# Ohio Legislative Service Commission

*122nd Senate Bill Analysis*

**S.B. 219**

122nd General Assembly

(As Introduced)

**Sens. Gardner, Cupp, Kearns, Suhadolnik**

- In accordance with provisions of the federal Clean Air Act Amendments of 1990 and regulations adopted under those provisions, requires the owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process at the source to develop and submit a risk management plan, and generally requires the plan to be revised every five years.
- Establishes eligibility criteria for covered processes at stationary sources to be used to determine which of certain specified risk management requirements are to be met by the owners or operators of those sources.
- Authorizes the Director of Environmental Protection to adopt rules for the purposes of the risk management program and requires the rules to be consistent with, equivalent in scope, content, and coverage to, and no more stringent than applicable federal statutory and regulatory provisions.
- Requires owners and operators of stationary sources who are required to submit risk management plans to pay specified annual fees, creates the Risk Management Plan Reporting Fund to receive moneys from the fees, and requires the fund to be used exclusively for the administration and enforcement of the bill and rules adopted under it.
- Requires anyone violating the bill or a rule adopted or order issued under it to pay a civil penalty of not more than $25,000 for each day of each violation, and establishes other enforcement mechanisms, including authority for the issuance of abatement orders and injunctive relief.
- Generally establishes civil immunity for the state and any officer or employee of the state with regard to the inspection, investigation, review, or acceptance of a risk management plan.

## CONTENT AND OPERATION

***Background***

Included in the federal Clean Air Act Amendments of 1990 are provisions requiring the preparation of risk management plans by the owners or operators of stationary sources from which accidental releases of specified regulated substances may occur. Based on specified eligibility criteria, an owner or operator also may be required to conduct certain activities such as a hazard assessment as part of the risk management activities.

The bill establishes a program governing risk management plans that is based on the provisions of the federal statute and regulations adopted under it. State statutory authority for such a program is a prerequisite for the delegation of the federal program to the state by the U.S. Environmental Protection Agency (USEPA).

***Definitions***

For the purposes of the new statutes governing the risk management program, the bill defines the following terms:

(1) "Accidental release" means an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

(2) "Covered process" means a process that has a regulated substance present in an amount in excess of the threshold quantity as determined in rules adopted under the bill (see "***Rules***," below).

(3) "Environmental receptor" means natural areas such as national or state parks, forests, or monuments; officially designated wildlife sanctuaries, preserves, refuges, or areas; and federal wilderness areas, that could be exposed at any time to toxic concentrations, radiant heat, or overpressure greater than or equal to the endpoints provided in rules adopted under the bill and that can be identified on local U.S. Geological Survey maps (see "***Rules***," below; see **COMMENT** 1).

(4) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(5) "Process" means any activity involving a regulated substance, including any use, storage, manufacturing, handling, or on-site movement of the substance or any combination of these activities. A group of vessels that are interconnected, or separate vessels that are located in such a manner that a regulated substance potentially could be involved in a release, must be considered a single process.

(6) "Public" means any person except employees or contractors at a stationary source.

(7) "Public receptor" means off-site residences, institutions such as schools or hospitals, industrial, commercial, and office buildings, parks, or recreational areas inhabited or occupied by the public at any time where the public could be exposed to toxic concentrations, radiant heat, or overpressure as a result of an accidental release.

(8) "Regulated substance" means a toxic or flammable substance listed in rules adopted under the bill (see "***Rules***," below).

(9) "Stationary source" means any buildings, structures, equipment, installations, or substance-emitting stationary activities that belong to the same "industrial group," that are located on one or more contiguous properties under the control of the same person or persons, and from which an accidental release may occur. The term includes transportation containers used for storage not incident to transportation and transportation containers connected to equipment at a stationary source for loading and unloading, but does not include the transportation, including storage incident to transportation, of any regulated substance or any other extremely hazardous substance under the bill. The term also does not include naturally occurring hydrocarbon reservoirs. Properties cannot be considered contiguous solely because of a railroad or pipeline right-of-way.

