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THE TOXIC SUBSTANCES INFORMATION ACT

As a response to the Kepone crisis, the Virginia General Assembly has enacted the Toxic Substances Information Act. Code of Virginia §32-428 et. seq. The purpose of the Act is to provide for the reporting by commercial establishments of any toxic discharges which may pose a hazard to life or health. In addition, the Act provides substantial penalties for responsible individuals and organizations who fail to make the required reports. The State Board of Health handles the administration of the Act.

Section 32-429 states that the purpose of the Act is to "collect, catalogue, and evaluate all information concerning substances which are toxic in certain concentrations and under certain conditions ... and ... hereby protect the public health ..." Pursuant to this mandate the Board of Health is given broad powers to collect and catalogue information about toxic substances, and is under an affirmative duty to evaluate the collected information to determine the accuracy and relevance of the information collected.

Additionally, the Board is required to promulgate and thereafter update a list of substances which are considered to be toxic under certain conditions. That list has been promulgated and is available from the Department of Health. Liability for failure to report the emission of a toxic substance is predicated on its presence on the list. No disclosure under the Act need be made if a particular substance is not on the list. The Board is also permitted to exempt certain establishments from the reporting requirement once it has determined that the class of establishments, or the individual establishment, do not constitute a "substantial risk" to public health by their discharge of listed substances.

The duties imposed on "owners and operators" of commercial establishments that emit listed substances are substantial: (1) they are required to report to the Board by January 1, 1977 that they are manufacturing or emitting the substance; (2) they are required to supplement that report with comprehensive information concerning the properties of the substance, the methods of disposal or emission, the safety measures taken for employees, and other pertinent information; and (3) they are required to make reasonable inquiry into the toxicity of any listed substance to determine if the conditions under which it is produced require disclosure under the Act.

Owners and operators of establishments that propose to produce or emit a listed sub-

stance such that its production or emission render it a toxic substance must presently: (1) report prior to production that they so intend; (2) make reasonable inquiry into the toxicity of the substance proposed to be produced; and (3) submit the additional information listed in the above paragraph to the Board of Health. All owners and operators must direct each employee to a physician if the owner or operator suspects that any impairment may be caused by the employee's contact with the substance.

The potential liabilities for owners and operators of commercial establishments which produce a toxic substance can be quite substantial. In the first place, any knowledge held by an agent or employee concerning the toxicity of a substance is attributed to the owner or operator if that owner or operator should have received that information by the exercise of due diligence. Any owner or operator who has knowledge of the toxicity of a substance and fails to report its production has violated the operative section of the Act. Such a violation renders the violator liable to a civil penalty of up to ten thousand dollars for each day of violation. In addition, the usual equitable remedies are available to the Board --- "injunction, mandamus or other appropriate remedy".

There are several shortcomings of the Toxic Substances Reporting Act despite the fact that it represents a useful step toward the prevention of a future chemical disaster. The first, and one which no preventative or reportive law of this design can solve, is the problem of imperfect or incomplete enforcement. Lack of staff and money will make it extremely difficult for the Board to discharge its duties consistently with the legislative purpose. One only hopes that the public awareness of this problem will remain high so that the Board can be forcefully urged to insure the complete coverage of reporting requirements.

The second shortcoming arises from the definition of "toxic substance". The Act limits the meaning of this term to those substances which pose a "substantial" risk to animal organisms. The use of the term "substantial" to limit the coverage of the Act is too restrictive. It puts an additional burden on the Board to show toxicity which is not justified in view of the present, though perhaps slight, danger of many non-biodegradable chemicals. Any danger to health should be sufficient to at least require reporting. It would be a fairly harmless requirement in view of the fact that the Act imposes no liability for the actual production of a toxic substance. It is the failure to report which gives rise to liability.

The third shortcoming is that the definition of "toxic substances" does not include those substances which pose a risk to

plant organisms. where plant life is a vital part of the aquatic ecosystem any poisonous substance which might harm the plant life should also be reported to the Commonwealth.

Fourth, and we noted this with regard to the Commonwealth's environmental impact statement law, the information which is elicited by the reporting requirement should be on public record, subject to the examination of interested citizens. It would aid in enforcement to have additional "eyes and ears" keeping watch on polluters.

Despite its drawbacks the Toxic Substances Reporting Act should help Virginia police her worst polluters. The effectiveness of the Act will depend largely on its enforcement, and one only hopes the enforcement will be strict. The people of Virginia have a right to know how their health will be affected by certain dangerous chemicals.