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Releases of hazardous
substances at military
facilities

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The State Emergency Response Commission requested a summary of the legal authorities related to emergency response to releases of hazardous substances at military facilities. The following discussion highlights existing law.

Discussion

Federal emergency response to the release of hazardous substances is primarily authorized by two statutes: section 311 of the Clean Water Act, as amended by the Oil Pollution Act of 1990, 33 U.S.C.A. • 1321 (1986 & Supp. 1992), and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. •• 9601--9675 (1983 & Supp. 1992) (CERCLA). These statutes require the President of the United States to prepare a National Contingency Plan for response to discharges of oil and releases of hazardous substances, pollutants, and contaminants. 33 U.S.C.A. • 1321(d) (Supp. 1992); 42 U.S.C.A. • 9605 (1983 & Supp. 1992). The President has delegated to the U.S. Environmental Protection Agency the responsibility for maintaining the National Contingency Plan. Exec. Order 12,580, reprinted in 42 U.S.C.A. • 9615 (1983), as amended by Exec. Order 12,777, reprinted in 33 U.S.C.A. • 1321 (Supp. 1992).

Response Authorities - Clean Water Act and CERCLA

Section 311(c) of the Clean Water Act authorizes the President to ensure the removal of a discharge and the mitigation or prevention of a substantial threat of a discharge of oil or a hazardous substance into or on navigable waters and adjoining shorelines, into or on the waters of the exclusive economic zone, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

When a discharge or a substantial threat of a discharge from a

vessel, offshore facility, or onshore facility constitutes a substantial threat to the public health or welfare of the United States, the President is authorized to direct all federal actions to remove the discharge or to mitigate or prevent the threat of the discharge. Each federal agency participating in the removal or mitigation efforts must act in accordance with the National Contingency Plan or as directed by the President. 33 U.S.C.A. • 1321(c) (Supp. 1992).

Section 104 of CERCLA authorizes the President to remove any hazardous substance, pollutant, or contaminant or to take any other response action consistent with the National Contingency Plan that the President deems necessary to protect the public health or welfare or the environment. 42 U.S.C.A. • 9604(a) (Supp. 1992).

National Contingency Plan

The National Contingency Plan is published at 40 C.F.R. Pt. 300 (1991). Under the National Contingency Plan, the Department of Defense has the responsibility to take all action necessary with respect to releases when the release is on, or the sole source of the release is from, any facility or vessel under the Department's jurisdiction, custody, or control. 40 C.F.R. •• 300.120(b)(1), 300.175(b)(4) (1991).

Other Response Authorities

Federal Radiological Emergency Response Plan. In addition to the National Contingency Plan, the Federal Radiological Emergency Response Plan (FRERP) and the Federal Response Plan may be applicable to a spill or release at a military facility. Pursuant to Executive Order 12,148, reprinted in 50 U.S.C.A. app. • 2251 (1991), the Federal Emergency Management Agency published the FRERP in 1985, assigning federal agency roles in responding to peacetime radiological emergencies. 50 Fed. Reg. 46,551 (1985).

Under the FRERP, the Department of Defense is responsible for the safe handling, storage, and transportation of nuclear weapons and other radioactive materials in custody. The Department of Defense is also tasked with assisting other federal agencies and state and local governments in the event of a radiological emergency. Id. at 46,557-58. See 1993 Inf. Op. Att'y Gen. (Jan. 13; 663-92-0494).

Federal Response Plan. The Federal Response Plan can be

used to supplement the National Contingency Plan and the FRERP.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (1974), as amended, authorizes the preparation of a federal response plan for disasters and emergencies. The current Federal Response Plan was published by the Federal Emergency Management Agency in April 1992. It contains a hazardous materials annex that calls for the Department of Defense to undertake direct response actions for releases of hazardous materials from its vessels, facilities, and vehicles, and upon request, if consistent with the department's operational requirements, to provide personnel and equipment to other federal agencies and state and local governments. FEMA, The Federal Response Plan ESF 10-16 to 10-17 (Apr. 1992).

Army Regulations. The Department of the Army has adopted regulations related to hazardous and toxic materials management and oil and hazardous substance control and contingency plans. 32 C.F.R. Pt. 650, subpts. F, I (1992). The regulations state the Army's policy of establishing and maintaining a capability for emergency response to accidental discharges of oil and spills of hazardous and toxic substances at or near Army installations and activities. Id., • 650.204(a). Installations having certain onshore and offshore oil storage facilities are required to prepare and maintain a Spill Prevention Control and Countermeasure Plan. Id., • 650.208. Installation commanders are also required to maintain an Installation Spill Contingency Plan to identify resources for use in cleaning up discharges. Id., • 650.213.