(10) "Transportation" includes, without limitation, transportation that is subject to oversight or regulation under federal regulations governing the transportation of natural or other gas by pipeline, liquefied natural gas facilities, or the transportation of hazardous liquids by pipeline or to a state natural gas or hazardous liquid program for which the state has in effect a certification to the U.S. Department of Transportation under a federal statute that allows a state to establish safety standards and practices for intrastate pipeline facilities or intrastate pipeline transportation if the state submits an annual certification to do so.

(11) "Threshold quantity" means the quantity specified for regulated substances in rules adopted under the bill (see "***Rules***," below);

(12) "Vessel" means any reactor, tank, drum, barrel, cylinder, vat, kettle, boiler, pipe, hose, or other container. (Sec. 3753.01.)

***Risk management plans***

***Preparation and submission of plans***

The bill stipulates that effective on the date that the USEPA delegates the risk management program to the Ohio Environmental Protection Agency (EPA), the owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process as determined in rules adopted under the bill (see "***Rules***," below) must comply with the bill's requirements, and requirements in those rules, relating to the development and submission of a risk management plan not later than the latest of June 21, 1999, the date on which a regulated substance is first present above a threshold quantity in a process, or three years after the date on which a regulated substance is first listed under applicable federal regulations (sec. 3753.03(A)(1)). It provides for periodic updating of plans by requiring an owner or operator who has submitted a plan, or submitted a required update of a plan, to revise and update the plan not later than five years after the initial submission of the plan, not later than five years after its most recent update, or as otherwise provided in rules adopted under the bill (see "***Rules***," below), whichever is applicable (sec. 3753.03(A)(2)).

Under the bill, an affected owner or operator must submit a single risk management plan that reflects all covered

processes at the stationary source by the applicable deadline and in the form required by the Director of Environmental Protection in rules adopted under the bill (see "***Rules***," below). The plan must include a "registration" that reflects all covered processes at the stationary source. (Sec. 3753.04(A).)

The bill prohibits an owner or operator who is required to submit a risk management plan from failing to do so (sec. 3753.04(E)). Anyone who purposely violates that prohibition must be fined not more than $20,000 or imprisoned for not more than one year, or both. Each violation is a separate offense. (Sec. 3753.99.) Additionally, an owner or operator who knowingly makes a false statement in a plan, on a record upon which information in the plan is based, or on or pertaining to any other information or records required to be maintained under the bill or rules adopted under it is guilty of falsification (sec. 3753.04(F)). Under law not affected by the bill, falsification is a first degree misdemeanor, the penalty for which is a fine of not more than $1,000, a term of imprisonment of not more than six months, or both (secs. 2921.13 and 2929.21, not in the bill).

***Other requirements***

The bill apparently establishes a three-tiered system under which specified risk management activities must be conducted by affected owners or operators based on the types of covered processes at stationary sources. The specified activities apparently are to be a part of an owner's or operator's risk management plan.

Under that system, a covered process is subject to Program 1 requirements if it meets all of the following criteria:

(1) For the five years prior to the submission of a risk management plan, the process has not had an accidental release of a regulated substance where exposure to the substance, its reaction products, overpressure generated by an explosion involving the substance, or radiant heat generated by a fire involving the substance led to the death of or injury to any person off-site or response or restoration activities for an environmental receptor off-site;

(2) The distance to a toxic or flammable endpoint for a worst case release assessment conducted pursuant to a hazard assessment as specified in rules adopted under the bill (see "***Rules***," below) is less than the distance to any public receptor; and

(3) Emergency response procedures have been coordinated between the stationary source and local emergency planning and response organizations. (Sec. 3753.03(B).)

The owner or operator of a stationary source with at least one covered process that is subject to Program 1 requirements must do all of the following in addition to submitting a risk management plan:

(1) Submit with the plan an analysis of the worst case release scenario for each covered process and documentation that the nearest public receptor is beyond the distance to a toxic or flammable endpoint;

(2) Submit with the plan a five-year accident history for the process;

(3) Ensure that response actions have been coordinated with local emergency planning and response agencies; and

(4) Certify the following in the plan: "Based upon criteria in rules adopted by the Director of Environmental Protection under (the bill), the distance to the specified endpoint for the worst-case accidental release scenario for the following process(es) is less than the distance to the nearest public receptor: (list processes). Within the past five years, the process(es) has (have) had no accidental release that caused offsite impacts provided for in rules adopted by the Director under (the bill). No additional measures are necessary to prevent offsite impacts from accidental releases. In the event of fire, explosion, or a release of a regulated substance from the process(es), entry within the distance to the specified endpoints may pose a danger to the public emergency responders. Therefore, public emergency responders should not enter this area except as arranged with the emergency contact indicated in the risk management plan. The undersigned certifies that, to the best of my knowledge, the information submitted is true, accurate, and complete. (signature, title, date signed)" (Sec. 3753.04(B).)

