that a large number of volunteers would just leave the fire serv-

ice simply because they would be required to complete a minimum level of training."



a number of townships in the state consulted their local fire departments or adopted ordinances that provide for a minimum level of training and education, says Wessel, a greater number have not addressed these concerns.

"Today more than ever, townships really need to be well-informed about the competency level within their local fire departments," says Wessel, "especially since citizens are more likely to file lawsuits charging a department and the responsible municipality with sub-standard service and gross negligence."

#### **Hazmat training required**

While townships are not required to oversee basic firefighter education, one area they must confront is protection from hazardous material (hazmat) incidents. Under Titles I and III of the federal Superfund Amendments and Reauthorization Act of 1986 (SARA),

state and local governments must implement various requirements to ensure that they are prepared for a hazmat incident. Officials should keep in mind that SARA is being enforced by the U.S. Environmental Protection Agency (EPA) in Pennsylvania since municipal employees are not covered by the Occupational Safety and Health Act.

Local governments that oversee both compensated and non-compensated workers, such as firefighters, are now responsible to meet the planning and training requirements under SARA, says Wessel. Local officials must confirm that emergency response plans are in place and workable and make sure that their local emergency responders are trained at the appropriate level as outlined under SARA.

**This second floor training exercise in Williamsport underscores the vital role that training and education play in providing adequate fire protection for a community. (Photo by Susan H. Wessel.)**

"Most municipal firefighters will fit into the first responder, operations level category," says Wessel. "Townships have a legal responsibility to get involved and ensure that local response personnel are capable of providing adequate service in the event of a hazmat incident."

As defined by SARA, individuals in the first responder, operations level category respond to a hazmat incident to protect persons, property or the environment. Basically, their function is to contain the release from a safe distance, keep it from spreading, and prevent exposures.

First responders at the operations level must have at least eight hours of training or sufficient experience to demonstrate competency at this level, as well as in the following six areas:







**Firefighters often find themselves in situations that require highly specialized skills, including this simulated response to an automobile accident. Here a firefighter uses an air chisel to demonstrate how a victim can be removed safely. (Photo by Susan H. Wessel.)**

- basic hazard and risk assessment techniques;
- selection and use of the proper personal protective equipment;
- basic hazardous materials terms;
- basic control, containment and/or confinement operations within the capabilities of the resources and equipment available to them;
- basic decontamination procedures; and
- standard operating procedures.

"Ensuring the appropriate level of training is largely a judgment call for

townships, and it may often come down to taking the word of the fire chief," says Wessel. "Nevertheless, townships must be prepared to show the EPA that their local firefighters are trained and well-prepared for a hazmat incident."

#### **No state requirements**

Aside from the SARA requirements, there are no laws in Pennsylvania that set mandatory training standards, says Jack Simon, state fire commissioner. While nine surrounding

states demand an average of 100 hours of basic health and safety training, the commonwealth has left minimum training requirements to be decided largely by individual departments or their governing municipalities.

"I am truly concerned that the state does not require a minimum level of training for firefighters," says Simon. "Many states have already established guidelines, and I would like to see Pennsylvania institute some set of criteria a firefighter must meet before he risks his life and the lives of others."

George Stapleton, director of fire training at Harrisburg Area Community College (HACC), agrees with the commissioner's assessment and stresses the overall importance of providing firefighting training.

"We need to establish some level of required competency in Pennsylvania," says Stapleton. "Firefighters must have enough training to perform their jobs safely and effectively and ensure the community that they are capable of providing an adequate level of service."

#### **Voluntary certification available**

While Pennsylvania does not require firefighter training, a voluntary certification program modeled after a national effort was begun in 1981 to accredit professionally competent fire protection personnel in the commonwealth.

The testing procedure for certification, which is overseen by the state Fire Service Professional Qualifications Board, is a non-competitive process that evaluates the level of competency of individual firefighters through a written test and a series of skill exercises.

The three firefighter certification levels now available in Pennsylvania are Firefighter I, II and III. Currently, about 1,000 firefighters are certified at Level I, 200 at Level II, and nearly 100 at Level III.

A training profile leading to Firefighter I certification includes such subjects as:

- fire alarm/communications systems,
- water supplies,
- search and rescue,

ntilation, and  
pes and knots.

The Firefighter II certification expands on basic skills and knowledge and emphasizes such areas as:

- forceable entry,
- extinguishing agents,
- property protection,
- fire prevention, and
- victim removal.

Emphasis is placed on the mental ability of the firefighter at Level III certification. Firefighters must demonstrate in-depth knowledge of:

- building codes,
- tactics and command,
- hazardous materials,
- public education, and
- fireground management.

Future certification programs will include officers, training officers, hazardous materials personnel, education specialists, and code enforcement specialists.

#### Several training outlets

Firefighters in Pennsylvania can receive training through a number of

“

*I am truly concerned that the state does not require a minimum level of training for firefighters. Many states have already established guidelines, and I would like to see Pennsylvania institute some set of criteria a firefighter must meet before he risks his life and the lives of others.*

Jack Simon  
State Fire Commissioner

”

outlets, including more experienced personnel within their local departments, regional and county fire schools, exchange programs between urban and rural departments, the State Fire Academy, the National Fire Academy, and other facilities outside the state.

The Pennsylvania State Fire Academy, located in Lewistown, Mifflin County, has developed a two-level approach for providing training and education for firefighters since first opening its doors in 1955.

With a staff of three full-time resident instructors, the academy conducts



Entering a burning building to douse flames or rescue a victim is arguably the most dangerous but also the most important aspect of a firefighter's job. Training, therefore, must stress such details as self-contained breathing apparatus, protective clothing, and search and rescue techniques.



Facilities at the Public Safety Training Center on the campus of the Harrisburg Area Community College include a residential burn structure that allows students to confront controlled live-fire situations.

a broad range of free courses designed to take advantage of the unique facilities on the campus, which include

classrooms, burn pits for live flammable liquid fire training, a railroad tank car for mock hazardous materials inci-

dents, and a five-story structural training complex where a variety of scenarios can be created.

The burn building was built in 1935 to provide realistic training to students through live fire suppression exercises. For many years, the building was considered the leading facility of its kind in the country; however, after 35 years of heavy use, safety concerns now limit live fire exercises to certain areas of the building.

Commissioner Simon reports that the Fire Academy received a \$2 million appropriation from the state legislature in 1990 to go ahead with long-standing plans to refurbish the commercial and industrial sections of the burn complex for search and rescue training and further plans to build a new residential and commercial/industrial complex for live fire exercises.

"Projects of this type are always long and difficult, but if all goes as planned," says Simon, "we expect to begin work sometime this summer and have the academy fully operational once again by the summer of 1992."

In addition to the successful residential program, the State Fire Academy also conducts ongoing programs at the local level that are funded by cooperative agreements with community colleges, vo-tech schools, and other institutions. The local-level programs involved over 800 instructors and 51,900 students in 1990 and logged just under 1 million student hours, says Simon.

Local-level training programs are important to the fire service in Pennsylvania and around the country, he says, because firefighters always have



**STOLTZFUS  
SPREADERS**

**(215)286-5146**

**SPREADERS, TENDERS & LOADERS  
SINCE 1945**

**4 MODELS:**

TAILGATE .....	Any width
JR. SLIP-IN .....	2 to 3.5 cy
SLIP-IN .....	4 to 11 cy
AUGER .....	6 and 8 ft.

Lowest cost spreader.
Engine-powered pickup sizes.
Full-size hydraulic units.
Improved and more powerful.

*Custom designs and stainless steel available.*

a difficult time taking off work to attend to in another area of the state.

While the State Fire Academy continues to provide a wide variety of subject areas for firefighters, instructors are focusing much of their current training efforts on hazardous materials, search and rescue, and officer training courses.

"Training firefighters is an endless cycle," says Commissioner Simon. "Hopefully, with a little more time and effort, the State Fire Academy will be a facility other states can once again use as a model."

#### Regional facilities available

Several regional training facilities are available throughout the state, including the Public Safety Training Center at Harrisburg Area Community College (HACC), which serves as a testing and recruitment center for local public safety agencies and as a local-level fire training center for a three-county region.

The center at HACC, which was

**“**  
*Officials are understandably hesitant to impose minimum training requirements on firefighters when most of them are volunteers.*  
**”**

Richard B. Wessel  
Acting Administrator  
State Fire Academy

built in 1988 with \$3.1 million from Dauphin County and the Commonwealth of Pennsylvania, includes training facilities for fire, police, emergency medical, and private sector emergency response personnel.

Facilities at the HACC training center include a five-story drill tower, smoke chamber, structural burn building, motor vehicle driving range, and a holding pond that provides all water

used in training exercises.

"We are entering our third year of operation, and it seems as if more and more area firefighters are taking advantage of the facilities here at HACC," says Stapleton, director of fire training.

#### Courses free of charge

Many Pennsylvania firefighters also take advantage of training courses available at the National Fire Academy and Emergency Management Institute in Emmitsburg, Maryland. The academy offers a wide range of programs, from fire technology and incident management to fire prevention and organizational management, to improve a firefighter's ability to protect his community from the threat of fire.

Any person with substantial involvement in fire prevention and control, rescue, or emergency management activities is eligible for enrollment at the National Fire Academy, which provides courses free of charge to fire service personnel, as well as lodging on a space-available basis.

#### PENNS VALLEY PUBLISHERS

Pennsylvania's  
Comprehensive Ordinance Service  
*-Since 1951-*

#### MUNICIPAL LEGISLATIVE SERVICES

Codification  
Recodification  
Revision  
Supplementation  
Ordinance Drafting  
Act 170 Amendments  
Zoning and Subdivision Ordinances

#### Publishers of :

Chrostwaite's  
Pennsylvania  
Municipal Law  
Reporter

Model Ordinances  
for  
Pennsylvania  
Municipalities

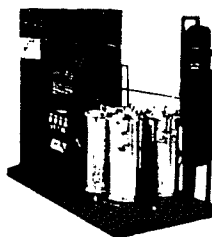
Contact:  
Penns Valley Publishers  
4104 York Street  
Harrisburg, PA 17111  
(717) 558-7700

#### WEST PENN CHEMEX

FOR ALL YOUR CLEANING NEEDS  
with

PRESSURE WASHERS, STEAM CLEANERS  
and RGF WATER RECYCLE SYSTEMS

#### THE POLLUTION SOLUTION SYSTEM



#### BENEFITS:

- Stop Pollution
- Avoid EPA fines
- Save water
- Avoid costly cleanups
- Save cleaning compound
- Simple and efficient

Distributors for  
CHEMEX, L & A, LANDA,  
KARCHER & RGF RECYCLE SYSTEMS

Call Today For a Free Demonstration!  
**(800) 533-9870**

20 Cedar Street  
Franklin, PA 16323

Commissioner Simon attended a two-week course at the academy recently, titled "Command and Control of Fire Department Operations in Catastrophic Disaster," and encourages firefighters to look into the many benefits available at the academy.

"The facilities are most accommodating," says Simon. "The National Fire Academy offers an excellent opportunity for quality education."

For course and registration information about the National Fire Academy, townships may contact the Office of Admissions and Registration, National Emergency Training Center, 16825 S. Seton Ave., Emmitsburg, MD 21727-8995, telephone (301) 447-1000.

For applications or more information about Pennsylvania's firefighter certification process, townships should contact Richard Wessel or Patsy Crawford at the State Fire Academy, P.O. Box 631, Lewistown, PA 17044, telephone (717) 248-1115.



Cumberland County Volunteer Firefighter Kevin Nelson explains the importance of checking walls for heat when entering a burning structure to extinguish flames or rescue victims.

## SPECIFY KUHN FOR CLEAN-CUT ROADWAYS

If you're spec'ing out machines to get clean cut right of ways economically, you need to look no further than the GMD 55S Multidisc Mower from Kuhn, the largest manufacturer of disc mowers in the world.

The GMD 55S is the perfect mower for durable, dependable, low maintenance mowing. Just look at these features:

- Standard cutting height of 3" — optional 6" cutting height available
- Replaceable disc guards and skids
- Cutterbar can operate on inclines up to + - 30°



- Clog-free mowing operation
- Cutterbar driveline designed for perfect dynamic balance minimizing vibration
- Helical cut gears in cutterbar for optimal lubrication at all angles
- 5 heavy-duty discs, 6' 7" cutting width is ideal for county/municipal sized tractors
- Double safety cover standard

Look at the competition, then look at Kuhn. There's only one that makes the cut. Kuhn's GMD 55S.

Kuhn Farm Machinery, Inc.  
P.O. Box 224  
Vernon, NY 13476 315/829-2620



**THE KUHN CONNECTION**  
Joining agriculture and technology for over 160 years

Sold and serviced by:

ABC Groff, Inc.  
110 S. Railroad Ave.  
New Holland, PA 17557  
(717) 355-2122

Sibert Equipment  
1175 Brickcrafters Road  
New Oxford, PA 17350  
(717) 624-8763

Ralph W. Kyle Inc.  
R.D. 1, Route 158  
Mercer, PA 16137  
(412) 748-4300

2-7

**The University of Kansas  
Division of Continuing Education  
Lawrence, Kansas 66045-2600**

**Fire Service Training Program**

**Testimony  
House Committee on Local Government  
Friday, August 20, 1993**

**by  
Alan G. Walker  
Director**

*House Local Gov't  
8-20-93  
Attachment - 3*

## The Fire Service Training Program at the University of Kansas

The Fire Service Training program for the State of Kansas began in 1949 as a result of legislation which provided the University of Kansas with funding to conduct training for the state's 14,000 paid and volunteer fire personnel who belong to approximately 700 fire departments.

**K.S.A. 76-327 Training of Firemen, Travelling Instructors, Annual Fire School;**  
*Federal Aid: The University of Kansas shall, through its extension division, provide for a traveling instruction service to train firemen in the municipalities of the state requiring such instruction. This extension service shall include training in firemanship, fire inspection, fire protection, fire prevention and such other instruction as will provide the municipalities with better trained firemen. Travelling instructors shall be employed who shall visit and instruct in such places as the head of the extension division of Kansas University shall determine. The instructors shall be allowed actual and necessary traveling and hotel expenses incurred in the performance of their duties and shall receive such salary as the University may deem appropriate. The University shall conduct an annual Fire School. The University is hereby authorized and empowered to accept any grants in aid that may be available from any federal agency. (L., 1949, ch 81, article 1)*

As part of the university's Division of Continuing Education, Fire Service Training pursues its mission with a full-time staff consisting of a director, three program managers, an office manager, and a secretary (a fourth program manager's position and a secretarial position have been vacant for lack of state funding for several years). The full-time staff is supplemented by a cadre of 300 part-time field instructors from within and outside the state.

The annual operating budget for the program is approximately \$450,000, of which \$250,000 originates from state general appropriations. The balance of the budget is generated from fees, contracts and grants.

There are several outstanding programs which have been developed by Kansas Fire Service Training in the past five years, such as a comprehensive, nationally accredited, NFPA standards-based certification system featuring Firefighter I-III, awareness, operational and technician level hazardous materials response, Instructor I-II, Fire Officer I, Driver/Operator, and Inspector I. Many of these certification programs are offered through a variety of such formats as: challenge examinations, retroactive placement, self-study, direct delivery courses provided by Fire Service Training, and other courses recognized by Fire Service Training which are delivered by fire departments, community colleges and other organizations. Over the last several years, the percentage of volunteer firefighters which make up the total enrollment in University of Kansas Fire Service Training certification programs has been increasing. For example, in FY 92 over 75% of the individuals who enrolled in Fire Fighter I, were volunteer fire personnel.



There are other advanced, technical courses such as: the mobile SCBA training laboratory which features a two-story search and rescue maze with movable partitions, realistic sound effects, an electronic tracking system with two-way communication, as well as an air compressor and cascade system; and an LPG course which provides fire service personnel with much needed experience in fighting live fires in a controlled and safe environment. Fire Service Training also provides courses in such topics as: auto extrication, high angle and water rescue, farm extrication, high rise fires, fire ground command, grain elevator fires, hazardous materials, leadership and management. The one course delivered by the University of Kansas Fire Service Training program more than any other each year is the "Elements of Fire Fighting" course, which is a basic hands-on, skills-oriented course most often requested by small rural volunteer fire departments. Over the last five years, Fire Service Training has delivered an average of 33 of these courses annually.

However, the most unique feature of the Fire Service Training program at the University of Kansas is not just any single course, but rather how this organization has defined its role in providing training and education for the fire service in Kansas, how it markets programs and services, the delivery strategies which it uses, and the methods used to measure its success.