Emergency Planning and Community Right-to-Know Act

It is not clear whether the Emergency Planning and Community Right-to-Know Act of 1986 (Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III)), 42 U.S.C.A. •• 11001 -- 11050 (1992), applies to military facilities.

The emergency planning provisions of SARA Title III apply to "covered facilities." SARA Title III defines the term "facility" to mean

all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person). For purposes of [emergency release notification under section 304], the term includes motor vehicles, rolling stock, and aircraft.

Id., • 11049(4). The term "person" is defined as "any individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State or interstate body." Id., • 11049(7). Thus, according to one treatise, since the term "person" does not include the United States, federal facilities are not required to comply with SARA Title III. Federal facilities, however, may voluntarily comply. See J. Gordon Arbuckle et al., Environmental Law Handbook 195 n.23 (1991).

On the other hand, another treatise suggests that SARA Title III may apply to federal facilities: "Whether federal facilities are subject to this program is an interesting question. Title III contains no federal sovereign immunity waiver, and CERCLA's waiver is rather narrow." Donald W. Stever, Law of Chemical Regulation and Hazardous Waste • 6.11[2][a][i] at 6-242 n.641 (1992). CERCLA itself contains two provisions related to national security that suggest that SARA Title III may apply to military facilities. These provisions state as follows:

(1) Site specific Presidential orders. The President may issue such orders regarding response actions at any specified site or facility of the . . . Department of Defense as may be necessary to protect the national security interests of the United States at that site or facility. Such orders may include, where necessary to protect such interests, an exemption from any requirement . . . under title III of the Superfund Amendments and Reauthorization Act of 1986 with respect to the site or facility concerned. . . .

(2) Classified information. Notwithstanding

any other provision of law, all requirements of the Atomic Energy Act and all Executive orders concerning the handling of restricted data and national security information, including "need to know" requirements, shall be applicable to any grant of access to classified information under the provisions of . . . title III of the Superfund Amendments and Reauthorization Act of 1986.

42 U.S.C.A. • 9620(j) (Supp. 1992). Apart from the above, we found no authorities that would directly support application of SARA Title III to military facilities.

In 1987, the Office of the Assistant Secretary of Defense issued a memorandum stating that while EPCRA does not apply to federal facilities, the Department of Defense endorses its overall objective, defined as protecting the public in the event of a release of a toxic substance. The memorandum directs the Department of Defense to comply, as a matter of policy, "with the conceptual objectives of the act" relating to emergency planning, "to the extent practicable." The memorandum states that the Department of Defense should not respond to EPCRA's right-to-know reporting requirements. The memorandum recommends the notification of the local emergency planning committee in the event of a hazardous substance release, and that each installation identify an official to serve as the point of contact for the committee. Memorandum from the Office of the Assistant Secretary of Defense regarding Applicability of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA) to the Department of Defense (May 29, 1987) (copy attached).

In addition, the National Contingency Plan provides for coordination between the federal Regional Response Plans and the On-Scene Coordinator Contingency Plans, prepared pursuant to the National Contingency Plan, and the SARA Title III local emergency

When a federal facility is operated by a private company on behalf of the federal government, the private company falls within the definition of "person," and EPCRA will apply to the private company. See Jack A. VanKley, Nat'l Ass'n of Attorneys Gen., When the Government Breaks the Law: A Practical Guide For Enforcing Environmental Laws Against Federal Facilities (Feb. 1993).

response plans. Moreover, in developing the On-Scene Coordinator Contingency Plan, the On-Scene Coordinator is required to coordinate with the State Emergency Response Commission and the affected Local Emergency Planning Committees. 40 C.F.R. • 300.210 (1991). In addition, SARA Title III provides that the regional response teams, established pursuant to the National Contingency Plans, "may review and comment upon an emergency plan or other issues related to preparation, implementation, or exercise of such a plan upon request of a local emergency planning committee." 42 U.S.C.A. • 11003(g) (1992). Even if SARA Title III does not apply to military facilities, these provisions for cooperation and coordination allow for comprehensive emergency planning for hazardous substance releases.

Conclusion

The above discussion is intended to present an overview of federal response authorities pertaining to military facilities. If we can be of further assistance with respect to specific questions in this area, please do not hesitate to contact us.

MS:lae

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