A covered process is subject to Program 2 requirements if it does not meet the eligibility criteria for either Program 1 or Program 3 (see below) (sec. 3753.03(C)). The owner or operator of a stationary source with at least one covered process that is subject to Program 2 requirements must do all of the following in addition to submitting a risk management plan:

(1) Develop and implement a management system in accordance with rules adopted under the bill (see "***Rules***," below);

(2) Conduct a hazard assessment in accordance with rules adopted under the bill (see "***Rules***," below);

(3) Implement Program 2 or Program 3 prevention requirements in accordance with rules adopted under the bill (see "***Rules***," below);

(4) Develop and implement an emergency response program in accordance with rules adopted under the bill (see "***Rules***,"

below); and

(5) Submit as part of the risk management plan data on prevention program elements for covered processes that are subject to Program 2 requirements. (Sec. 3753.04(C).)

Under the bill, a covered process is subject to Program 3 requirements if the process does not meet the eligibility criteria for Program 1 and the process either is in standard industrial classification code 2611, 2812, 2819, 2821, 2865, 2869, 2873, 2879, or 2911 (see **COMMENT** 2) or is subject to the U.S. Occupational Safety and Health Administration safety management standard regarding highly hazardous chemicals (sec. 3753.03(D)). The owner or operator of a stationary source with at least one covered process that is subject to Program 3 requirements must do all of the following in addition to submitting a risk management plan:

(1) Develop and implement a management system in accordance with rules adopted under the bill (see "***Rules***," below);

(2) Conduct a hazard assessment in accordance with rules adopted under the bill (see "***Rules***," below);

(3) Implement Program 3 prevention requirements in accordance with rules adopted under the bill (see "***Rules***," below);

(4) Develop and implement an emergency response program in accordance with rules adopted under the bill (see "***Rules***," below); and

(5) Submit as part of the risk management plan data on prevention program elements for covered processes that are subject to Program 3 requirements. (Sec. 3753.04(D).)

The bill stipulates that if at any time a covered process no longer meets the eligibility criteria of its program level, the owner or operator must comply with the requirements of the new program level that applies to the covered process and must update the applicable risk management plan within six months of the covered process's change in eligibility in compliance with the bill and any rules adopted under it (sec. 3753.03(E)).

***Rules***

For the purposes of the risk management program, the bill authorizes the Director to adopt, amend, or rescind rules in accordance with the Administrative Procedure Act. The rules must be consistent with, equivalent in scope, content, and coverage to, and no more stringent than the requirements of the provision in the federal Clean Air Act Amendments of 1990 establishing the program and regulations adopted under that provision (see "***Background***," above). The rules may do any of the following:

(1) Identify and list regulated substances and establish threshold quantities for any regulated substance in a process at a stationary source;

(2) Add regulated substances to, or delete regulated substances from, the list established in rules adopted under item (1), above, or revise the threshold quantity for any regulated substance;

(3) Prescribe the form and all of the elements of a risk management plan;

(4) Prescribe the criteria for conducting a hazard assessment, including, without limitation, criteria for a worst case release assessment;

(5) Prescribe criteria for developing an emergency response program;

(6) Prescribe criteria for developing and implementing a management system that is required by the bill for stationary sources that comply with Program 2 or Program 3 requirements (see "***Risk management plans; Other requirements***," above);

(7) Prescribe criteria for the implementation of prevention requirements for covered processes that are subject to Program 2 or Program 3 requirements (see "***Risk management plans; Other requirements***," above);

(8) Prescribe record-keeping requirements, audit requirements, and public record-keeping requirements;

(9) Prescribe the schedule and format for the submission of risk management plans and other information required to be submitted under the bill or rules adopted under it;

(10) Prescribe toxic and flammable endpoints for regulated substances; and

(11) Establish any other requirements that the Director determines to be necessary or appropriate to implement and administer the bill.