Traditionally, most state level fire service training organizations develop and deliver training primarily through the use of full and part-time staff. The University of Kansas Fire Service Training program has assumed an additional role. Every two years the program publishes a catalog which is mailed to every fire department in the state. This catalog contains approximately 250 courses which have been developed by staff, instructors, as well as courses of National Fire Academy (NFA) origin. (As the state's fire service training agency, the University of Kansas is the NFA's designated course distributor for Kansas and a member of the NFA's TRADE network.) However, these catalogs also feature courses from some of the nation's leading experts in a variety of fields.

Seminars and workshops presented by such notable individuals as Alan Brunacini, Ron Coleman, John Mittendorf, Carl Holmes, Bill Blair, Ed Burns, Francis Brannigan, Phil Stittleburg, Jim Smith, Phil McClaughlin, Greg Noll and a host of others, are described in the catalog and available through the University of Kansas Fire Service Training program *on a request basis* to fire departments or other organizations, for delivery throughout the year, to any location in the state. Due to insufficient funding for the Fire Service Training program, however, the cost of these courses must be shared by the host(s)/participants and Fire Service Training.

Nevertheless, marketing these kinds of courses, enables the University of Kansas Fire Service Training program to offer the fire service in Kansas a *greater depth and variety* of training than would otherwise be possible, at a cost which is typically lower than these same seminars held elsewhere in the country. Use of these types of courses *minimizes the need to expend scarce Fire Service Training resources on research and development*. They also serve to mainstream the fire service in the state to current issues, trends and developments in technology which occur throughout the rest of the country and allow Fire Service Training to *respond very quickly to changing needs of its clients*.

As the National Fire Academy's designated agency for the delivery of fire service training in Kansas, the University of Kansas, in cooperation with the National Fire Academy, offers a variety of programs such as: direct delivery field courses; regionally delivered resident courses; National Fire Academy courses which have been handed off to, and are available through, the University of Kansas Fire Service Training program; and a special program for volunteer fire personnel who are selected and nominated by the Fire Service Training to attend special one-week resident courses at the National Fire Academy in Emmitsburg, Maryland. In the last five years, over 50 volunteer fire service personnel throughout the State of Kansas have participated in this special program.

Another important role of the University of Kansas Fire Service Training program is to *help fire departments to develop the capacity to provide improved training and education using internal personnel supported by Fire Service Training.* This strategy benefits fire departments as it relates to scheduling convenience, cost effectiveness, organizational growth and the development of its most important resource—its people. Concurrently, this delivery strategy also helps Fire Service Training achieve its goals and mission. The most important component to this strategy is a delivery system design which utilizes a comprehensive network of 300 specially trained and qualified University of Kansas Fire Service Training field instructors strategically located throughout the state. These individuals attend Fire Service Training-sponsored instructor train-the-trainer courses which are designed to familiarize the instructors with the content and delivery methodology of National Fire Academy and/or Fire Service Training developed courses. There are between 40 and 50 of these train-the-trainer courses offered throughout Kansas each year. Many field instructors have become qualified to teach as many as twelve different courses through this process. When these instructors return to their respective organizations, they may then teach the course for which they have completed a train-the-trainer. Fire Service Training supports these deliveries by providing student manuals, lesson plans, audio visual aids and certificates. Several fire departments in Kansas have taken full advantage of this strategy by having each of their officers become field instructors with Fire Service Training. This provides a fire department with in-house delivery capability of quality training with minimal resources needed for research and development. There are presently 40 different courses and certification programs offered by Fire Service Training in this format.

The present status of the University of Kansas Fire Service Training program is the result of many significant and far reaching changes which have been implemented over the last seven years. The primary delivery strategy in use by the program until 1986 involved a director supervising four full-time itinerant instructors who would travel the state and teach courses. The number and variety of courses delivered through the program each year was limited by two factors: the extent to which four individuals could schedule enough travel, given the time available logistically, to meet the needs of fire department personnel statewide; and the combined expertise of four individuals on fire service subjects.

While this delivery strategy may have been appropriate in the 1950s and 1960s for meeting the needs of typical paid and volunteer fire departments, in most paid fire departments and some of the more progressive, well-organized volunteer fire departments, the increasing need for more sophisticated and advanced training simply outgrew the capability of a state training system to meet these needs based upon the exclusive expertise of four individuals and the logistical limitations associated with their travel. (Some state fire service training systems continue to suffer from this phenomena.) Given this type of delivery system design, doubling or even tripling staff size would not solve this problem.

At the same time, the Fire Service Training budget was almost 100% state general appropriation money as there was little or no income from fees, contracts or grants. Therefore, expenditures each year were limited to the amount appropriated which simply was not sufficient for taking the kinds of initiatives needed to reach all the fire departments in Kansas. In fact, just the opposite was occurring because of inflation and shrinkage which reduced delivery capability of the program even further than the inherent limitations described earlier. These are the primary reasons why the program lacked credibility and support from the fire service in Kansas at the time. It was not until Fire Service Training began offering certain types of courses on a cost recovery basis and using income from some programs to fund others, that its ability to provide training improved. For example, in FY 91, the University of Kansas Fire Service Training program was able to provide over 200 courses at no charge to participants or fire departments. Most of the departments who requested and received this training were small, rural volunteer fire departments least likely to be in a position to pay for such training. Part of the funding needed to provide this amount of free training came from income received by fees from Fire Service Training certification programs. Today, despite reductions in funding which have occurred, such as the loss of the Carl Perkins money (\$40,000) in 1992, Fire Service Training continues to use a socialized internal funding strategy in order to provide some training at no charge for those organizations most in need.

The greatest challenge faced by the Fire Service Training program between 1986 and 1990 was to rebuild the program as quickly as possible while interfacing successfully with an extremely critical constituency and the subsequent political issues, and simultaneously train a new staff. Like many states, the fire service in Kansas is primarily made up of volunteers spread over a large geographical area, representing widely diverse interests and expectations from the Fire Service Training program.

Development of a number of innovative programs and the use of several strategies were necessary in order to be successful given the formidable challenges present. Two major improvements made in the last several years include the use of a catalog/marketing demand driven delivery system and expansion of the field instructor program and train-the-trainer concept.

**CATALOG/MARKETING DEMAND DRIVEN DELIVERY SYSTEM:** One of the most unique aspects of the Fire Service Training program in Kansas is its customer demand driven delivery system which revolves around the course catalog. Generally, most state fire service training systems market courses which have either been developed by the National Fire Academy and/or the respective state fire service training staff.

In addition, many courses delivered by fire service training organizations (particularly those operating a fixed facility) are preselected and prescheduled for specific dates and locations. Brochures and catalogs advertising these activities are then sent to fire departments. In addition to not having a fixed training site, the Kansas Fire Service Training program differs from this approach in two significant ways.

First, while courses are offered which have been developed by the National Fire Academy, full-time staff and Fire Service Training field instructors throughout the state, the program also features some of the nation's leading experts on a wide variety of contemporary topics from throughout the country. Including courses such as this in the Fire Service Training catalog, helps the program to act as a kind of "talent scout", "networker" and "broker" on behalf of the fire service in the state, allowing dramatic improvement in the variety, sophistication and depth of the training offered to constituents without a large increase in budget. This new role has been especially important in renewing a relationship with the fire departments in Kansas who do not need assistance with basic training but are interested in more advanced, technical and specialized subjects, while maintaining vitally needed basic hands-on training programs for those departments who continue to need this type of training.

Second, with very few exceptions, the annual schedule of Fire Service Training course deliveries is client demand driven. Every two years each fire department in Kansas is sent a course catalog. Fire department officials review the catalog (like they would a catalog from a commercial business) and chose those courses which they would like Fire Service Training to deliver.

**FIELD INSTRUCTOR PROGRAM:** In 1986 the Kansas Fire Service Training program began a small cadre of field instructors to complement the full-time staff. These individuals were part-time employees of the University of Kansas. In 1988 there were approximately 20 such individuals active with the program, responsible for approximately 60% of the annual course deliveries. These field instructors were used to teach courses to small volunteer departments and were typically members of larger paid departments. In 1989 this concept was expanded by developing standardized criteria and retention requirements for field instructors as well as implementing a new category of field instructors, referred to as associate field instructors. These individuals are not university part-time employees. This category of field instructors (technically considered to be contractors) have to meet the same qualifications as the part-time paid field instructors and can become approved to teach the same courses, but they are generally not compensated by Fire Service Training. The intent of establishing this new category of field instructors was to provide a mechanism for fire departments which wanted to develop in-house on-shift delivery capability (using internal personnel) for the delivery of Fire Service Training supported courses. Today there are over 300 associate field instructors who account for approximately 90% of Fire Service Training annual course deliveries. The expansion of the field instructor concept and the increased role it has played in the Fire Service Training system represents an important innovation over the last five years.

The last few years have been especially difficult for state fire training systems. These are organizations which are asked to do the impossible with dwindling resources and mounting political pressure from their constituents who are demanding a greater degree of sophistication and depth to the training which is provided. *Gone are the days of state training delivery systems which rely primarily on itinerant full-time instructors as a primary source for course development and delivery.* Even large, well established programs have been hit hard. Many have gone from being fully state funded to partially state funded ("state assisted"). Within the limits imposed by fiscal restrictions, the Fire Service Training program at the University of Kansas has adapted to change, listened to its clients needs, focused on its mission, goals and objectives and has identified the measures used to define excellence.

## Performance Measures

An effective management system used to measure the performance of any organization must employ both quantitative and qualitative measures. In this section of this paper the management evaluation system used to measure the performance of the Kansas Fire Service Training program is described.

The first important point to make is that the evaluation of any organization should be based upon its mission, and since organizational missions differ, the evaluation criteria may differ. The vital role that a well conceived and well advertised mission statement plays in the subsequent development of an evaluation system is yet another testament to the importance of having such a declaration of what the organization is about, in the first place.

The mission statement of the University of Kansas Fire Service Training program (similar to the one described earlier) not only tells clients what Fire Service Training does, but also begins to define what it means to be "successful".

The basis for the management evaluation system used by Fire Service Training to measure how it performs is firmly grounded in its mission statement.

*Plan, direct, and administer a quality, comprehensive and uniformly delivered statewide fire service training program in Kansas, through the most efficient use of the resources available in order to assist in meeting the training needs of as many fire service personnel as possible, so that lives and property may be saved more safely and effectively.*

**Quality.** There are several methods used by Fire Service Training to establish and maintain the quality of the programs offered. First, it is important to use quality courses. Such courses are usually characterized by their use of an instructor's guide containing the outline for the presentation of information, a variety of audio-visual aids, student activities, a student manual, etc.

These courses must then be delivered by instructors who have experience with the subject matter *and* have undergone special training in instructional methodology as well as Kansas Fire Service Training delivery policies and procedures.

In 1988, the cadre of Fire Service Training Field Instructors (which numbered approximately 20 at the time) was strengthened by developing qualification criteria for individuals who wanted to become Fire Service Training field instructors. These qualifications included required training in educational methodology, and experience in the fire service. Upon becoming approved as a field instructor, individuals are then required to complete annual in-service training designed to continue to improve instructional delivery skills and to teach a minimum number of hours worth of Fire Service Training courses in order to remain active. Field instructors for the Kansas Fire Service Training program also become approved to teach specific courses by attending instructor train-the-trainer courses which are designed to familiarize instructors with the content and teaching methodology of National Fire Academy or Fire Service Training developed courses. During these train-the-trainer courses, field instructors are also familiarized with Kansas Fire Service Training course delivery and other standard operating policies and procedures. The use of the instructor train-the-trainer delivery strategy combined with written standard operating policies and procedures also helps to maximize *uniformity of delivery*, another component of the mission statement, the Fire Service Training quality assurance system and ultimately its management evaluation system.

In addition to the methods for improving quality and measuring organizational performance described thus far, the Kansas Fire Service Training program also relies heavily on a sophisticated course and instructor critique program. This critiquing system is modeled much after the present system used by the National Fire Academy. Numerical values are assigned to student responses and cumulative results are calculated for each instructor at the end of the fiscal year.

The critiques not only provide useful information regarding the content of the course, but they are also used to provide feedback regarding the instructor's performance. These critiques are then reviewed by Fire Service Training staff and the results are compiled on an annual basis by course and by instructor. The results from instructor critiques are used in part to determine the recipient of the annual Fire Service Training Field Instructor of the Year Award. Informally, Fire Service Training staff also seek qualitative feedback directly from their clients and personally monitor selected deliveries throughout the year.

**Comprehensiveness.** Another major component of the mission statement which makes up part of the management system used to measure the performance of the Kansas Fire Service Training organization involves maximizing the depth and variety of courses available to fire department personnel in Kansas. This objective cannot usually be achieved through the exclusive use of courses developed and delivered based upon the expertise, time and resources of a typical state fire service training staff alone.

Therefore, it is important that a progressive fire training and educational institution also catalog and act as an agent for the delivery of courses taught by subject matter experts from outside the organization. Instructors such as these can be located through sources such as state fire service training systems, referrals from fire departments, authors of trade journal articles, and through conferences such as the Fire Department Instructor's Conference (FDIC) and the California Instructor's Conference. Use of these outside instructors, combined with courses developed by the National Fire Academy, Fire Service Training staff and field instructors within Kansas fire departments, allows the state fire training system to feature a greater variety of courses than would otherwise be possible.

*Efficient use of resources.* Given the public service nature of the Kansas Fire Service Training program, its mission, and an environment in which the public demands greater accountability, it is particularly important to be able to demonstrate that funds are used to their fullest potential. This represents both a moral and professional obligation and requires an organization to utilize an efficient instructional system design. Maximizing the efficiency of the internal operations within the organization from a design perspective, while maintaining a high level of quality is also important.

The measures which are used to monitor how well the Kansas Fire Service Training program performs these functions include calculation of the following: average cost per course delivery; average cost per enrollment; and most importantly, average cost per student instructional hour delivered. These figures are based upon the *total expenditures* (including all salaries and benefits, full and part-time, capital expenditures, travel expenses, supplies, etc.) for the program on an annual basis. Obviously, in order to perform these calculations, an organization must have a management information system (MIS) which produces the necessary data. For example, in FY 91, the Kansas Fire Service Training program recorded 8,669 enrollments, and 496 course deliveries representing 196,166 clock hours of training (537 FTEs). (Total student clock hours is calculated by multiplying the enrollment for each course by the numbers of students in each course and then adding these subtotals for every course together.) Total expenditures for the Fire Service Training program in Kansas that year was \$455,871.00. This means that the average cost it took to produce each enrollment, course delivery and clock hour of training provided, was \$53, \$918, and \$2.36, respectively. These figures represented decreases of 53%, 58%, and 39%, respectively, from what it took to produce the same units during FY 89. Studies conducted during FY 91 on this aspect of the performance of state fire service training systems nationwide indicated that the Kansas Fire Service Training program ranked third in this efficiency rating among states participating in the study (Wilson, 1992).

These calculations are not only made to measure the performance of Fire Service Training as a whole, but are also used to measure the performance of different program areas within Fire Service Training for which staff have management responsibility.

*Meeting the training needs of as many fire department personnel as possible.* This phrase in the University of Kansas Fire Service Training mission statement serves as the basis for measuring production as a quantitative indicator of performance. As with the efficiency measures described earlier, the units are, once again: number of course deliveries, total enrollments, and total student instructional hours delivered on an annual basis.

