

WEC FACT SHEET

New Jersey Work Environment Council (WEC)

Worker and Union Rights to Participate in Inspections to Prevent Catastrophic Toxic Releases

Union representatives now have important new rights to help protect the safety and security of workers and communities. Union representatives can help point out and prevent potential chemical hazards by participating in inspections and investigations of workplaces conducted by New Jersey's *Toxic Catastrophe Prevention Act* (TCPA) program. These inspections occur at regulated facilities about every 12 – 18 months.

In September 2005, the Department of Environmental Protection (DEP) issued Administrative Order No. 2005-05.¹ This fact sheet explains union representative and worker rights under this Order. These rights are similar to inspection “walk-around” rights under the *Occupational Safety and Health Act* (OSHA).

Background on the Toxic Catastrophe Prevention Act (TCPA)

TCPA's purpose is to prevent chemical accidents at New Jersey facilities that use high volumes of “extraordinarily hazardous substances (EHS).”² TCPA regulates about 100 private and public sector facilities, including chemical plants, oil refineries, paper mills, food processors, and water and sewage treatment operations. *To determine if your facility is regulated by TCPA, call WEC at (609) 695-7100.*

TCPA requires facilities to develop a *Risk Management Plan* (RMP). RMPs generally include:

- a. the identity and quantity of EHS that are generated, stored, handled or that could be produced;
- b. a prevention program, including safety precautions, maintenance procedures, monitoring, and employee training measures;
- c. a description of potential “worst case” releases, including quantities released and the number of people that could be harmed;
- d. an emergency response program;
- e. a five-year accident history; and
- f. evaluation (every five years) whether the facility meets “state of the art” practices for preventing toxic releases.³

¹ To view the Order, go to www.njwec.org.

² TCPA was enacted by New Jersey's legislature in 1985 after a toxic release in Bhopal, India killed many thousands. Based on this law, in 1990 Congress enacted amendments to the Clean Air Act (Section 112(r)) which augments TCPA. DEP administers and enforces both laws.

³ TCPA is complicated. For a more detailed TCPA summary, contact WEC. To request a copy of the official TCPA regulations, called the *Consolidated Rule Document*, call DEP at (609) 984-7573.

Worker and Union Participation Rights

The DEP Administrative Order applies to all TCPA inspections, investigations, and audits at regulated facilities. In this fact sheet the term “inspection” also includes an “investigation” and “audit.”

Inspection Notices and Written Explanations

Unlike OSHA, DEP generally provides advance notice to management of inspections. Typically, DEP will instruct management to:

1. Immediately post a notice, or a DEP notice provided, of an inspection. The notice must be “conspicuously displayed” in the area to be inspected; and immediately provide a copy of this notice to the union representative, if there is one.
2. After the inspection, management must conspicuously display the name and telephone number of DEP’s inspector for not less than 30 days in the inspection area. Also, they must promptly provide this notice to the union representative, if there is one.
3. All employees can view a copy of any written explanation by DEP to management of the purpose, scope, procedures, progress, or outcome of the inspection, including any legal citations.

DEP shall instruct management to act on the following not more than 24 hours after receiving the DEP explanation:

- Conspicuously display the explanation in the inspection area; and
- Immediately provide a copy of this notice to the union representative, if there is one.

Rights to Accompany the Inspector to Point Out Hazards

The order says that during an inspection, DEP shall instruct management to afford an opportunity to accompany inspectors to an employee who works in, or is familiar with, the part of the facility being inspected, and a union representative, if any.

WEC TIP **Union reps usually know the most knowledgeable employees to accompany the inspection in their areas. So it’s helpful to make such suggestions to the inspector.**

Inspectors may permit additional union representatives and additional employees to accompany him or her if he or she determines that to do so will aid the inspection.

WEC TIP **As during an OSHA inspection, inspectors have a lot of authority to determine how to conduct the inspection. It is important for union representatives to know their legal rights and develop professional relationships with inspectors to assure thorough inspections.**



Rights to Participate in Meetings

When DEP meets with management to explain the inspection's purpose, scope, procedures, progress or outcome, DEP shall instruct management to invite any employee and union representative that participates in the inspection. DEP can meet separately with participating employees and union representatives, if DEP decides it's necessary.

Other Provisions

- Inspectors can interview employees. Interviews can be conducted without management personnel present, if the inspector feels this is necessary.
- Inspectors can resolve any dispute as to who is the representative of management and employees. If there is no union representative, or if the inspector can't determine who the union representative is, he or she shall consult with those employees he or she believes necessary for an effective inspection.