***Fees***

The bill requires the owner or operator of a stationary source for which the submission of a risk management plan is required to pay an annual fee of $50 to the EPA and any of the following applicable fees:

(1) A $65 fee if a covered process in the stationary source includes propane and propane is the only regulated substance at the stationary source over the threshold quantity;

(2) A $65 fee if a covered process in the stationary source includes anhydrous ammonia that is sold for use as an agricultural nutrient and is on-site over the threshold quantity;

(3) A $200 fee for each regulated substance over the threshold quantity. Propane must be considered as a regulated substance subject to the $200 fee only if it is not the only regulated substance over the threshold quantity, and anhydrous ammonia must be considered as a regulated substance subject to that fee only if it is not sold for use as an agricultural nutrient. (Sec. 3753.05(A).)

In accordance with rules adopted under the bill (see "***Rules***," above), the fees assessed under the bill must be collected for the year 1999 not later than June 21, 1999. Thereafter, the fees must be collected not later than September 1 each year. The fees assessed for a stationary source must be based on the regulated substances present over the threshold quantity identified in the risk management plan on file for the year 1999 as of June 21, and for each subsequent year as of September 1. (Sec. 3753.05(B).)

Under the bill, the owner or operator of a stationary source for which the submission of a risk management plan is required who fails to submit the plan within 30 days after the applicable filing date prescribed by rules must submit with the plan a late filing fee of 15% of the total fees due as described above (sec. 3753.05(C)). The bill authorizes the Director to establish fees to be paid by persons, other than public officers or employees, to cover the costs of obtaining copies of documents or information submitted to the Director under the bill and rules adopted under it. The Director may charge the actual costs involved in accessing any computerized data base established or used for the purposes of assisting in the administration of the bill. (Sec. 3753.05(D).)

All moneys received from the fees and charges discussed above must be credited to the Risk Management Plan Reporting Fund, which the bill creates. The fund must be administered by the Director and used exclusively for the administration and enforcement of the bill and rules adopted under it. (Sec. 3753.05(E).)

The bill requires the Director, beginning in fiscal year 2001 and every two years thereafter, to review the total amount of moneys in the fund to determine if that amount exceeds $750,000 in either of the two preceding fiscal years. If the total amount in the fund exceeded that amount in either fiscal year, the Director, after review of the fee structure and consultation with affected persons, must issue an order reducing the amount of the annual fees described above so that the estimated amount of moneys resulting from the fees will not exceed $750,000 in any fiscal year. Conversely, if, upon review of the fees and after the fees have been reduced, the Director determines that the total amount of moneys collected and accumulated is less than $750,000, the Director, after review and consultation, must issue an order increasing the amount of the annual fees so that the estimated amount of moneys resulting from the fees will be approximately $750,000. However, fees never can be increased to an amount exceeding the amount specified in the bill as discussed above.

The bill states that notwithstanding that part of the Administrative Procedure Act requiring an adjudicatory hearing prior to the issuance of an adjudication order, the Director may issue an order changing the amount of fees without the necessity to hold such a hearing. It also stipulates that the issuance of such an order is not an act or action that is subject to appeal to the Environmental Review Appeals Commission (formerly the Environmental Board of Review). (Sec. 3753.05(F).)

***Enforcement***

The bill prohibits anyone from violating any of its provisions or any rule adopted or order issued under it (sec. 3753.06). Anyone violating the prohibition must pay a civil penalty of not more than $25,000 for each day of each violation. The Attorney General, the prosecuting attorney of the county, or the director of law of the city where a violation has occurred or is occurring, upon the Director's written request, must bring an action for the imposition of the civil penalty against the violator. Moneys from civil penalties must be credited to the Risk Management Plan Reporting Fund (see "***Fees***," above). (Sec. 3753.09(B).)

Under the bill, the Director or his authorized representative, upon proper identification and upon stating the purpose and necessity of an inspection, may enter at reasonable times on any private or public property, real or personal, to inspect, investigate, obtain samples, and examine and copy records to determine compliance with the bill and rules adopted or orders issued under it. The Director or his authorized representative may apply for, and any judge of a court of record may issue for use within the court's territorial jurisdiction, an administrative inspection warrant or other appropriate search warrant necessary to achieve the bill's purposes. (Sec. 3753.07.)