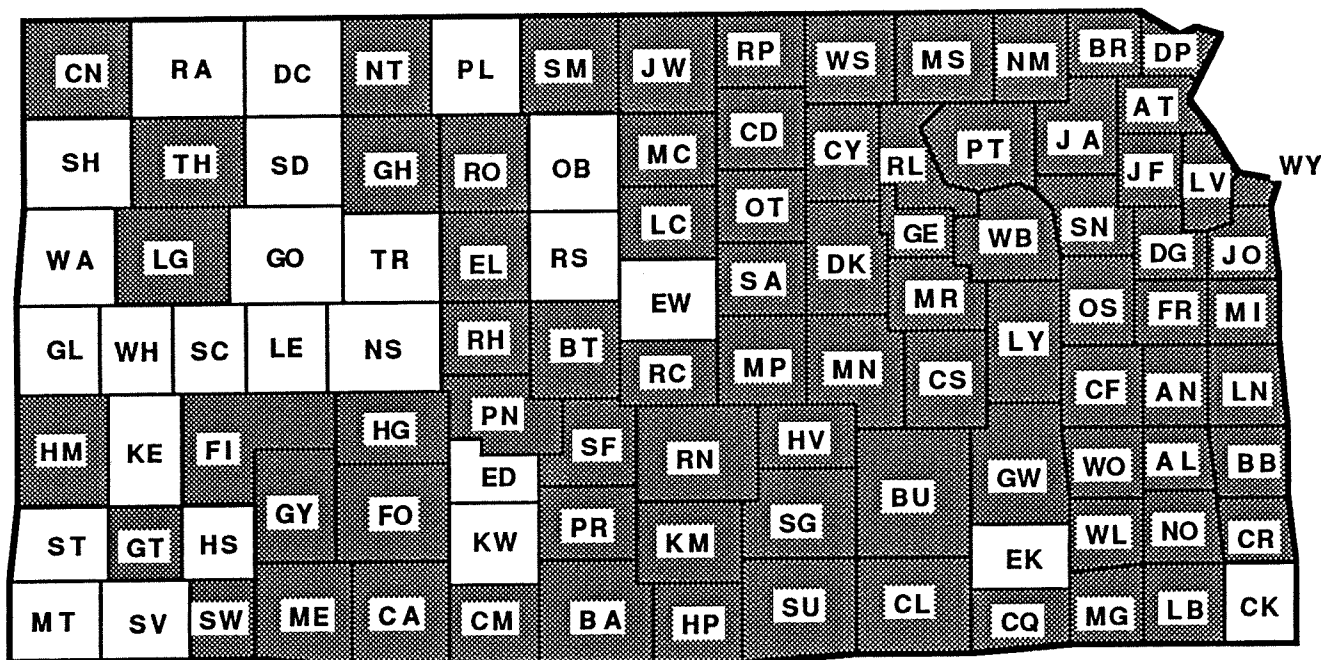


The FY 91 production cited earlier (8,669 enrollments, 496 course deliveries and 193,166 clock hours) represented an increase of 300%, 335%, and 209% respectively over FY 88 production. While the total increase in the state appropriated portion of the Fire Service Training budget for that same period of time was approximately 14%.

An additional measure is also used as an indicator of overall organizational staff productivity. The ratio of full-time staff (including clerical personnel) to total student instructional hours delivered per annum is calculated in order to provide such an indicator. For example, as noted earlier, in FY 91 the Kansas Fire Service Training program delivered 193,166 clock hours of training to fire personnel in the state of Kansas. Therefore, the staff productivity ratio for the organization that year was 1 to 29,718 hours (an increase of 413% from FY 89). This means that for each full time position within the organization, 29,718 contact hours of training were provided to students in the field.

The problem remains, however, that this data only reflects training delivered by the University as a result of requests for such training and therefor, in the absence of requests, some fire departments in the state do not receive any training from the University's program.

11  
M RT



FY89-93 Class Locations By County

**Presentation to  
House Committee on Local Government  
Subject: Hazardous Materials Training**

COPY

Mr./Ms. Chairperson, Committee members, good morning. It's an honor to be here this morning.

My name is Chester Covert. I am a Certified Hazardous Materials Manager and am currently President of the Heartland Chapter of the Academy of Certified Hazardous Materials Managers.

Before I discuss the topic of this Committee, I would like to provide some background information on the Academy, which I am representing here today, and its goals and objectives.

The objectives of the Academy are as follows:

1. To provide credentialed recognition to those professionals engaged in the management and control of hazardous materials who have attained the required level of education, experience and competence.
2. To foster continued professional development of Certified Hazardous Materials Managers through continuing education, peer group interaction and technological stimulation.
3. To facilitate the transfer of knowledge and experience among professionals and organizations vitally concerned with hazardous materials management.
4. To provide government, industry and academia with a mechanism for identifying hazardous materials management professionals who have fulfilled the requirements for certification by a professional peer group. *and*
5. To promote ethical behavior among professionals involved in the management of hazardous materials.

To become a CHMM an individual must:

- have an appropriate degree
- *have* completed a minimum of three years of appropriate, documented experience in the field of hazardous materials management
- pass an extremely rigorous closed book examination; professionally prepared and administered
- maintain status through re-certification *and*
- honor the Academy Code of Ethics.

House Local Gov't Interim  
8-20-93  
Attachment *4*

Currently, the ACHMM has over 5,000 members nationally. The Heartland Chapter has over 50 members representing a diverse mix of mid to upper level managers from industry and the public sector. Companies and organizations represented by our chapter include: Hallmark, Groundwater Technology, Burlington Railroad, FMC, Waste Management, Beech Aircraft, and KDHE. In most situations, these CHMMs are responsible for facility compliance, health and safety, and emergency response.

- - - - -

In general, it is our objective to set standards for professionalism and competence in a relatively new and extremely complex field where accidents or improper management can put human health and the environment in great peril.

The myriad of regulations promulgated in the name of environmental protection over the past 15 to 20 years is mind-numbing. These include Federal regulations and corresponding state regulations with each state adding additional, no less stringent, requirements and regulations. These include:

- Clean Air Act of 1970, amended 1977 and 1990
- Clean Water Act of 1972, amended 1977
- Comprehensive Environmental Response, Compensation and Liability Act of 1980;  
amended in 1984 by the Superfund Amendments and Reauthorization Act
- Federal Insecticide, Fungicide and Rodenticide Act of 1972
- Hazardous Materials Transportation Act, 1975
- Occupational Safety and Health Act, 1970
- Resource Conservation and Recovery Act of 1976, amended in 1984 by the Hazardous and  
Solid Waste Amendments
- Safe Drinking Water Act of 1974, amended 1986
- Toxic Substances Control Act of 1976
- Pollution Prevention Act of 1990

All of the regulations were written and passed primarily to protect human health and the environment. Most of these regulations have requirements for handling of designated hazardous materials, record keeping and safety programs for persons who may be exposed to hazardous materials in the course of their jobs.

As discussed in the Hazardous Materials Managers Handbook in the chapter titled "Safety Overview of Hazardous Materials Management Activities":

Training is a key element of any safety program. Even a casual glance at OSHA regulations will underscore this. Regulations (29 CFR 1910.120) outlining training requirements of hazardous waste workers have inspired a new industry providing "canned" courses emphasizing provisions of RCRA, CWA, CAA, SARA, emergency response, and notification. These courses should be carefully reviewed before being used to be sure they are consistent with the organization's policies and address the actual hazards faced.

Actual training programs must reflect not only operational concerns but those of safety and health as well. This training must be in response to the actual workplace risk assessment. It must be tied to the evaluation of worker backgrounds of education and experience. For instance, a degreed chemist understands that bases are hazardous, just as are acids. Chemical technicians are not always aware of this and may be sometimes observed handling dilute acids with great care but casually exposing themselves to harm from concentrated bases.

Following the training assessment portion of a risk assessment process, needs should be developed for which a schedule of training can be established to assure that workers receive the information they need to appropriately and safely perform their jobs. This assessment may be performed for each individual worker but it is probably more practical to key it to a job category. Thus, drivers will receive different training than that appropriate for geologists. It should not be assumed that workers who are more formally educated in their specialty have necessarily received the information they need to participate in the assurance of their own workplace safety and health.

The training schedule should include a safety and health orientation of new works, workers transferred from other departments or facilities, summer students, consultants, and contractors. The orientation should include, as a minimum, review of the organization's safety policy, safety organization (including where to go for specific safety information, facility lay-out (including restricted areas), hazards at facility or associated with various processes, controls, emergency response procedures, Safety Manual or Handbook, procedures to be followed in case of injuries or exposures, and peculiarities of the organization or location, such as neighborhood crime, high altitude sickness, endemic wildlife diseases, etc. An introduction to the organization's Hazard Communication program may be included.

In summary:

- "Canned" training may not be appropriate to the situations applied and must be carefully selected; accreditation and scrutiny of the trainers is very important,
- prior to beginning training, the sponsoring organization must have a clear policy of health, safety and employee exposure, with clear objectives for initial training and continuous re-training,
- prior to beginning training, a risk assessment should be performed by a qualified professional to identify thoroughly, the actual risks confronted by the individual in the individual's specific workplace,
- other, more normal, safety issues must not be overlooked in the zeal to become a "HazMat Responder"

- training must be carefully planned and prepared to provide the best fit to the situation and environment,
- and, finally, training is no substitute for experience; individuals who have completed training should then be mentored by experienced persons in a sequential manner, prior to being left alone to deal with dangerous and hazardous materials or situations which can jeopardize their health or lives or the health and safety of the general public.

We applaud this committee for its efforts to ensure appropriate training and effective emergency response capabilities. It was these same concerns which in large part led to development of the CHMM training and accreditation program. With these thoughts, I'll close, and will be happy to respond to any questions you might have.

# Executive Summary

The initial creation of boundary review commissions in the 1960s reflected an effort by some states to respond to the rapid growth in the number of suburban communities that developed after World War II as a result of massive migration out of the nation's older industrial central cities. This growth gave rise to concerns about unplanned and uncoordinated metropolitan development, local fiscal disparities, territorial disputes, and a proliferation of small local governments lacking viability. Boundary review commissions (BRC), therefore, were seen as a means by which a state could manage metropolitan development in presumably rational ways.

Boundary review commissions now operate in 12 states. Eight states established BRCs between 1959 and 1969 (Alaska, California, Michigan, Minnesota, Nevada, New Mexico, Oregon, and Washington). The other BRCs are in Iowa (1972), Utah (1979), Virginia (1980), and St. Louis County, Missouri (1989).

Most BRCs were established with a set of broad policy goals. In general, BRC missions, as spelled out in legislation, were to (1) encourage orderly metropolitan development and discourage sprawl, (2) promote comprehensive land use planning, (3) enhance the quality and quantity of public services, (4) limit destructive competition between local governments, and (5) help ensure the fiscal viability of local governments.

More specifically, the commissions exercise decisionmaking or advisory authority over the establishment, consolidation, annexation, and dissolution of units of local government, within the framework of state constitutional and legislative provisions. Six BRCs operate statewide (Alaska, Iowa, Michigan, Minnesota, New Mexico, and Virginia); the others operate within particular counties or metropolitan areas. Most BRCs are authorized to consider all types of boundary issues, but three of them (Nevada, New Mexico, and Utah) may consider only annexation. Eleven commissions have authority to approve or deny proposals, subject to judicial appeal or popular referendum. Virginia's BRC has only an advisory role; boundary decisions are made by the state courts.

To determine the current status of BRCs, ACIR interviewed commission staff members and conducted a survey of state associations of municipalities, townships, and counties.

For the most part, the commissions are small and have limited funding. Some BRCs have their own staff, while others rely on part-time staff (usually county employees). Some BRCs receive funding from the state; others rely on local government funds. Some of the commissions are active and influential; others are underutilized or inactive. Basic philosophical differences about local gov-

4-15  
U.S. Advisory Commission on  
Intergovernmental Relations  
800 K Street, NW  
South Building  
Suite 450  
Washington, DC 20575

(202) 653-5640  
FAX (202) 653-5429



**Members of the  
U.S. Advisory Commission on Intergovernmental Relations  
(May 1992)**

**Private Citizens**

Daniel J. Elazar, Philadelphia, Pennsylvania  
Robert B. Hawkins, Jr., *Chairman*, San Francisco, California  
Mary Ellen Joyce, Arlington, Virginia

**Members of the U.S. Senate**

Daniel K. Akaka, Hawaii  
Dave Durenberger, Minnesota  
Charles S. Robb, Virginia

**Members of the U.S. House of Representatives**

Donald M. Payne, New Jersey  
Craig Thomas, Wyoming  
Ted Weiss, New York

**Officers of the Executive Branch, U.S. Government**

Lamar Alexander, Secretary, U.S. Department of Education  
Bobbie Kilberg, Deputy Assistant to the President,  
Director of Intergovernmental Affairs  
Samuel K. Skinner, White House Chief of Staff

**Governors**

John Ashcroft, Missouri  
George A. Sinner, North Dakota  
Stan Stephens, Montana  
*Vacancy*

**Mayors**

Victor H. Ashe, Knoxville, Tennessee  
Robert M. Isaac, Colorado Springs, Colorado  
Joseph A. Leafe, Norfolk, Virginia  
*Vacancy*

**Members of State Legislatures**

David E. Nething, North Dakota Senate  
Samuel B. Nunez, Jr., President, Louisiana Senate  
Ted L. Strickland, Colorado Senate

**Elected County Officials**

Ann Klinger, Merced County, California, Board of Supervisors  
D. Michael Stewart, Salt Lake County, Utah, County Commission  
Barbara Sheen Todd, Pinellas County, Florida,  
Board of Commissioners

**Local Boundary Commissions:  
Status and Roles  
in Forming, Adjusting and Dissolving  
Local Government Boundaries**

4-7  
X  
6

# Contents

Introduction .....	1
Traditional Processes for Establishing and Changing	
Local Government Boundaries .....	2
Incorporation .....	2
Overlapping .....	3
Towns and Townships .....	3
Special Districts .....	3
Annexation .....	3
Consolidation and Merger .....	3
Joint Powers .....	4
Study Commissions .....	4
Summary .....	4
The Origins and Purposes of Boundary Review Commissions .....	4
Growing Numbers of Governments .....	4
Changing Populations .....	7
Legislative Intent .....	8
The Current Status of Boundary Review Commissions .....	10
Alaska .....	11
California .....	16
Iowa .....	17
Michigan .....	17
Minnesota .....	18
Missouri .....	18
Nevada .....	20
New Mexico .....	20
Oregon .....	20
Utah .....	21
Virginia .....	21
Washington .....	22
Issues Facing Boundary Review Commissions .....	23
Why Have BRCs? .....	23
What Functions Should BRCs Perform? .....	25
How Should BRC Membership be Structured? .....	29
Effects of Boundary Review Commissions on Annexation .....	29
Conclusion .....	31
BRCs: One Method of Boundary Adjustment .....	31
BRCs Are Not All Alike .....	32
BRCs Face Varying Degrees of Controversy .....	32
Shifting Functions of Boundary Review Commissions .....	33
Difficulty of Achieving Broader Objectives .....	33
The Influence of State Law on BRC Agendas .....	34
Appendix A—Appendix Tables .....	39
Appendix B—Methodology .....	45
Appendix C—Questionnaire .....	47

# Local Boundary Commissions

## Introduction

The constitutions and laws of the 50 states set the rules for establishing and revising the boundaries of local governments (e.g., counties and municipalities). Consequently, there are many variations in how this function is carried out across the United States. Until the mid-twentieth century, state laws governing local government formation and boundary changes largely provided that local governments, landowners, or citizens initiate proposals to be decided case by case by local governments themselves or by the voters. In some states, the process favored municipal expansion through easy annexation. In other states, annexation was more difficult. In Virginia, for example, with its unique system of city-county separation, such proposals are adjudicated by the courts. Some state legislatures act directly to establish local governments and adjust their boundaries.

After World War II, rapid suburbanization followed by massive migration into the Sunbelt states gave rise to concerns about urban sprawl, unplanned and uncoordinated development, local fiscal disparities in metropolitan areas, territorial disputes, and the proliferation of so-called peanut governments. Numerous proposals were made, therefore, to manage metropolitan and exurban development in presumably rational ways.

In 1959, Minnesota and Alaska established institutions to help with the task of changing local government boundaries. These institutions are referred to, generally, as boundary review commissions (BRCs). Since 1959, ten other states have created similar institutions (California, Iowa, Michigan, Missouri, Nevada, New Mexico, Oregon, Utah, Virginia, and Washington). The federal government also entered the field of local boundary issues through the *Voting Rights Act of 1965* and its amendments. The legislation is intended to ensure that local jurisdictions are not formed or altered in ways that will create or perpetuate racial or ethnic discrimination.<sup>1</sup> As a result, local boundary issues have become intergovernmental issues.

This report updates and elaborates on the Commission's earlier work on boundary review commissions and other boundary issues.<sup>2</sup> The central questions concern (1) the extent of local freedom and flexibility in creating, changing, and eliminating local government structures, powers, and boundaries and

ernment organization have a strong impact on the commissions' functions, as do state laws governing boundary changes and the formation of local governments.

The initially broad purposes of BRCs have changed over time. Today, annexation and mediation of interjurisdictional boundary conflicts top the BRC agendas. Because these issues require different types of analysis and assistance than originally envisioned for BRCs, some commissions have developed new techniques for resolving disputes and negotiating agreements for service delivery and tax sharing. These techniques can help reveal alternatives to annexations and consolidations, such as interlocal agreements and contracts.

Boundary issues are often contentious. In some cases, it appears that BRCs have reduced the number of disputes, although it was not possible to determine whether reduced tension was the result of BRC problem solving or citizen reluctance to raise boundary issues. BRC states do not have obviously better patterns of urban development or fewer contentious boundary disputes than non-BRC states. Although BRCs can provide assistance in dispute resolution, most of them are not empowered to manage growth and boundary changes themselves.