To avoid possible confusion, the union should notify both DEP and the employer in advance to identify who they want to be the walkaround rep.

- For the purpose of this order, "Employee" does *not* include supervisors, managers, independent contractors, subcontractors, consultants, or employees of affiliated firms.
- The inspector may, at his or her discretion, deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection.
- Management may require an employee or union representative who accompanies an inspector to sign an agreement solely to protect trade secrets and confidential business information. If a facility contains classified national security information, only persons authorized to have access to that information may accompany an inspector in areas containing that information.



Management sometimes over-classifies processes as 'trade secret.' This should be discussed with the inspector to make sure trade secret claims are valid.

Other TPCA Rights to Participate

Under federal *Clean Air Act* rules enforced as part of the TPCA Program, management is required to allow other forms of employee participation."⁴ Management must:

- Develop a written plan of action regarding employee participation.
- Consult with workers and union representatives on "...the conduct and development of process hazards analysis with risk assessments and on the development of the other elements of process safety management in this rule."
- Provide to workers and union representatives "...access to process hazard analyses with risk assessments and to all other information required to be developed under this rule," including the overall Risk Management Plan.

⁴ Consolidated Rule Document, Section 68.83, page 64.

What If You Believe You Have Been Retaliated Against?



You have a right to participate in all phases of TCPA inspections without any form of employer retaliation. These rights include complaining to DEP and seeking an inspection and participating in inspections and proceedings related to an inspection. These protections are found in the *NJ Conscientious Employees Protection Act*, the *Occupational Safety and Health Act* (Section 11c), the *NJ Public Employees Occupational Safety and Health Act*, and the *Clean Air Act* (Title III, Section 7622).

WEC urges you to work through your union, which can offer the best protection against possible employer retaliation.

If you believe you have been discriminated against for participating in the TCPA Program or for other job safety, health, or environmental activities, contact your union and WEC.

WEC TIP

Legal protections regarding discrimination have strict time limits (Thirty days in the case of OSHA) so it is important to seek assistance as soon as you believe you have been retaliated against.

Will My Employer Generally Know About These Rights?

DEP is sending information about your rights to management so they should understand them.

However, your employer may question what legal authority DEP has to allow you to participate in the TCPA program. The answer: TCPA regulations require, in part, that owners and operators, and employees and representatives “shall not hinder or delay, and shall assist, the Department in the performance of all aspects of any inspection and audit.” (N.J.A.C. 7:31-8.2 (a))



Also, WEC notes that the *Clean Air Act* says “Whenever the Administrator or the Board conducts an inspection of a facility pursuant to this subsection, employees and their representatives shall have the same rights to participate in such inspections as provided in the *Occupational Safety and Health Act*.”⁵

5 Title III Hazardous Air Pollutants, Section 112(r) Prevention of Accidental Releases, (6) Chemical Safety Board, (L) (ii) (c). The term “Administrator” also means the DEP, since the state enforces this program.

The New Jersey Work Environment Council (WEC) is an alliance of labor, community, and environmental organizations working together for safe, secure jobs, and a healthy, sustainable environment. WEC links workers, communities, and environmentalists through training, technical assistance, grassroots organizing, and public policy campaigns to promote dialogue, collaboration, and joint action. Thanks to the Ford Foundation for financial support of WEC efforts to involve workers and their unions in environmental protection.

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LOCAL UNION TCPA ACTION PLAN

- Determine if your facility is regulated by TCPA by calling WEC at (609) 695-7100.
- Invite WEC to make a presentation to your union.
- Inform and educate other union representatives and workers of these new rights and procedures.
- Discuss these procedures and rights with management and make sure you are notified of any TCPA activity. Make sure DEP and management knows who from the union should be contacted in the event of an inspection or other activity.
- Contact the DEP TCPA Office to determine when the next inspection, audit, or other activity may occur. Their phone number is (609) 984-7573.
- Monitor compliance with these provisions.
- Work on programs for prevention of chemical exposure, spills and disasters.
- Keep your national union's health and safety office informed.



This fact sheet was prepared by the New Jersey Work Environment Council (WEC).

Contact WEC to request a speaker for a meeting, a workshop on TCPA, assistance using the rights explained in this fact sheet, or information about membership affiliation.

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