The bill authorizes the Director to issue orders requiring the owner or operator of a stationary source that is subject to the bill to abate a violation of the bill or a rule adopted or order issued under it. Such an order may be issued as a final order without issuing a proposed action under the Environmental Protection Agency Law and without holding an adjudication hearing. The bill specifies that issuance of an abatement order is not a condition precedent to bringing a civil, criminal, or civil penalty action under the bill. (Sec. 3753.08.)

Upon written request of the Director, the Attorney General, the prosecuting attorney of a county, or the director of law of a city where a violation has occurred or is occurring must prosecute to termination or bring an action for injunction against any person who has violated the bill or any rule adopted or order issued under it (see **COMMENT** 3). The court of common pleas in which an action for injunction is filed has the jurisdiction to and must grant preliminary and permanent injunctive relief upon showing that the person against whom the action is brought has violated or is violating the bill or a rule adopted or order issued under it. The bill requires the court to give precedence to such an action over all other cases.

Upon the certified written request of any person, the Director must conduct investigations and make inquiries that are necessary to secure compliance with the bill or rules adopted or orders issued under it. Upon request or upon his own initiative, the Director may investigate or make inquiries into any violation of the bill or rules adopted or orders issued under it. (Sec. 3753.09(A).)

***Relief from civil liability***

The bill stipulates that the state and any officer or employee of the state is not liable in a tort action when the state inspects, investigates, reviews, or accepts a risk management plan from an owner or operator of a stationary source that is subject to the bill unless an action or omission of the state or an officer or employee of the state constitutes willful or wanton misconduct or intentionally tortuous conduct. Any action brought against the state under this provision must be brought in the Court of Claims. (Sec. 3753.10(B).) For these purposes, "tort action" is defined as a civil action for damages for harm, but does not include a civil action for damages for a breach of contract or other agreement between persons or for a breach of a warranty that exists pursuant to state statute or common law. "Harm" means injury, death, or loss to person or property. (Sec. 3753.10(A).)

The above provision does not create, and cannot be construed as creating, a new cause of action against or substantive legal right against the state or an officer or employee of the state. It also does not affect, and cannot be construed as affecting, any immunities from civil liability or defenses established by state statute, the U.S. Constitution, or the Ohio Constitution or available at common law to which the state, or an officer or employee of the state, may be entitled under circumstances not covered by this provision. (Sec. 3753.10(C)(1) and (2).)

The bill states that the existing statute conferring civil immunity on state officers and employees while performing their duties does not apply to an officer or employee of the state if the officer or employee is performing work in connection with inspecting, investigating, reviewing, or accepting a risk management plan from an owner or operator of a stationary source that is subject to the bill at the time that the officer or employee allegedly caused the harm or caused or contributed to the presence or release of toxic or flammable substances for which damages are sought in a tort action. In the alternative, the immunities conferred by the bill apply to that individual. (Sec. 3753.10(C)(3).)

## COMMENT

1. Several of the bill's provisions are based on provisions in federal regulations. Those provisions contain technical terms such as "overpressure" and "endpoints." The bill does not define these terms. In some cases, the federal regulations contain definitions or descriptions of the terms; in other cases, they do not. Presumably, the meaning of each such technical term for the bill's purposes is the meaning contained in the federal regulations or, absent that, the dictionary meaning.

2. The types of industries included in the standard industrial classification codes listed in the bill are as follows:

2611 Pulp Mills

2812 Alkalies and Chlorine

2819 Industrial Inorganic Chemicals, Not Elsewhere Classified

2821 Plastics Materials, Synthetic Resins and Nonvulcanizable Elastomers

2865 Cyclic Organic Crudes and Intermediates and Organic Dyes and Pigments

2869 Industrial Organic Chemicals, Not Elsewhere Classified

2873 Nitrogenous Fertilizers

2879 Pesticides and Agricultural Chemicals, Not Elsewhere Classified

2911 Petroleum Refining

3. Generally, anyone found guilty as the result of prosecution is subject to a specified criminal penalty. The bill requires prosecution of a violation of any provision of the bill or any rule adopted or order issued under it. However, the only criminal penalty established under the bill is for failure to submit a risk management plan.

## HISTORY

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