Boundary review commissions inevitably are drawn into controversy when they rule on or attempt to mediate proposals for boundary changes. Sometimes, these issues end up in court, especially in Michigan. In some states, there have been legislative challenges to the BRCs. Oregon abolished one of its three commissions, and Washington limited the role of its BRC. For the most part, the BRCs that have survived these challenges have done so by offering analytical and mediating services not available from other agencies.

The existence of boundary review commissions raises some concerns about citizen self-determination. When the state creates a BRC, citizens, in many cases, can no longer petition the legislature to establish a new unit of government or expand one to meet their needs. Boundary adjustments approved by a BRC usually are submitted to a referendum. When a BRC vetoes a proposal, however, the decision does not go to the voters. Thus, boundary commissions can prevent incorporations even when the electorate favors them.

As such, BRCs may undercut the value of having a variety of local governments that allows citizens to choose the jurisdictions that provide the services and tax rates most closely matched to their preferences. BRCs, it is argued, may interfere with citizen preferences regarding the creation and maintenance of local governments. In particular, BRCs may value large government units more highly than small ones. Those who take this view assume that BRCs generally would oppose new incorporations and favor annexations or consolidations.

However, BRC analyses may not necessarily carry a "bigger is better" bias. The diseconomies of large-scale governments as well as small-scale governments are generally recognized. Legislative direction to BRCs, as well as the analytical criteria they have developed, may guard against bias in either direction. The strongest political value in the local government system is against consolidating existing units. This preference is enforced by state laws that all but rule out municipal consolidation under most circumstances.

In general, BRCs respond to individual proposals for boundary changes rather than formulating broad strategies for metropolitan boundary adjustments. This situation is a disappointment to those who hope for a "rationalization" of local

government patterns and a comfort to those who believe that an electoral-level marketplace of boundary decisions is preferable to a centrally planned pattern.

One question that cannot be answered definitively is whether BRCs are effective. No substantive or systematic evidence could be found on whether BRCs effectively assist urban growth management, ease competition for territory and tax base, or protect the public interest and promote fiscal equity. Despite 30 years of experience with BRCs, no comprehensive evaluation of their work or effectiveness could be found.

Nevertheless, most of the BRC staff and local association representatives opposed abolishing the commissions. Several respondents argued that without BRCs boundary issues might become more political and/or litigious. The ability of BRCs to conduct studies and analyses that assist citizens and officials in making boundary decisions was cited as a useful function, as were the mediation and dispute resolution roles.

Table 7 (cont.)  
Characteristics of Boundary Review Commissions

State	Agency Title	Statutory Citation	Date Established	State or Local Organization	Membership	Funding	Staff	Type of Boundary Changes Considered	Additional Review or Approval
New Mexico	New Mexico Boundary Commission	N.M.S. Annotated 1978 Section 3-7-1	1965	One statewide board	3 appointed by Governor	State funded per diem and expenses	Staffed by state	Annexation	Appeal to district courts
Oregon	Local Government Boundary Commissions	O.R.S. Chp. 199.410-199.512	1969	Two in metropolitan areas Third abolished 1980	7 or 12 appointed by Governor	Locally funded	Varies by commission	Annexation Incorporation Detachment from cities Consolidation or merger Creation, abolition, or modification of certain special districts including approval of additional functions Extraterritorial extension of sewer or water services by cities or special districts Creation of private sewer and water firms Transfers of territory	Depends on method of initiation Appeal to State Court of Appeals
Utah	Boundary Review Commission	Utah Code Annotated Title 10 Chp. 2 Part 4	1979	County	Varies by commission 7 or 5	County provides space and financing	0	Annexation	Appeal to courts

Table 7 (cont.)  
Characteristics of Boundary Review Commissions

State	Agency Title	Statutory Citation	Date Established	State or Local Organization	Membership	Funding	Staff	Type of Boundary Changes Considered	Additional Review or Approval
Virginia	Commission on Local Government	Ch19.1 Title 15.1 Code of VA	1980	One statewide board	5 by Governor	State \$460,000 in FY 89-90	7	Incorporation Annexation Consolidation Limited immunization of counties from city annexation Mediation	Courts make initial decisions and hear appeals
Washington	Boundary Review Boards	W.S. Ch. 36.93 R.C.W.	1967	Required for counties over 210,000 population optional in other counties	11 for counties over 500,000 and 5 for all others	County funded	Varies by county	Annexation Incorporation Dissolution of cities and towns Consolidation of cities and towns Creation, consolidation, or abolition of special districts Extraterritorial extension of sewer or water service by a city or special district	Appeal to courts

*Table 7*  
**Characteristics of Boundary Review Commissions**

State	Agency Title	Statutory Citation	Date Established	State or Local Organization	Membership	Funding	Staff	Type of Boundary Changes Considered	Additional Review or Approval
Alaska	Local Boundary Commission	A.S. 44.47.565-44.47.590	1959	One statewide board	5 appointed by Governor	State funded \$266,000	4	Annexation Detachment Dissolution Incorporation Merger or Consolidation	Referendum or legislative review in some instances Appeal to courts
California	Local Agency Formation Commissions	C.G.S. Sections 56000-57550	1963	One for each of 58 counties (except San Francisco)	Varies	Counties legally required to pay expenses	Most are staffed by county employees.	Annexation Incorporation Detachments from cities Creation, reorganization, formation and abolition of special districts and county service areas Determines spheres of influence	Referendum, local government Appeal to courts if discrimination or abuse of power alleged
Iowa	City Development Board	Ch. 368	1972 (compliance mandatory in 1975) 1968 (incorporation and consolidation)	One statewide board	Total of 5 3 by Governor plus 2 local representatives	State funded \$45,000	1	Annexation Incorporation Dissolution Consolidation Detachment	Referendum within 90 days Appeal to the courts

*Table 7 (cont.)*  
**Characteristics of Boundary Review Commissions**

State	Agency Title	Statutory Citation	Date Established	State or Local Organization	Membership	Funding	Staff	Type of Boundary Changes Considered	Additional Review or Approval
Michigan	State Boundary Commission	Public Act No. 191 (1968) as amended	1972 (Annexation)	One statewide board	3 statewide by Governor 2 by Probate Judge in County	State funded over \$220,000	3	Annexation Incorporation Consolidation	Appeal to courts Referendum if area to be annexed has 101 or more persons
Minnesota	Minnesota Municipal Board	M.S.A. Ch. 414 (1988)	1959	One statewide board	3 appointed by Governor	State funded \$247,000	4	Annexation Incorporation Detachment from cities Consolidation of municipalities and towns Concurrent detachment and annexation	Appeal to courts. Referenda in some circumstances
Missouri	St. Louis County Boundary Commission	RSMo. 72.403 Ch. 72	1989	One county—St. Louis County	10 nominated by mayors and county council and selected by county executive	County council appropriates funds	Staffed by county employees	Annexation Incorporation Consolidation Transfer of governing jurisdiction	Referendum
Nevada	City Annexation Commission	N.R.S. 268.610-268.670	1967	Counties with population 100,000 or more and less than 250,000	Varies	Operating expenses from county	0 (Inactive)	Annexation	Appeal to courts

4-10

Table A-3  
Number of Special Districts in the United States, by State, 1957-1987

State	1957	1962	1967	1972	1977	1982	1987
Alabama	119	202	251	286	336	390	421
Alaska	—	—	—	—	—	6	14
Arizona	50	52	76	90	106	130	253
Arkansas	254	299	352	366	424	505	505
California	1,650	1,962	2,168	2,223	2,227	2,506	2,734
Colorado	421	566	748	812	950	1,030	1,085
Connecticut	187	204	221	231	236	281	281
Delaware	64	63	65	78	127	139	202
District of Columbia	1	1	1	2	1	1	1
Florida	227	264	310	315	361	417	414
Georgia	255	301	338	366	387	390	410
Hawaii	—	16	15	15	15	14	14
Idaho	431	469	513	543	612	659	705
Illinois	1,800	2,126	2,313	2,407	2,745	2,602	2,783
Indiana	313	560	619	832	885	897	836
Iowa	199	263	280	305	334	361	372
Kansas	808	880	1,037	1,136	1,219	1,370	1,387
Kentucky	157	179	273	446	478	517	569
Louisiana	217	241	334	419	30	39	24
Maine	107	125	127	126	178	195	203
Maryland	155	176	187	229	252	264	223
Massachusetts	205	194	247	268	328	354	391
Michigan	102	99	110	139	168	184	250
Minnesota	92	115	148	211	263	356	374
Mississippi	248	266	272	282	304	315	307
Missouri	827	742	734	820	1,007	1,195	1,217
Montana	174	192	209	258	311	450	514
Nebraska	610	752	952	1,081	1,192	1,157	1,119
Nevada	58	85	95	134	132	134	146
New Hampshire	80	85	89	94	103	113	120
New Jersey	140	295	311	341	380	454	486
New Mexico	112	102	97	99	100	101	112
New York	924	970	965	954	964	923	978
North Carolina	111	126	215	248	302	321	321
North Dakota	168	246	431	561	587	692	703
Ohio	160	177	228	275	312	377	410
Oklahoma	105	124	214	402	406	916	498
Oregon	550	727	800	826	797	825	876
Pennsylvania	34	1,398	1,624	1,777	2,035	2,050	1,805
Rhode Island	51	56	67	73	78	80	83
South Carolina	112	142	148	182	182	242	300
South Dakota	69	80	106	136	148	199	212
Tennessee	195	268	386	457	471	469	462
Texas	645	733	1,001	1,215	1,425	1,681	1,892
Utah	118	142	163	176	207	211	236
Vermont	72	72	72	74	67	83	95
Virginia	40	46	48	58	65	83	106
Washington	745	867	937	1,021	1,060	1,130	1,177
West Virginia	32	55	120	172	258	292	290
Wisconsin	78	68	62	121	190	263	366
Wyoming	133	144	185	203	217	225	250

Source: U.S. Department of Commerce, Bureau of the Census, *Government Organization, Census of Governments*, Vol. 1 (Washington, DC, every 5 years).

Table A-4  
Number of Townships in the United States, by State, 1957-1987

State	1957	1962	1967	1972	1977	1982	1987
Connecticut	152	152	149	149	149	149	149
Illinois	1,433	1,433	1,432	1,432	1,436	1,434	1,434
Indiana	1,009	1,009	1,009	1,008	1,008	1,008	1,008
Kansas	1,550	1,546	1,543	1,517	1,449	1,367	1,360
Maine	471	470	469	472	475	475	471
Massachusetts	312	312	312	312	312	312	312
Michigan	1,262	1,259	1,253	1,248	1,245	1,245	1,242
Minnesota	1,828	1,822	1,817	1,798	1,792	1,795	1,798
Missouri	328	329	343	343	326	325	325
Nebraska	478	478	486	476	471	470	454
New Hampshire	222	221	222	224	221	221	221
New Jersey <sup>1</sup>	233	233	232	232	232	245	247
New York	932	932	931	931	930	928	929
North Dakota	1,392	1,387	1,378	1,368	1,360	1,360	1,355
Ohio	1,335	1,328	1,324	1,320	1,319	1,318	1,318
Pennsylvania <sup>2</sup>	1,564	1,555	1,554	1,552	1,549	1,549	1,548
Rhode Island	32	31	31	31	31	31	31
South Carolina	2	—	—	—	—	—	—
South Dakota	1,080	1,072	1,050	1,034	1,010	996	984
Vermont	238	238	238	237	237	237	237
Washington	69	66	63	39	—	—	—
Wisconsin	1,276	1,271	1,269	1,268	1,270	1,269	1,268

<sup>1</sup> Because New Jersey state law does not distinguish between townships and incorporated municipalities, some argue that the number of townships in New Jersey should be 0. See Table A-2.

<sup>2</sup> The Bureau of the Census treats townships in New Jersey and Pennsylvania as "townships" because they have no relation to concentrations of population.

Source: U.S. Department of Commerce, Bureau of the Census, *Government Organization, Census of Governments*, Vol. 1 (Washington, DC, every 5 years).



## Department of Health and Environment

Robert C. Harder, Secretary

Reply to:

Testimony Presented to  
House Local Government Committee  
by

The Kansas Department of Health and Environment

August 20, 1993

### Hazardous Materials Training

The Department of Health and Environment (KDHE), is pleased to provide testimony pertinent to its role regarding Hazardous Material Training and its relationship to the Superfund Amendments and Reauthorization Act.

The agency's Division of Environment consists of various bureaus and programs which participate, in varying degrees, to chemical/hazardous materials response.

Kansas Department of Health and Environment (KDHE) District Offices are often the initial receiver of problems arising from hazardous materials spills or accidental releases due to their proximity to the occurrence. District staff that respond to these calls for assistance undergo a minimum 40 hour training course as outlined in OHSA's CFR 29.1910.120. Environmental Remediation Bureau staff and others within the agency also are required to have this minimal response training if they respond to incidents. KDHE's primary response to these incidents, however, is monitoring the clean-up of incidental sites. KDHE for the most part is not a first responder and usually does not respond to routine spills of hazardous materials. Kansas Article 28 requires all spills of a potentially polluting material be reported to KDHE's Bureau of Environmental Remediation. Notification of spill reporting information is shared between KDHE and DEP regardless of which agency receives the initial contact.

KDHE's Radiation Control Program is responsible for operational response to all accidents/incidents in Kansas which involve radioactive material or radiation. This includes accident assessment, radiation monitoring, public protective action recommendations, and regulatory control of radioactive materials and



activities licensed by KDHE. These responsibilities are mandated by statute (K.S.A. 48-1601 et. seq.) and by the State Emergency Operations Plan.

Radiation Control Program and other designated KDHE staff must be provided with adequate training to enable them to perform their emergency responsibilities effectively and safely. Designated KDHE staff receive training for responding to an accident at Wolf Creek Generating Station, and in addition, all Radiation Control staff receive training for responding to all radiation emergencies. Radiation control staff also receive basic training for responding to accidents which may involve other hazardous materials in addition to radioactive materials. Training consists of a 10 day Radiological Emergency Response Operations course sponsored by the U.S. Department of Energy and Federal Emergency Management Agency. All subsequent training is provided in-house by Radiation Control staff, or by staff at the Wolf Creek Generating Station.

Training provided for responding to an incident at the Wolf Creek Generating Station must be approved by Federal Emergency Management Agency.

KDHE's Environmental Remediation Program responds to spillage incidents, provides oversight to onscene spillage containment, provides for necessary environmental and health monitoring including neutralization, when possible, and clean-up and disposal of spill material. These responsibilities are mandated by statute under Federal Superfund Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 USCA 9601 et. seq.; K.S.A. 65-171 et. seq. and K.S.A. 65-3453 and 3455.

Training requirements for Environmental Remediation staff include a 40 hour safety training course and annual 8 hour refresher course. These training courses are sponsored by the Environmental Protection Agency National Spill Training School and the Hazardous Materials Transportation Emergency Training. Additional training is obtained from the National Fire Protection Association, EPA contractors and Kansas universities.

Instructors for required courses are selected by EPA and may contract for university instructors meeting teaching qualifications. However, the majority of KDHE's training is provided by EPA under cooperative agreements.

Due to the broad acceptability of the 40 hour safety training course among agencies and states, this is probably the most popular and used training course.

KDHE's Right-to-Know Program is responsible for the administration and information management of hazardous chemicals notification from facilities regulated under the Federal Superfund Amendments and Reauthorization Act (SARA) Title III Emergency Planning and Community Right-to-Know Act (EPCRA); P.L. 99-499 and Kansas K.S.A. 65-5701 et.seq.. Chemical information derived from these reports is made available for emergency planning needs at county and community levels. Chemical hazard information is also made available to the health community, first responders, general public, and the regulated community.

Right-to-Know Program staff do not respond to incidents and training is not required.

On October 17, 1986 the "Superfund Amendments and Reauthorization Act of 1986" (SARA) was enacted into law. One part of the new SARA provisions is Title III: the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) Public Law 99-499. Title III establishes requirements for federal, state, and local governments and industry regarding emergency planning and "community right-to-know" reporting on hazardous and toxic chemicals. This legislation builds upon EPA's Chemical Emergency Preparedness Program (CEPP) and numerous state and local programs aimed at helping communities to better meet their responsibilities in regard to potential chemical emergencies. The community right-to-know provisions of Title III will help to increase the public's knowledge and access to information on the presence of hazardous chemicals in their communities and releases of these chemicals into the environment.

Kansas has enacted its own EPCRA law (K.S.A. 65-5701 et.seq.) and regulations (K.A.R. 28-65-1 et.seq.) which in addition to adopting the federal legislation, assigns responsibility for EPCRA implementation to the Adjutant General's Division of Emergency Preparedness (DEP) and the Kansas Department of Health and Environment's Right-to-Know Program (KDHE/RTK). Title III of SARA requires that facilities subject to its provisions report specified hazardous chemicals stored on site or released into the environment. The purpose of this reporting is 1) to improve a community's ability to respond to chemical emergencies; and 2) to inform

the public about hazardous chemicals in their communities.

The Community Right-to-Know Program is housed within KDHE's Division of Environment, Bureau of Air and Radiation, and provides support for the oversight and administrative activities of the State Emergency Response Commission (SERC).

K.S.A. 1990 Supp. 65-5703, as amended by L. 1991, ch. 202, paragraph 1, creates the State Emergency Response Commission comprised of specified state officials or their designee (the Lt. Governor, the Secretary of Wildlife and Parks, the Secretary of Human Resources, the Secretary of State Board of Agriculture, the Secretary of Health and Environment, the Adjutant General, the Superintendent of the Kansas Highway Patrol, the Fire Marshal, the Secretary of Transportation, the Attorney General, the Chairperson of the State Corporation Commission, and the Governor), three public members, and two members to represent owners and operators of facilities regulated by the act.

The purposes of the commission are to carry out all requirements of the federal act, i.e., the federal Emergency Planning and Community Right-to-Know Act of 1986, which has two primary components: emergency planning and notification, and chemical reporting; and, to provide assistance in the coordination of state agency activities relating to: chemical emergency training, preparedness, and response, and chemical release reporting and prevention, transportation, manufacture, storage, handling, and use.

To carry out these purposes the SERC is required to perform such duties as are specified in the federal act, as specified in Kansas law, and as are deemed necessary and appropriate by the commission in achieving its purpose. The Commission is to establish local planning districts and appoint local planning committees. The Local Emergency Planning Committees (LEPCs) shall perform such duties as specified in the federal act to be performed by such committees, and perform duties as assigned by the SERC as well as duties deemed necessary by the SERC.

K.S.A. 65-5704, as amended by L. 1991, ch. 202, paragraph 2, assigns to the secretary of health and environment specific responsibilities and furtherance of the purposes of the SERC:

1. Provide support for oversight and administrative activities of the commission.
2. Receive, process and manage hazardous chemical information required to be submitted and notifications required to be given pursuant to the federal act.
3. Authority to establish a list of Kansas reportable chemicals which shall also be subject to the requirements of sections 311 and 312 of the federal act.
4. Authority to designate planning quantities and reportable quantities for any chemical designated for listing as reportable in Kansas.
5. Adopt such rules and regulations as necessary to implement the provisions of the federal act and the secretary's duties under this section.

K.S.A. 65-5705 assigns specific responsibilities to the adjutant general in furtherance of the purposes of the SERC: He has the responsibility for emergency planning activities under the federal act, including adoption of such rules and regulations necessary to implement provisions of the federal act relating to emergency planning.

The Right-to-Know Program provides chemical storage information to DEP which then uses this data for emergency planning purposes at the local level.

#### Title III Data Use

The Right-to-Know Program maintains a state wide integrated Title III data base, available to provide information and analysis. This system carries data received from facilities which use, manufacture, or emit toxic and hazardous chemicals that are reported to the state under the provisions of the federal and state Emergency Planning and Community Right-to-Know Act.

The state system includes data collection, quality assurances and entry by the state, and down load of facility and chemical information to county Local Emergency Planning Committees (LEPCs) and other local users using the CAMEO system. The state also provides local maps, facility plans, and Response Information Data Sheets (RIDS) or chemical profiles, in support of the local CAMEO system applications.

The state has been called upon to provide data and analysis for many purposes. An annual summary and analysis of all Title III data is published by the department.

JIF3/AGENCTEST.893

# EMERGENCY PLANNING COMMUNITY RIGHT-TO-KNOW ACT (EPCRA) SARA TITLE III

## BACKGROUND

October 17, 1986: Congress enacted Public Law 99-499 (EPCRA)  
May 1987: Kansas adopted Federal Law  
December 1987: Kansas Regulations established  
April 1991: Kansas amended Kansas Law to deviate slightly from Federal Act

## PURPOSE

Provide local governments and the public with information concerning hazardous chemicals.

Encourage and support emergency planning efforts at the state and local level.

## GENERAL CONTENT

18 Sections to the Law including 4 major reporting parts.

### Major Reporting Sections

- \* Emergency Planning (Sections 301, 302, 303)
- \* Emergency Notification (Section 304)
- \* Community Right-to-Know (Sections 311, 312)
- \* Toxic Chemical Release Reporting (Section 313)
- \* Other Sections


## AGENCIES ENFORCING EPCRA IN KANSAS

### Division of Emergency Preparedness

- \* Adjutant General
- \* Sections 301, 303, and 304

### Department of Health and Environment

- \* Right-to-Know Program
- \* Sections 302, 311, 312, and 313

House Local Gov't Interim  
8-20-93  
Attachment 

## GLOSSARY OF ACRONYMS AND USEFUL DEFINITIONS

### ACRONYMS

CAS:	Chemical Abstract Service
DEP:	Division of Emergency Preparedness
EHS:	Extremely Hazardous Substance
LEPC:	Local Emergency Planning Committee
MSDS:	Material Safety Data Sheet
RQ:	Reportable Quantity
SERC:	State Emergency Response Commission
SIC Code:	Standard Industrial Classification Code
TPQ:	Threshold Planning Quantity

### DEFINITION OF TERMS

**AGRICULTURAL USE:** The growing of crops or cover or the raising of livestock. It is a broad expression encompassing a wide range of growing operations, not just farms, and includes nurseries and other horticultural operations.

**CERCLA:** Comprehensive Environmental Response, Compensation, and Liability Act provides authority for federal cleanup of uncontrolled hazardous waste sites and response to release of hazardous substances.

**EXTREMELY HAZARDOUS SUBSTANCES:** Chemical substances subject to the emergency planning provisions of Title III, the Emergency Planning and Community Right-to-Know Act.

**FACILITY:** All buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person.

**HAZARDOUS CHEMICAL SUBSTANCES:** Hazardous chemical substances comprise the group of substances subject to Sections 311 and 312 reporting as defined under OSHA 29 CFR Pt. 1910 and its implementing regulations, but with additional exclusions under Section 311(e) of Title III.

**RELEASE:** Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment of any chemical.

**REPORTABLE QUANTITY:** A standard against which a facility compares an accidental chemical release or spill of an extremely hazardous substance or CERCLA substance which may subject the facility to emergency release notification.



## CLASSES OF CHEMICALS

### Extremely Hazardous Substances (EHS)

- \* list of 366

### Hazardous Chemicals

- \* not on a specific list

### CERCLA Chemicals: Comprehensive Environmental Response, Compensation, and Liability Act of 1988

- \* list of 702+ hazardous chemicals and waste

### SAMPLE LIST OF EHS AND/OR CERCLA CHEMICALS

<u>CAS #</u>	<u>TRADE NAME</u>	<u>CHEMICAL NAME</u>	<u>RQ</u>	<u>TPO</u>	<u>EHS</u>	<u>CERCLA</u>
7664-41-7	Ammonia	Ammonia	100	500	X	X
309-00-2	Aldrex	Aldrin	1	500/10,000	X	X
13071-79-9	Counter	Terbofos	1	100	X	
944-22-9	Dyfonate	Fonofos	1	500	X	
20859-73-8	Fumitoxin	Aluminum Phosphide	100	500	X	X
1563-66-2	Furodan	Carbofuran	10	10/10,000	X	X
732-11-6	Imidan	Phosmet	1	10/10,000	X	
56-38-2		Parathion	10	100	X	X
298-02-2	Thimet	Phorate	10	10	X	X
121-75-5	Malathion	Malathion	100			X
1910-42-5	Cyclon	Paraquat	1	10/10,000	X	
93-76-5		2,4,5-T	1000			X
1918-00-9	Banvel	Dicamba	1000			X

### SAMPLE OF HAZARDOUS CHEMICALS

<u>TRADE NAME</u>	<u>CHEMICAL NAME</u>	<u>TPO</u>
Aatrex	Atrazine	10,000
Ambush	Permethrin	10,000
Bronco	Alachlor + Glyphosate	10,000
Dual	Metolachlor	10,000
Prowl	Pendimethalin	10,000
Tordon	Picloram	10,000

## EMERGENCY PLANNING

### SECTION 301

- \* Establish State Emergency Response Commission (SERC)
- \* Establish Emergency Planning
- \* Establish Local Emergency Planning Committees (LEPC)

### SECTION 303

- \* Comprehensive Emergency Response Planning
- \* Each LEPC prepares a plan and annual review of plan

### SECTION 305

- \* Emergency Training and Review of Emergency Systems
  - Federal Programs
  - State Programs

### SECTION 304

- \* Emergency Notifications
  - Applies to any facility
    1. at which hazardous chemicals are produced, stored, or used.
    2. at which there is a release of RQ (within a 24 hour period) of any EHS or CERCLA hazardous substance or waste.
  - Does not apply to
    1. a release which results in exposure to persons solely within the boundaries of the facility.
    2. pesticide products exempt from CERCLA Section 103(a) reporting under Section 103(a).
      - meaning the normal application of registered pesticides under FIFRA is exempt. However accidents, spills, improper application, and improper disposal are not exempt.
    3. other releases as defined by the Act.

- \* Notification under Section 304

-Who

-Where

-What

-Exemptions

## SECTION 302

### \* EHS Notification

#### \* Facilities meet 2 criteria

- they have EHS chemicals on site
- they exceed the TPQ at any one time

#### \* Must report within 60 days

#### \* Only exceptions to reporting are transportation facilities and shipping vessels

## SECTION 311

### \* Material Safety Data Reporting

#### \* Report EHS and Hazardous Chemicals that exceed the TPQ

#### \* Must report within 90 days

#### \* State reporting differs from federal - Kansas list only

#### \* Exemptions

## SECTION 312

### \* Emergency and Hazardous Chemical Inventory

#### \* Annual report

#### \* Based on quantity stored for previous year

#### \* More detailed than 302 and 311

#### \* Uses

## EMERGENCY NOTIFICATION (SPILLS/ACCIDENTAL RELEASES)

Facilities must immediately notify the LEPC and the SERC if there is a release of a listed hazardous substance that exceeds the reportable quantity for that substance. Substances subject to this requirement are substances on the list of 302 extremely hazardous substances as published in the Federal Register and substances subject to the emergency notification requirements under CERCLA Section 103(a).

The initial notification can be by telephone, radio, or in person. The Division of Emergency Preparedness provides a 24-hour spill reporting number for initial notification. A summary of reporting procedures for spills and accidental releases follows:

### SECTION 304 REPORTING (Emergency Release)

- I. Applies to any facility
  - A. at which a hazardous chemical is produced, used, or stored and
  - B. at which there is release of a reportable quantity (within a 24 hour period) of any EHS or CERCLA (Comprehensive Environmental Response Compensation and Liability Act) hazardous substance or hazardous waste listed under CERCLA.
- II. Does not apply to
  - A. release which results in exposure to persons solely within the boundaries of the facility (Note: Kansas article 28 requires that all spills of a potentially polluting material be reported to Kansas Department of Health and Environment, Bureau of Environmental Remediation at 913/296-1662).
  - B. any release which is a "federally permitted release" CERCLA Section 101 (10).

House Local Gov't Interim  
8-20-93  
Attachment 7

- C. any "continuous" release except for statistically significant increases CERCLA Section 103 (f) and Section 103 (e).
- D. normal application of registered pesticides under FIFRA are exempt from CERCLA Section 103 (a) reporting under Section 103 (e). Accidents, spills, improper application, and improper disposal of pesticides are not exempt.
- E. releases not meeting definition of release - Section 101 (22).
- F. radionuclide releases which occur:
  - 1. naturally in soil.
  - 2. naturally from disturbance of land for purposes other than mining.
  - 3. from dumping coal and coal ash at utility & industrial facilities with coal fired boiler.
  - 4. from coal piles at #3 above.

## Notification

- I. For Title III reporting owner or operator shall immediately notify the coordinator of the LEPC <sup>1</sup> and the SERC <sup>2</sup> - DEP <sup>3</sup> at 913/296-3176 (24 hr) or 913/266-1000. For CERCLA reporting, you must also notify NRC (National Response Center) at 1/800/424-8802.
- II. Notice shall include
  - A. chemical name or identify.
  - B. whether substance is an EHS.
  - C. estimate of quantity released.
  - D. time and duration of release.
  - E. medium or media into which the release occurred.
  - F. known or anticipated acute or chronic health risks associated and advice regarding medical attention necessary for exposed individuals.
  - G. proper precautions to take as a result of the release.
  - H. names and phone number of person(s) for further information.

---

<sup>1</sup> Local Emergency Planning Committee

<sup>2</sup> State Emergency Response Commission

<sup>3</sup> Division of Emergency Preparedness

### III. Follow-up written shall

- A. be done as soon as practical.
- B. set forth updates to the verbal information.
- C. include additional information concerning:
  - 1. actions taken to contain release
  - 2. known or anticipated acute or chronic health risks associated with the release.
  - 3. advice regarding medical attention necessary for exposed individuals (where appropriate).

### Exceptions to the Notification Requirements

In lieu of the written notice specified above, if the release is a CERCLA hazardous substance, not an EHS, and has a statutory RQ <sup>4</sup> then the notice required under CERCLA Section 103(a) to the LEPC can be used.

Transportation-related releases (means a release during transportation, or a storage incident to transportation if the stored substance is moving under active shipping papers and has not reached the ultimate consignee) can meet the requirements of 304 reporting by calling the 911 operator or, if no 911 service is available, by calling the operator and giving the information indicated above.

### Penalties

Civil	\$25,000/day for first violation and \$75,000/day for subsequent violations
Criminal	up to \$25,000 fine or imprisonment for not more than 2 years or both for first violation and \$50,000 fine or 5 years or both for second or subsequent violations

### CONTINUOUS RELEASES (40 CFR 302.8)

Continuous releases are not required to be reported under Section 304; there are, however, other reporting requirements for continuous releases. Facilities must qualify releases as continuous and stable by submitting initial telephone and initial written notifications to the SERC-DEP, LEPC, and NRC.

---

<sup>4</sup> Reporting Quantity

Continuous is defined as a release that occurs without interruption or abatement or that is routine, anticipated, and intermittent during normal operations or treatment processes. The reporting requirements are as follows:

### **Initial Telephone Notification**

- I. Person in charge must
  - A. identify the release to the NRC, SERC, and LEPC as continuous above the RQ.
  - B. provide name and location of the facility or vessels.
  - C. provide name(s) and identity(s) of the hazardous substance(s) being released.

### **Initial Written Notification (within 30 days)**

- I. Must be made to the
  - A. appropriate EPA Regional Office.
  - B. State Emergency Response Commission (SERC).
  - C. Local Emergency Planning Committee (LEPC).
- II. Must include
  - A. the name of the vessel or facility, location (including longitude and latitude), the case number assigned by NRC or EPA; port of registration of the vessel, the name and telephone number of the person in charge of the facility or vessel.
  - B. the population density within a one mile radius of the facility or vessel.
  - C. the identity and location of sensitive populations and ecosystems within a one mile radius of the facility or vessel.
  - D. the name/identity of the hazardous substance.
  - E. the upper and lower bounds of the normal range of the release over the previous year.
  - F. source of the release.
  - G. frequency of the release.

- H. statement describing the basis for stating the release is continuous and stable.
  - I. an estimate of the total annual release in the previous year.
  - J. the environmental medium/media affected by the release.
  - K. a signed statement that the release is continuous by definition and reporting information is accurate.
- III. Follow-up notification within 30 days of the first anniversary date of the initial written notification
- A. must include the same information as the initial written notification.
- IV. Notification of changes in the release.

#### **Exception**

In lieu of the initial written report or the follow-up report, a Section 313 may be submitted with the following additional information.

- 1. Population density within a 1 mile radius.
- 2. Sensitive populations and ecosystems within a 1 mile radius.
- 3. For each hazardous substance
  - a. Upper and lower bounds of normal range.
  - b. Frequency of release.
  - c. Statement describing basis for continuous release.
  - d. Signed statement.

WP51HD/EMERREL2



## LOCAL EMERGENCY PLANNING COMMITTEES

The emergency planning sections are designed to develop state and local governments emergency response and preparedness capabilities through better coordination and planning, especially within the local community.

Title III requires that the governor of each state designate a State Emergency Response Commission. The state commission must designate local emergency planning districts and appoint Local Emergency Planning Committees. The state commission is responsible for supervising and coordinating the activities of the local emergency planning committees, for establishing procedures for receiving and processing public requests for information collected under other sections of Title III, and for reviewing local emergency plans.

This local emergency planning committee must include elected state and local officials, police, fire, civil defense, public health professionals, environmental, hospital, and transportation officials as well as representatives of facilities subject to the emergency planning requirements, community groups, and the media. Facilities subject to the emergency planning requirements must designate a representative to participate in the planning process. The local committee must establish rules, give public notice of its activities, and establish procedures for handling public requests for information.

House Local Gov't Interim  
6-20-93  
Attachment 28

The local committee's primary responsibility is to develop an emergency response plan. The local committee will evaluate available resources for preparing for and responding to a potential chemical accident. The plan must include:

- \* Identification of facilities and extremely hazardous substances transportation routes
- \* Emergency response procedures, on-site and off-site
- \* Designation of a community coordinator and facility coordinator(s) to implement the plan
- \* Emergency notification procedures
- \* Methods for determining the occurrence of a release and the probable affected area and population
- \* Description of community and industry emergency equipment and facilities and the identity of persons responsible for them
- \* Evacuation plans
- \* Description and schedules of a training program for emergency response personnel
- \* Methods and schedules for exercising emergency response plans.

The emergency response plan must be reviewed by the state commission as well as annually by the local committee. The Regional Response Teams, composed of the federal regional officials and state representatives, may review the plans and provide assistance to the local committees upon request.

Those planning activities of the local committees and facilities should be focused on, but not limited to, the 302 extremely hazardous substances published in the Federal Register.

WP51HD/LEPC

## RIGHT-TO-KNOW PROGRAM DATA USE

1. Aid to Emergency Planners and Emergency responders through information and data transfer. Support of CAMEO in 53 counties (Figure 2.) with some counties having multiple units. (e.g. fixed and mobil).
2. Provide toxic emission data to state environmental regulation agencies where used to cross check permit data, and identify facilities for inspection follow-up.
3. Targeting facilities for Pollution Prevention follow-up including National 33/50 program.
4. Provide information to organized citizens groups (e.g. Sierra Club, Plains Keeper, etc.) on specific facilities.
5. Provide information to medical community, public and emergency responders regarding chemical hazard including health, toxicity, etc.
6. Provide information to lending institutions and realtors prior to property transfers.
7. Assist in locating facilities with cancelled pesticide (i.e. Dinoseb) for EPA.

House Local Gov't Interim  
8-20-93  
Attachment 9

8. Provide information on location of facilities storing hazardous chemicals as part of criteria for designation of proposed interstate highway routing (e.g. B and V Engineering for KDOT).
9. Provide information to USEPA contractor (ICF Inc) regarding non-manufacturing facilities reporting Section 313 toxic release emission chemicals in storage, to support expansion of Section 313 reportable facilities by SIC code.
10. Provide U.S. Internal Revenue Service information on facilities storing chlorofluorocarbons, ozone depleting chemicals, for purpose of imposing excise tax under Montreal accord.
11. Provide U.S. Dept of Energy information on facilities by specific oxygenate.
12. Provide information and analysis to citizen group (Working Group on Community Right-to-Know) regarding TRI chemicals present at non-manufacturing facilities.
13. Many individuals (without identified affiliation make requests for data base queries, such as:
  - a) list of Brine producing facilities
  - b) list of facilities that store carbon dioxide

- c) list of pesticide users that are aerial applications
- d) list of facilities that store hazardous chemicals by SIC code
- e) lists of facilities that use specific chemical, or classes of chemicals
- f) lists of facilities and associated chemicals by location (town, county, etc.)

14. Many local government agencies have expressed interest in using Title III data to support local zoning and development decisions.

15. Some local government agencies have begun to use the CAMEO system to track other data beyond Title III (i.e., location of sewer systems, septic tanks, private wells, fire hydrants, etc.).

KFB4/TITLEIII

## GENERAL RESPONSIBILITIES OF THE SERC UNDER TITLE III

### Responsibilities of State Emergency Response Commissions (SERC's)

#### I. SARA Title III mandates that SERC's do the following:

##### A. With respect to Local Emergency Planning Committees (LEPC's)

1. Appoint LEPC's (Section 301(a))
2. Supervise and coordinate the activities of the LEPC's (Section 301(a))
3. Revise appointments to LEPC's as deemed appropriate (Section 301(d))
4. Respond to petitions from interested persons for modification of LEPC membership (Section 301(d))
5. Review the LEPC's hazardous materials emergency response plans (Section 303(3)(e))
6. Make recommendations to the LEPC's on plan revisions which may be necessary to ensure coordination with emergency response plans of other emergency planning districts (Section 303(e))

##### B. With respect to Emergency Planning Districts

Designate emergency planning districts to facilitate preparation and implementation of emergency plans (Section 301(a))

##### C. With respect to Public Access Information

1. Designate an official to serve as information coordinator (Section 301(a))
2. Establish procedures for receiving and processing information requests from the public under Section 324 for (Section 301(a))
  - a. emergency response plans
  - b. material safety data sheets (MSDS's)
  - c. Section 311 lists of facility chemicals
  - d. Section 312 Tier I forms (not in Kansas)
  - e. Section 313 Toxic Release Inventory Form R's
  - f. Section 304 written Emergency Release Follow-up Forms
  - g. Section 312 Tier II Forms which are
    1. in possession of SERC (Section 312 (e)(3)(B))
    2. not in possession of SERC and must be requested from facility because request is for chemical present in excess of 10,000 pounds (Section 312(e)(3)(B))

House Local Group Interim

8-20-93

Attachment 10

3. not in possession of SERC and may (in SERC discretion) be requested from facility for chemical present in less than 10,000 pounds (Section 312(e)(3)(C))

NOTE: Tier II forms must be provided to public requestor within 45 days of receipt of request (Section 312(e)(3)(D))

3. Information on adverse health effects

- a. Identify the adverse health effects associated with hazardous chemicals or extremely hazardous substances where the identity of the chemical or substance is claimed as a trade secret (Section 322(h)(1))
  - b. Provide information on adverse health effects to any person requesting information about such hazardous chemicals or substances (Section 322(h)(1))
4. On request from a facility owner or operator, withhold Section 312 Tier II chemical location information from public access (Section 324(a))
  5. Provide requesting state or local officials Tier II information from facilities, requesting the information from the facility, if necessary (Section 312(e)(2))

D. With respect to Environmental Protection Agency

Notify the Administrator of the Environmental Protection Agency (hereafter, EPA) of facilities which have notified the SERC that they are subject to Section 302 (Section 302(d))

E. With respect to facilities

1. Receive notices from facilities that they are subject to Section 302 (Section 302(c))
2. Receive emergency release notifications and follow-up notices from facilities under Section 304 (Section 304(b)(1))
3. Receive lists of hazardous chemicals from facilities (Section 311(a)(1)(B))
4. Receive Tier I reports from facilities (Section 312(a)(1)(B)) - not in Kansas
5. Receive Tier II reports from facilities (Section 312(a)(2))

F. With respect to other state and local officials

1. Upon request, provide Tier II forms in LEPC possession (Section 312(e)(2))

2. Upon request from state and local officials for Tier II form not in LEPC possession, obtain it from facility and provide it to official (Section 312(e)(2))

II. SARA Title III gives SERC's the discretion to do the following:

A. With respect to emergency planning districts

1. Join with other SERC's to establish planning districts covering more than one state (Section 301(b))
2. Designate the covered facilities within such multi-state districts (Section 301(b))

B. With respect to facilities

1. Designate additional facilities to be subject to the requirements of the emergency planning subtitle after public notice and opportunity for comment (Section 302(b)(2))
2. Notify additional facilities designated under Section 302(b)(2) of their designation
3. Request that facilities provide a Tier II form for a chemical present in a quantity less than 10,000 pounds (Section 312(e)(3)(C))
4. Recommend to the Governor of the State that the EPA Administrator designate additional facilities to be covered by the reporting requirements of Section 313 (Section 313(b)(2))
5. Commence a civil legal suit against an owner or operator of a facility under Section 326(a)(2)(A) for:
  - a. Failure to provide information to an LEPC requested under Section 303(d)(3)
  - b. Failure to provide a Tier II form requested under Section 312(e)(1)

C. With respect to LEPC's

1. Revise LEPC membership appointments (Section 301(d))

D. With respect to the EPA

1. Notify the EPA Administrator of the designation of additional facilities under Section 302(b)(2) (Section 302(d)(2))



E. With respect to the State's Governor

1. Recommend to the Governor that the EPA Administrator be asked to designate additional facilities under Section 313(b)(2)
2. Recommend to the Governor that the EPA Administrator be asked to disclose the specific chemical identity of a hazardous chemical, an extremely hazardous substance, or a toxic chemical claimed as a trade secret under the provisions of Section 322 (Section 322(d)(1))
3. Recommend to the Governor that information provided to EPA under the trade secret provisions of Section 322(g) be requested
4. Recommend that the Governor ask the EPA Administrator to add to or delete from the Section 313 Toxic Chemical List (Section 313(e)(2))

F. With respect to lawsuits, etc.

1. Refer possible violations of SARA Title III to the EPA Administrator for investigation and appropriate enforcement actions (Section 325)
2. Respond to citizen suits alleging failure by the Commission to respond to a request for Tier II information under Section 312(e)(3) (Section 326(a)(1)(D))
3. Recommend that the State commence civil action against the EPA Administrator for failure to provide trade secret information upon request (Section 326(a)(2)(C))

III. Other laws which may impose mandatory duties on SERC

A. State open meetings law

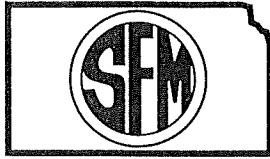
1. May require all SERC and committee meetings to be open to the public
2. May require advance notice of all meetings

B. State public records law

1. May make public SERC records in addition to those specified in SARA Title III (i.e. minutes)
2. May impose certain records retention requirements on SERC

C. State ethics laws

1. May impose restrictions on SERC member votes on issues where there may be a conflict of interest



*"Where Fire Safety Is A Way Of Life"*

Kansas State Fire Marshal Department  
700 Jackson, Suite 600  
Topeka, Kansas 66603-3714  
Phone (913) 296-3401  
FAX (913) 296-0151

Joan Finney  
Governor

Edward C. Redmon  
Fire Marshal

TESTIMONY OF  
EDWARD C. REDMON  
STATE FIRE MARSHAL  
CHAIRPERSON, SERC  
BEFORE  
HOUSE LOCAL GOVERNMENT COMMITTEE  
AUGUST 20, 1993

The State Fire Marshal's Office has no direct role in chemical/hazardous materials emergency response. However, the fire service throughout the state are generally the first responders at a chemical or hazardous materials incident. You will hear from several fire chiefs later in the day. My office serves as the state focal point for the fire service throughout Kansas. We have to try to look out for the fire service and their varied interests ranging from large paid urban departments to all volunteer small rural departments, and every conceivable combination between these extremes among the 720 departments.

My office has long been an advocate of increased training for the fire service. Hazardous and chemical material response is just one small part of the training that should be available to the fire departments.

In looking at training for hazardous and chemical response as it relates to the fire service I would have several concerns. First, one size does not fit all. The type of training that would be appropriate for an Olathe, a Lawrence or a Dodge City may not be workable for a Lakin, an Arcadia or a Haddam.

Second the vast majority of fire fighters in this state are volunteer. They all have other jobs, they have to make a living. The training must be flexible enough to accommodate the reality of this issue in the fire service. That necessarily includes the timing of the training, the amount of training required, and the location of that training. You can't expect these volunteers to close their businesses or take a weeks vacation to travel across the state for training.

Finally, the issue that will make or break a training program for the fire service is cost. We have fire departments that barely have enough money to keep equipment operating, let alone purchase adequate safety gear for their members. Even if training is "mandated" you won't have much success unless the cost is reasonable. The issue that

House Local Gov't Interim  
8-20-93

An Equal Opportunity Employer

Attachment

11

Page 2

has caused the most contention in firefighter training generally is the costs.

Finally, in terms of training we don't believe a single training source should be mandated. However, there should be a single source to coordinate information about requirements and availability of training throughout the state.

As chairperson of SERC, whose responsibility includes supervising and coordinating the activities of the local emergency planning committees and reviewing local emergency plans, training is again vital. No matter how good the planned response is, if the responders aren't adequately trained, the community in which the incident occurred is not going to be adequately protected. Again I would caution that the same concerns I had above should come into consideration for training any responders statewide.

# Oregon Develops Statewide HazMat Response System

By TIM BIRR

All photos Bill Stemen

**N**ovember 1991: Fog hangs like a wet blanket over the flat farmland of Oregon's Willamette Valley on a cold winter morning. Just north of the town of Harrisburg, farmers are nursing their morning coffee when their homes are shaken by a thunderclap-like boom, followed by the fingernails-on-blackboard screech of metal on metal. Two freight trains have collided and volunteers from the Harrisburg Fire Department are soon on the scene. Locomotives rest atop each other like jackstraws in a pool of burning diesel and 20 cars are off the track. Faced with a serious situation and the potential for hazardous materials problems, the Harrisburg firefighters call for help from a unique source: the Oregon Office of State Fire Marshal. Within minutes of their request, career firefighters from Eugene city fire station 20 miles away are boarding a HazMat rig and heading for the scene.

After six years of hard lobbying and collaborative effort, the state of Oregon now has a uniform, statewide response to HazMat incidents. In different regions of the state, 10 local fire department HazMat teams are designated state teams; receiving equipment and training funds in return for agreeing to respond out of district to HazMat incidents within their particular regions.

Coordinated by the Oregon Office of State Fire Marshal, the program

*Tim Birr is a former fire captain/EMT who is public information director for the Eugene (OR) Dept. of Public Safety.*



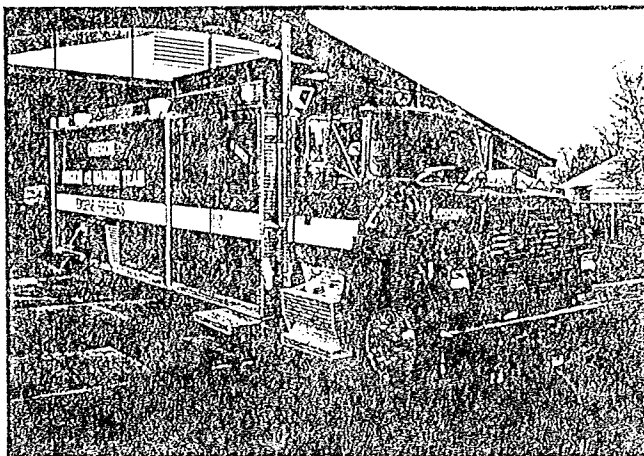
*A deluge set is used to apply foam onto a derailed locomotive.*

House Local Gov't Interim  
8-20-93

Attachment 1312

Firehouse/December 1992

traces its beginnings to the mid 1980s, when response to HazMat incidents became a growing source of concern to the state's fire service. Firefighters found themselves confronted by a double whammy: statistics showed that the number of incidents involving toxic or otherwise dangerous materials was increasing at the same time that new emergency response standards from OSHA were requiring more in terms of training, equipment and medical surveillance for those responding to such incidents. Faced with the high cost of meeting the requirements, a number of Oregon fire departments began debating the policy of not responding to HazMat incidents at all, an option allowed under Oregon state law. While no one denied the need for more stringent regulation to protect responders, the costs were then estimated at over \$200,000 per department by the Oregon Fire Chiefs Association.



HazMat 2 is ready to respond from Station #8 in Eugene, Oregon.

There were other costs, as well. As in the rest of the nation, recruiting the volunteers that make up the majority of Oregon's fire service had become more difficult. Although this was due to a variety of factors, one volunteer chief spoke for many when he said, "It's hard enough to find folks willing to donate their time and get up in the

middle of the night. To ask them to face toxic chemical spills wearing canvas suits designed for firefighting is just too much."

But even as a number of Oregon fire departments debated "no HazMat response" policies, others developed their own HazMat teams. A few departments, mostly career and urban, located on major transportation corridors or in communities with heavy industry, bit the bullet and funded local HazMat response units resulting in a checkerboard pattern of response capabilities throughout the state. Whether from departments

that got on the HazMat bandwagon or chose to sit on the curb and watch the parade go by, a growing number of fire service leaders suggested that the problem was statewide and that a statewide solution was needed.

Then Oregon State Fire Marshal Olin Greene (now U.S.F.A. Administrator) suggested a solution: state funded

# NEW 3rd Edition!



## IFSTA ESSENTIALS of Fire Fighting

- Addresses the NEW (1992) NFPA 1001 Standard
- Easy-to-read format
- Step-by-step instructions
- Over 1,600 photos and illustrations
- Over 600 pages

### STUDY GUIDE for ESSENTIALS of Fire Fighting

\$30.00

\$15.00

Call or write for your copies today!  
 IFSTA Headquarters, FIRE PROTECTION PUBLICATIONS, Box FH1292ESS, Oklahoma State University,  
 Stillwater, OK 74078-0118; 1-800-654-4055

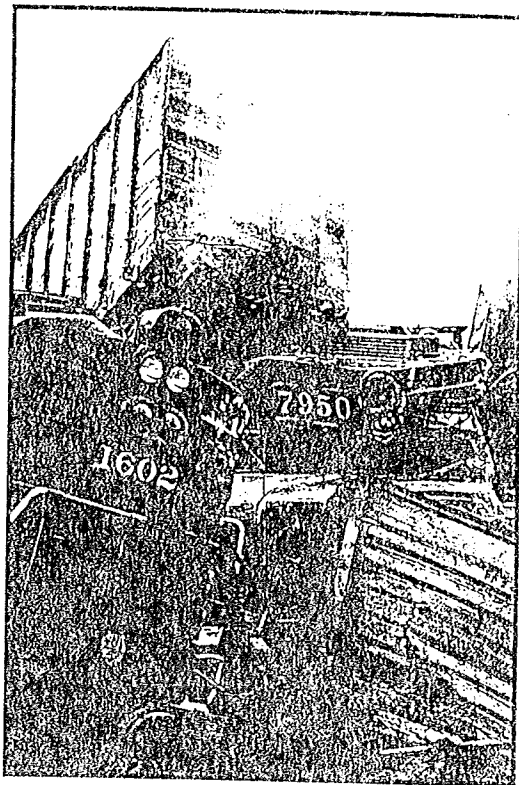
regional teams that would provide a statewide level of coverage. It was further suggested that fees be assessed on businesses that load petroleum products so that industry could be a partner with the state in solving the problem.

The 1989 Oregon Legislature saw before it three bills dealing with various aspects of the HazMat response issue. House Bill 2156 would authorize the state fire marshal to negotiate contracts with local governments to provide regional response services, with the state providing operating authority, liability protection, training and equipment while local agencies provided 24 hour staffing, dispatch capability and equipment maintenance. House Bill 2174 would enable the state fire marshal to manage a revolving operations account and to recover specialized emergency response costs from owners of property involved in incidents. Where appropriate, the bill provided for property owners to recover from third party defendants. The third bill, House Bill 2332, would authorize the Department of Revenue to collect a loading fee from businesses that remove petroleum products from storage. Proceeds would be used to fund a statewide HazMat response system.

An intensive lobbying effort was mounted by the fire service, including a newly formed state association of HazMat responders. The Oregon Fire Chiefs' Association held a series of news conferences and sent out press packets to newsrooms throughout the state and, when the legislative session had ended, Oregon had a plan.

With the legislature's approval of the program, the first step was for the state fire marshal's office to contract with those departments wishing to host regional teams. The contracts were designed to ensure that response procedures and equipment would be in place throughout the state. A bid process was established and the state's fire service was invited to submit proposals. Among the bids submitted were those by departments that already had established HazMat teams.

By early 1991, departments were designated as regional teams, and those departments that had developed and equipped their own teams prior to the development of the state system began responding to incidents under the new plan. The first team to become operational under the state plan was a unit established by the Eugene Fire/EMS Division in 1987. By the end of 1991, nine regional teams had been



*A two-train collision in Harrisburg, Oregon caused this wreck of diesel locomotives.*

*In the first  
year of the new  
program, the state  
fire marshal  
dispatched  
regional teams to  
147 incidents.*

designated and placed under contract, covering all the state except for a large and sparsely populated region of Eastern Oregon. By fall 1992, a contract had been signed for a team in that region, with training under way and equipment on order. In the first year of the new program, the state fire marshal dispatched regional teams to 147 incidents.

The intent of the program is to provide advanced, OSHA HazMat Technician level service at major incidents throughout the state. The regional teams are not intended for HazMat cleanup or disposal, nor for simple standbys. The state has established minimum response criteria that must

be met before a regional team will be dispatched. The local agency having jurisdiction must respond to the scene, establish command and conduct an initial sizeup. Only when the local incident commander has determined that a hazardous material is involved and that the situation can't be controlled with local resources, including conventional mutual aid, will a state team be dispatched. The state fire marshal's office has a 24 hour, seven day a week duty officer who receives requests for team activations and, after receiving such a request, will consult with the regional team leader to determine if the incident meets criteria for regional response.

Once a state team arrives at an incident, face to face contact is made with the local incident commander and the team leader is briefed on incident status. Overall incident command remains with the local jurisdiction; the role of the regional team is to provide hazard assessment and tactical expertise, as well as to take whatever actions are agreed upon with the local incident commander.

As part of the state contract, regional teams, including those that had already equipped themselves prior to the development of the state system are receiving vehicles and equipment provided by the state, with the intent of standardizing response as much as possible. Most teams will be "loaned" a HazMat truck under contract. Behind the driver's compartment of the 33 foot long rig is a "resource room" that serves as a command center and is equipped with a computer, modem, fax machine and two cellular telephones, enabling responders to tap into databases and expertise around the nation. In addition, the units carry the CAMEO system and on disk chemical data bases, as well as hard copy references and texts.

The trucks are valued at \$110,000 each. Before being placed in service, they are outfitted with \$170,000 worth of equipment, including protective apparel, detection and sensing devices, containment and decontamination equipment and miscellaneous tools. In addition, each rig has a 7.5 KW diesel powered auxiliary generator.

February 27, State Fire Marshal Ev Hall handed over the first truck to be placed in service to Eugene fire officials. By the end of the year, Oregon should have a uniform level of HazMat response coverage.



**University of Kansas  
Division of Continuing Education  
Lawrence, Kansas 66045-2600**

**Kansas Law Enforcement Training Center**

**Testimony  
House Committee on Local Government  
Friday, August 20, 1993**

**by  
John P. Wolf  
Assistant Dean**

Good morning ladies and gentlemen. Thank you for the opportunity to testify before you this morning. My name is John Wolf and I am Assistant Dean of the Division of Continuing Education at the University of Kansas. The University of Kansas historically has been very involved in public administration. Because of this it has developed training programs in law enforcement and fire service, some of which date back to the 1930's.

The Kansas Law Enforcement Training Center, a unit of the Division of Continuing Education, is located at the former naval air station, which is situated south of the City of Hutchinson and west of the City of Yoder in Reno County, Kansas. It has been there since September 1, 1969. Prior to that time, specifically from January 1, 1968 through August 31, 1969, it was located on the Lawrence campus of the university.

Its mission, as expressed in the law enforcement training act, K.S.A. 74-5601 *et. seq.*, is

the promotion and development of improved law enforcement personnel and procedures throughout the state, and the training center shall offer to qualified applicants . . . such programs and courses of instruction designed to fulfill this end.

Funding for the training center is currently provided from the law enforcement training center fund, as established by K.S.A. 74-5619, and enabled by K.S.A. 20-362 and K.S.A. 28-172a and K.S.A. 12-4117. Currently in accordance with the provisions of K.S.A. 20-362(e), the law enforcement

*House Local Gov't Interim  
8-20-93  
Attachment 13*



training center fund receives \$5 from the docket fee charged in criminal and traffic-related cases in state district courts. This level of remittance from the docket fee was set by the legislature in its session of 1986. Funding the training center from the docket fee was authorized by the legislature in the session of 1982.

The training center also receives, in accordance with the provisions of 1992 HB 2238, \$4 from the docket fee charged in criminal and traffic-related cases in municipal courts. This level of remittance from the docket fee was set by the legislature in its session of 1992. No monies from the general revenue of the State of Kansas are involved in the funding of the operations of the center. This funding principle may be thought of as the "user tax" concept of funding for law enforcement training. That is, the monies generated come from those individuals who violate the laws of the State of Kansas. Law-abiding citizens do not participate in paying for law enforcement training.

Prior to FY 1983, KLETC has been funded by the old LEAA (Law Enforcement Assistance Administration) and then for a time was funded from general revenue.

The general purpose of the KLETC is to provide a basic training course of not less than 320 hours of instruction to all individuals employed as full time law enforcement officers within one year of their initial employment; to provide a basic training course of not less than 80 hours of instruction to all individuals employed as part time law enforcement officers within one year of their initial employment; to conduct a school for all newly elected sheriffs each election year; and to extend the instructional programs of KLETC throughout the State on a regional basis. The director of KLETC is the director of police training for the State and as such has the responsibility to certify on an annual basis any local or regional law enforcement training schools conducted within the State by state or local law enforcement agencies.

The Kansas Law Enforcement Training Act, K.S.A. 74-5601 *et. seq.*, mandates officers to receive the level of training, either basic or continuing, which is appropriate to their employment status on a timely basis. Officers must complete the basic training portion before they are eligible to receive a permanent appointment to a position as a law enforcement officer. Failure to complete either type of training is grounds for forfeiture of the officer's position. KLETC maintains a central registry of all individuals who have served as either full or part time law enforcement officers in the State since 1983, to monitor compliance with this requirement. The records of those officers who fail to complete the required training in the required time



frames are referred to the Kansas Law Enforcement Training Commission for action.

Thank you again, Madam Chairman, ladies and gentlemen, for the opportunity to address you this morning. I would be happy to respond to any questions which you might have.

GWEN WELSHIMER  
 REPRESENTATIVE, EIGHTY-EIGHTH DISTRICT  
 SEDGWICK COUNTY  
 6103 CASTLE  
 WICHITA, KANSAS 67218  
 316-685-1930

DURING SESSION  
 LEGISLATIVE HOTLINE  
 1-800-432-3924



TOPEKA

HOUSE OF  
 REPRESENTATIVES

## COMMITTEE ASSIGNMENTS

MEMBER: TAXATION  
 LOCAL GOVERNMENT  
 ADMINISTRATIVE RULES & REGULATIONS

August 20, 1993

Dear House Local Government Committee Members:

For your study and consideration during the interim, attached is a suggested substitute for HB 2312 by the Local Government Committee which requires bonding of building contractors.

Due to Kansas windstorms, hailstorms, lightning, cyclones, tornadoes, and fires over the past three years, a frontier for new contractor con artists has emerged. The building industry and the Legislature must come up with some kind of solution that will not only protect our constituents but enhance the building industry as well. Often, established and honest building contractors are bound by contract to continue with current jobs and are not available to work for disaster victims, leaving the disaster victim precariously vulnerable to fraud. The attached substitute bill is a definition of one way to give the public reasonable protection and recourse against worthless contractors who take advantage of the situation from within and from outside the state.

Fraudulent and poor quality construction often results in lawsuits against the repair contractor who repairs it, the owner who then sells it, the agent who represents it, the appraiser who appraises it, and even the attorney can be accused of misrepresentation. The contractor, however, can be unidentified, unfound, bankrupt or deceased, and even unknown at the time of discovery.

There are over 11,000 real estate licensees and 900 appraiser licensees who have spent many valuable work hours and thousands of dollars on licensing and education requirements to put themselves in a position of responsibility for what the building contractor builds or repairs.

In years past, construction and repairs were a smaller investment than they are today. Goofed up construction that would cost the property owner \$1,000 to \$3,000 today can reduce the market value of the real estate by three to four times that amount and up, respectively.

Worthless contractor fraud is a MAJOR problem for victims, the judicial system, real estate professionals, and competent and honest building contractors. Whether we attempt to bring relief through bonding, a fee fund, or criminal statutes, I see no alternative to statewide licensing to bring the industry initially into focus.

Thank you to all of you and to Chairwoman, Nancy Brown, for fair and open attitudes in addressing this issue as a committee bill. I look forward to your views and suggestions as well as hearing testimony at the option of the Chair.

*Gwen*  
 Gwen Welshimer

House Local Gov't Interim  
 8-20-93  
 Attachment 14



# State of Kansas

## BOARD OF EMERGENCY MEDICAL SERVICES

109 S.W. 6TH STREET, TOPEKA, KS 66603-3805

(913) 296-7296 Administration

(913) 296-7403 Education & Training

(913) 296-7299 Examination & Certification

(913) 296-7408 Planning & Regulation

Bob McDanel  
Administrator

Joan Finney  
Governor

DATE: August 20, 1993

TO: Local Government Committee

FROM: Bob McDanel *BM*

SUBJECT: Hazardous Materials Training

The Board of Emergency Medical Services is involved with hazardous materials training for three primary reasons:

First, the board regulates emergency medical services, many of which are an integral part of county emergency preparedness plans for incidents involving hazardous materials. Emergency medical services frequently respond to such incidents.

Second, the board certifies attendants, who may be required to take hazardous materials training in order to comply with county plans.

Third, the board trains instructors, who provide attendant training programs and continuing education.

The board has taken the following steps to facilitate hazardous materials training for all levels of attendants:

- 1) Reviewed all initial training curricula to determine the need for increased hazardous materials training.
- 2) Approved existing hazardous materials training programs for inclusion in required continuing education programs.
- 3) Encouraged instructor/coordinators to become hazardous materials instructors.
- 4) Developed cooperative relationships with the State Emergency Response Commission, the Division of Emergency Preparedness and the Department of Human Resources.

The State of Kansas may want to establish a single point of contact for emergency response training courses, including hazardous materials training. All courses, and all instructors, could be certified or approved by a single agency. These changes would, of course, require legislative action. I believe the Board of Emergency Medical Services demonstrates the effectiveness of a single contact point for a set of related programs.

RM/st

*#15*

House  
Loc. Govt.  
8-20-93

**Testimony before the House Committee on Local Government  
August 20, 1993**

**My name is Don Bruner, Director of Labor Management Relations and Employment Standards Division, Department of Human Resources.**

**Industrial Safety and Health, private sector consultation and public sector enforcement, is a part of this Division. Specifically, hazardous materials present in the workplace are of considerable concern to this Agency.**

**Safe storage, use and employee exposure is the main thrust of our efforts. Such is accomplished through on site inspection, work environment sampling and employer/employee training. Samples are analyzed in a lab approved by the Occupational Safety and Health Administration (OSHA).**

**Such training takes the form of direct on-site assistance as to proper storage, application and use. Training also occurs in a more formal seminar or conference setting. Training given by the Agency is conducted in accordance with OSHA law and rules by qualified professionals who are OSHA trained. Additionally, we maintain a film and video library for loan to employers or interested groups for their internal training efforts. Hazardous materials are part of those available.**

**I thank the committee for allowing my appearance and will stand for questions.**

House Local Gov't Interim  
8-20-93  
Attachment 16

TESTIMONY ON THE  
KANSAS CORPORATION COMMISSION  
ROLE IN EMERGENCY RESPONSE  
PRESENTED TO THE HOUSE  
LOCAL GOVERNMENT COMMITTEE

August 20, 1993

Chairperson Brown, members of the Committee, my name is William R. Bryson and I am Director of the KCC Conservation Division. On behalf of the Commission, I appreciate the opportunity to appear before you today to outline KCC's role in the Kansas Emergency Response program.

Since 1986, the KCC Conservation Division has administered the oil field spill response under Memorandum of Agreement with the Kansas Department of Health and Environment. As you heard this morning, KDHE has primacy from EPA to administer the Kansas spill response program. KCC's portion of that program deals with spills generated by oil and gas exploration and production activities. Interagency transfer of responsibility takes place when the crude oil leaves the lease and enters the first purchasers pipeline. During evolution of the program, KCC and KDHE have developed an interagency agreement on spill reporting, coordination between agencies where the spillage migrates off-lease, the basic techniques for timely containment and cleanup and for post cleanup monitoring. The interagency agreement is practical because KCC has regulatory and licensing control over the operator and has better enforcement leverage for causing timely spill containment and cleanup. The MOU was required by statutory mandate under K.S.A. 55-185(a).

Under the Clean Water Act, Resource Conservation and Recovery Act (RCRA) and CERCLA (better known as Superfund), crude oil is considered a pollutant, but has been generally exempt from the definition of a hazardous waste. Under SARA Title III of 1986, crude oil, by definition, became a hazardous material and subject to the dictates of the Emergency Planning Response and Community Right to Know Act (EPCRA). To accommodate the needs of the Division of Emergency Preparedness (DEP) and the Local Emergency Response Committees (LERC's) who are statutorily designated to be first responders to "incidents" involving release of hazardous materials to the environment, KCC has been

House Local Gov't Interim  
8-20-93  
Attachment 17

investigating and reporting the 500-600 oil spills to DEP since late 1991. Prior to that time, all spills were reported solely to KDHE. The arrangement with DEP hasn't been formalized into a MOU yet but the process is working. The Conservation Division's Department of Environmental Protection and Remediation is responsible for coordinating all spill reporting with DEP and KDHE.

We have provided a copy of K.A.R. 82-3-603 which is KCC's direction to oil and gas operators on what is expected in the way of reporting. The spiller either propose a cleanup plan or if unacceptable, KCC prescribes one to fit the situation. There are penalties for failure to report and to cleanup a spill in a timely manner.

We have attached flow charts for how the Conservation Division handles both the inspection and enforcement phases of spill response. Releases of hazardous materials other than crude oil, saltwater or other wastes associated with exploration and production are referred to KDHE by MOU.

Congress, in dealing with the Clean Water Act or the Oil Pollution Control Act used the terminology of "spill" or "release". In these acts, crude oil is considered a deleterious substance or pollutant which requires cleanup when spilled or released. The confusion, at times, lies with the fact that under EPCRA and the more recently enacted Hazardous Material Transportation Act (HMTA), crude oil falls under the definition of a hazardous material and when released, the event is termed an "incident". Division of Emergency Preparedness has to respond to "incidents" such as fires, accidents, floods, train wrecks where hazardous materials may be stored or being transported and where health and safety issues are involved. The KCC Transportation Division uses the term "incident" because its responsibilities of reporting to DEP have this definitional link. The Conservation Division uses the term "spill" because the petroleum industry has grown up with that term and understands it. A spill or release, is one type of hazardous material incident.

The KCC Transportation Division employees have been through HAZ-MAT Training and a part of the Commission's involvement in the Motor Carrier Safety Assistance Program (MCSAP). The Transportation Division occasionally finds itself in the role of first responder to a transportation

incident and can statutorily coordinate response if public health and safety is involved. Traditionally, the Commission's Division of Transportation turns the coordination effort over to the Division of Emergency Preparedness, and then becomes primarily involved in the post incident analysis of the event.

### TRAINING ISSUES

Each responding agency invited to this hearing was asked to address training of personnel who are required to respond to hazardous material releases. Since under part of the federal acts, crude oil and possibly other materials associated with the production of oil and gas are defined as hazardous, the KCC Conservation Division field staff should have training in hazardous material response. The current status of training with the Conservation Division is as follows:

- (1) The KCC field staff responds to releases of crude oil and saltwater. In-house training of personnel takes place in the district office on a daily basis. We believe that because several of KCC's present staff was instrumental in putting together KDHE's spill response manual and contingency plan back in the late 1970's and early 1980's, there is sufficient knowledge on our staff to train new employees. Some of our staff have provided response to hazardous material spills for twenty years and have served as instructors for operator courses.
- (2) In 1992, we had discussed the possibility of coordinating with Dan Karr of DEP to participate in their HAZ-MAT training course, or at least those subjects applicable to the limited number of hazardous materials which we regulate. We could not coordinate this during DEP's 1992 course cycle, but hope to participate in the next series of training. We may wish to contract with DEP to do this training.

The Commission believes there should be a single agency responsible for both coordination and providing emergency response training courses. The Division of Emergency Preparedness in their role of first responder is the most logical agency to have this role providing the Legislature is willing to supplement whatever fees and Federal grants are available to make formalized training a viable ongoing process. In the late 1970's EPA had a

marvelous series of courses on spill and emergency response. When no large "incident" or "event" took place, Congress cut back funding and training was the first to go. When the Exxon-Valdez accident occurred in 1987, trained persons both at the industry and governmental level were hard to find. In a sense, much of the Oil Pollution Act of 1990 should have never been needed if continued training by EPA, FEMA or the Coast Guard had been funded in the 1980's.

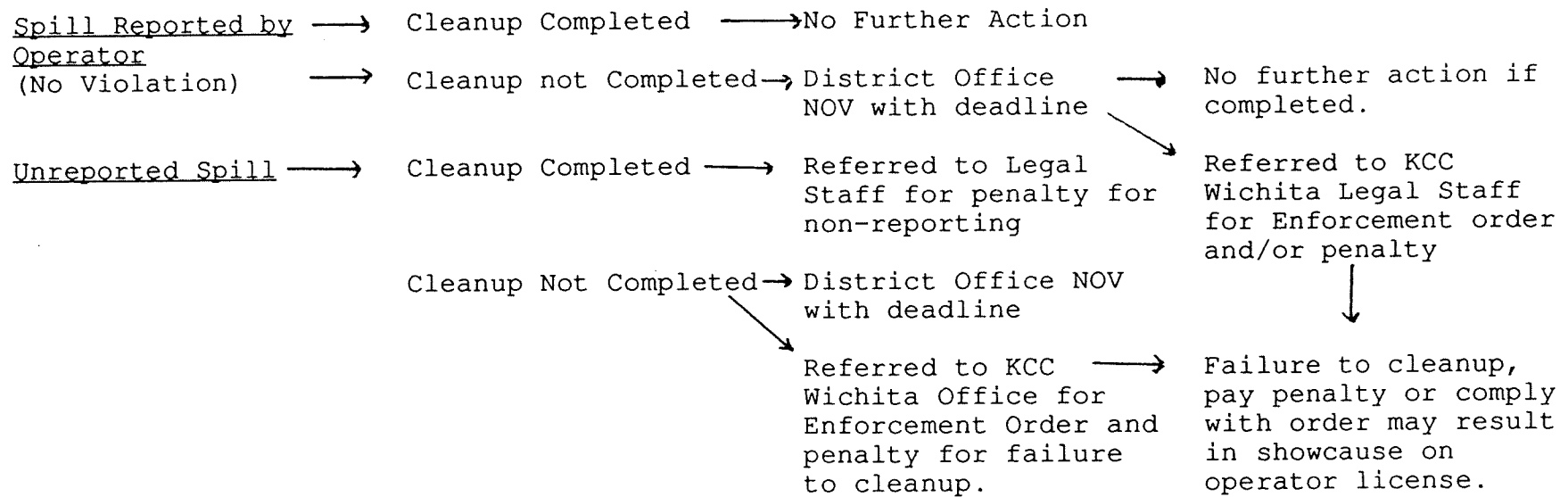
We believe the current coordination between state agencies involved in emergency response is very good and continues to become more refined. The Legislature will always be periodically concerned over duplication or overlap (five entities showing up at an incident) but our observation is that the state agencies really avoid this type of problems as much as possible and have the system to eliminate duplication. There will always be the potential for a temporary glitch in the system and this may occur at some time even if one agency was totally in charge. Incidents are always unplanned and even with the best emergency response plans and training a lack of proper coordination and selection of response measures may take place. The important part of interagency coordination is to be able to revise both training techniques and contingency plans to accommodate new problems as they occur.

The Corporation Commission, as one of the principal agencies, involved in response to spill incidents welcomes this opportunity to present a description of our program to you and provide input on the subject of emergency response planning and training in Kansas.



19-5

## ENFORCEMENT TRACKING AND ACTION



(Failure to cleanup Spill may cause KCC to use Fee Fund to Cleanup-Billing to Violating Operator)

19-6

KANSAS CORPORATION COMMISSION  
Inspection Phase

Spill Reports to  
KCC District  
Office by

1. Landowner/public
2. Operator
3. KDHE or other Agency
4. DEP/Local EP
5. KCC Central Office

Inspection

- > KCC District Office <
1. Contacts operator either after inspection or before.
  2. Prescribes containment/cleanup measures

Reporting

- >
1. KDHE Bureau of Environmental Remediation Inter-agency Agreement
  2. KCC Topeka Office
  3. DEP
  4. Some LEPC'S (Certain Counties)

Unreported Spills

1. Any spill not reported by operator
2. Discovered by KCC field inspection

Follow UP

- <
1. Witness Progress
  2. Determine additional Remediation measures of long term monitoring

Reporting

- >
1. KDHE (DEP)
  2. KCC Wichita Office

**82-3-603. SPILL NOTIFICATION AND CLEAN-UP; PENALTY; LEASE MAINTENANCE.**

- (a) Each operator shall notify the appropriate district office within 24 hours of discovery of a spill which is not confined in a surface pond. If the spill has reached flowing surface water, each operator shall notify the appropriate district office immediately upon discovery of the spill. The failure to timely notify the district office of a spill shall be punishable by a \$250 penalty for the first violation, \$500 for the second violation, and \$1000 and operator license review for the third violation. The notification shall include the following information:
- (1) The operator's name and license number;
  - (2) the lease name and legal description and the approximate spill location;
  - (3) the time and the date the spill occurred;
  - (4) a description of the escaped materials including type and amount;
  - (5) a description of the circumstances creating the spill;
  - (6) the location of the spill with respect to the nearest fresh and usable water resource;
  - (7) the proposed method for containing and cleaning up the spill; and
  - (8) any other information that the commission may require.
- (b) Each operator shall clean up a spill according to the proposed cleanup method or as modified by the district office. The cleanup shall be completed within 10 days of the spill notification or within a time period as prescribed by the district office. The failure to clean up a spill in a timely manner shall be punishable by a \$1000 penalty for the first violation, \$2500 for the second violation, and \$5000 and operator license review for the third violation.

(Authorized by K.S.A. 1989 Supp. 55-152, 55-164; implementing K.S.A. 1989 Supp. 55-172, 74-623; effective, T-87-46; December 19, 1986; effective May 1, 1987; amended May 1, 1988; amended April 23, 1990.)

## SUMMARY OF TESTIMONY

Before the  
House Committee on Local Government

Presented by  
Lieutenant Sam Grant  
August 20, 1993

Kansas Highway Patrol Troopers are first responders and normally respond to hazardous material spills that result from motor vehicle accidents.

The Kansas Highway Patrol's role in response to a chemical or hazardous material emergency is to protect persons from exposure by establishing a safety zone around the material and restricting access to the area.

Troopers receive thirteen hours of hazardous materials training in recruit school. An additional two hours of training is received annually at in-service training. The two hours of annual training is mandated. Training is obtained from several sources, including the Division of Emergency Preparedness and the Railroad industry, as well as our own personnel.

Annual training courses are approved by the Division of Emergency Preparedness. There may be duplication of emergency response training that could be avoided if a single point of contact was available.

A single point of contact for emergency response training would be desirable. Emergency response training courses should be approved, if not certified, by the Division of Emergency Preparedness.

House  
Local Govt.  
8-20-93

#18



THE CITY OF  
**EMPORIA**

Civic Center / 522 Mechanic / P.O. Box 928 / Emporia, KS 66801-0928 / 316-342-5105

#19  
Raymond A. Toso, Mayor  
Dale Davis, Vice-Mayor  
John R. Webb, Commissioner  
Tom Myers, Commissioner  
Elvin Perkins, Commissioner  
Steve Commons, City Manager

Good afternoon ladies and gentlemen. I am James Woydziak, and I am the Fire Chief in Emporia. I am also the Fire Chief for Lyon County Fire District No. 4, and the ambulance service provider for all of Lyon County. I am here today to present my views on Firefighter Certification verses Firefighter Recognition as available through the State Fire Marshals' Office.

I believe in Certification. I believe that NFPA (National Fire Protection Association) 1500's requirement that all personnel engaged in active structural firefighting be certified to the Firefighter I level as per NFPA standard 1001 is a reasonable goal that all responsible fire chiefs should be working to attain.

The certification that I believe in is that certification which is based on passing a standardized, validated test of knowledge and skills administered by trained personnel. The certification that I believe in would be a program that is reviewed and accredited by a national organization. The certification that I believe in is a program administered by a state agency that is ultimately responsible to the citizens of the state that funds it.

There are a number of possible ways to obtain this certification. One way is to obtain the necessary training from various sources and then arrange testing by a third party. This is a system that I am familiar with from my experience as a fire chief in Illinois. In that state, the University of Illinois at Champaign - Urbana was a primary provider of fire training. Various fire departments also provided training for their own and other departments. (We in Moline utilized U of I and the Peoria F.D. training academy extensively).

After the training was obtained, a representative from the State Fire Marshal's Division of Personnel Standards would arrive and administer a standardized, validated test to ensure that the required knowledge and skills were, in fact, learned. There was no questioning of the training and curriculum, only the end result was measured. Upon successful completion, the State Fire Marshal awarded Certification to the specified level. This type of program is not available in the State of Kansas.

Another system is to have the training agency accredited to administer the standardized, validated tests. This system is currently available in the State of Kansas. It is available from the University of Kansas Fire Service Training. Their program has been accredited by both the International Fire Service

Attach. 19  
House Loc. Gov't  
8-20-93

Accreditation Congress at Oklahoma State University (the people that put together the IFSTA Manuals), and the National Professional Qualifications Board for the Fire Service.

This program, in many ways, is similar to EMT certification. Training is provided, a standardized validated test is given, and those that pass are issued a certificate from the State of Kansas, Board of EMS. Many of us are familiar with this process because of the EMT's on our departments.

The process of certifying is not currently regulated except by the accreditation organizations. That is soon to change. The National Fire Protection Association is currently working on NFPA standard 1000. This standard will specify the accreditation process and will tie together the certification requirements of NFPA 1500, 1001, 1002, and all of the other professional qualification standards. NFPA standard 1000 is due out in 1994.

All of this is to provide background for my position on the Firefighter Recognition Program administered by the State Fire Marshal. The Firefighter Recognition Program is based on the concept that a fire chief is responsible for providing trained personnel to actively engage in firefighting. It recognizes that no NFPA requirement exists that a fire chief must obtain accredited certification for his or her personnel. It also recognizes that a variety of training sources exist both inside and outside of the State of Kansas.

~~XX~~ I am opposed to, and do not participate in the State Fire Marshal's Firefighter Recognition Program. I believe that it provides a false sense of certification. My main objection is the lack of a mechanism to determine if the required skills, knowledge and abilities were actually obtained. The fire chief's signature on the recognition application form may verify that the firefighter attended the class, but where is the proof that the required knowledge was obtained? Or even worse, what if the incorrect knowledge was obtained?

I also question the ability of a fire chief to successfully defend himself against a law suit brought by the family members of a deceased firefighter if they claim that their loved one died because he was not properly trained, but yet held a certificate of recognition from the State Fire Marshal. I am sure that an official from the recognizing agency would be called to the stand and asked about the level of training. Will the only answer be "Well, chief so and so said he was trained, so we took his word for it". Wouldn't it be much better to be able to produce test scores and documentation to back up a claim that the member showed that he was knowledgeable?

One comment that I have heard on several occasions is that many departments would participate in the existing, accredited program if it wasn't so expensive. It is true that there is a cost involved with accredited certification. The most economical

program from the University of Kansas costs \$60.00 per person. That program, known as the Registered Program, allows a department to provide their own training, bring in outside speakers, have their own drills or work with other departments, and then prove their knowledge and skills in front of an outside party. In many small departments, \$60.00 per person may be much more than the entire training budget for the year.

There are other programs available at \$80.00 per person. These may place an even bigger burden on a departments training budget, but may be desirable for other departmental reasons. The Direct Delivery program is one of these. It brings an instructor either to the department for hands on training spread over three or four weekends, or is provided at the annual State Fire School. (Some pre class work is required for this). The correspondence program is another option. This self study program, combined with practical skills practiced within the department offers a long term, self paced system to obtain the required knowledge and skills.

Lastly, there is the challenge program. This is where an individual may utilize the training and knowledge obtained from virtually any source and then demonstrate that knowledge by passing an extensive written and practical test.

If the cost of these programs is the reason to seek an alternative program, then perhaps we have missed the boat. Instead of seeking an alternative program, perhaps we should be working to establish the funding to reduce the costs or to reimburse or cover the costs.

Another comment that I have heard is that even after you complete the University of Kansas program, you still are not certified. You must then send an additional fee to obtain true certification. That is incorrect. Upon completion of the process you are issued a certificate from the University of Kansas and it has the seals of the International Fire Service Accreditation Congress and the Joint Council of National Fire Service Organizations "Pro Board". This is certification. It proves that you have demonstrated the required knowledge and skills by passing the random generated standardized, validated test required by these two accreditation organizations. Now, if you want another certificate to hang on the wall, for whatever reason, a separate one may be obtained from the Pro Board. They do charge \$10 for that certificate. It is certainly not required to be certified.

I made the comment earlier that I believe that the Firefighter Recognition Program as administered by the State Fire Marshal gives a false sense of certification. I believe this to be true by the number of people who have contacted K.U.F.S.T. and inquired about or attempted to enroll in Firefighter II and Fire Apparatus Operation certification programs. This only confuses and angers those firefighters who are denied access to the higher levels of the certification process. I believe that this is a disservice to those firefighters.

In conclusion, I just wish to state that I believe that firefighters across the state deserve to be honored and recognized for the contributions that they have made to their communities. But providing this certificate from the State Fire Marshal, specifying Firefighter I training levels, and basing it solely on each individual fire chiefs interpretation of NFPA 1001 is inappropriate and not fair.

If the real issue is money, then lets get busy and work together to find a funding source so that the existing accredited program is available to every firefighter on every department that wishes to participate.

Thank you.