

# Environmental & Chemical Update

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## Litigation and Regulatory Enforcement

### [1] NEPA: NRC Not Required to Examine Impact of Terrorist Attack in Nuclear Power Plant Relicensing

The Third Circuit Court of Appeals has ruled that the Nuclear Regulatory Commission (NRC) need not examine the environmental impact of a potential terrorist attack under NEPA in relicensing the Oyster Creek Nuclear Generating Station in Ocean County, New Jersey. *N.J. Dep't of Envtl. Prot. v. NRC, No. 07-2271 (3d Cir. March 31, 2009)*. In July 2005, AmerGen Energy Co. filed an application to renew the nuclear power plant's operating license for an additional 20 years. During the licensing process, the state environmental agency challenged NRC's failure to prepare an environmental impact statement (EIS) studying the impact of a potential aircraft attack on the power plant.

Specifically, the state sought an analysis of mitigation alternatives for core-melt sequences likely to result from an aircraft attack. The NRC Atomic Safety and Licensing Board determined that while terrorism reviews are important, they lie outside NEPA's scope. The state then appealed to the NRC, which affirmed, ruling that the terrorist attack the state envisioned was too unlikely to require an EIS. The NRC also determined that the environmental impact of a potential terrorist attack at the plant was addressed by the facility's generic impact statement and site-specific supplemental statement. The state challenged NRC's decision.

The appeals court agreed with NRC, ruling that the state failed to demonstrate "a reasonably close causal relationship" between the Oyster Creek relicensing proceeding and the environmental effects of a hypothetical aircraft attack. The court also held that the NRC had already considered such a scenario and "found that these effects would be no worse than those caused by a severe accident." The appeals court based its decision in part on the U.S. Supreme Court's decision in a case involving resumption of activity at the Three Mile Island nuclear power plant after an accident shut down one of its reactors. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1993).

### [2] NEPA: Federal Court Dismisses Challenge to Wyoming Drilling Permits

A federal judge in Wyoming has dismissed two lawsuits challenging federal drilling permits issued to several oil companies allowing them to drill wells in Wyoming's Atlantic Rim area. *Theodore Roosevelt Conservation P'ship v. Salazar, No. 07-01486 (D. Wyo. 3/31/09)*. Plaintiffs contended that the Bureau of Land Management (BLM) did not scrutinize the environmental effects of the individual drilling proposals as required by NEPA and the Federal Land Policy Management Act (FLPMA) and otherwise mismanaged the Atlantic Rim project, which entails roughly 2,000 wells in habitat favored by sage grouse and large game.

Plaintiffs also alleged that BLM (i) failed to accurately predict the project's impact on regional ozone



levels, (ii) prematurely committed its resources to the project, (iii) ran afoul of NEPA's public-participation requirements, and (iv) failed to weigh the land's multiple uses as required by the FLPMA.

The court disagreed with plaintiffs, ruling that the agency (i) sufficiently considered the impact on sage-grouse populations before choosing to allow development of oil and gas resources; (ii) met NEPA's standards for scientific integrity when it used models to determine the potential air pollution from the project; (iii) adequately considered the cumulative effect of the Atlantic Rim project on future projects; (iv) did not violate NEPA by failing to consider oil and gas operations that plaintiffs claimed were foreseeable; and (v) did not prematurely commit resources to the project, run afoul of NEPA's public participation requirements or fail to sufficiently weigh the land's multiple uses under the FLPMA.

### **[3] CERCLA: Federal Court Rules State Settlement May Authorize Contribution Suit Under Section 113**

A federal judge in Missouri has ruled that a state settlement may authorize a lawsuit for contribution under CERCLA section 113. *Westinghouse Elec. Co. v. U.S., No. 03-861 (E.D. Mo. 3/30/09)*. Reversing a prior district court decision which granted defendants' motion for summary judgment, the court concluded that a consent decree between plaintiff and the state provided a sufficient basis for the lawsuit, even though it was filed in state court without EPA's approval. The consent decree was an agreement between the current owner of the property and the state to clean up the site without a finding of liability.

The prior district court decision held that the consent decree was not "a judicially approved settle-

ment" and the state could not determine CERCLA liability without EPA authorization. On a motion to reconsider and faced with a split in relevant authority, the court here reversed, finding that the prior court erred when it found that a state could not determine CERCLA liability without specific EPA authorization. The court also said that, while the plaintiff did not meet the standard for granting reconsideration, "[i]t may be in the interests of justice to reconsider a ruling that could preclude [plaintiff] from recovering this subset of costs entirely."

### **[4] Water: United States Sues Oil Exploration Company over Spills in Alaska**

The United States and Alaska have separately sued BP Exploration (Alaska), an oil exploration company, over two oil spills in Prudhoe Bay in 2006, one of which was the largest ever on Alaska's North Slope. *U.S. v. BP Exploration (Alaska) Inc., No. 3-00064 (D. Alaska 3/31/09)*; *Alaska v. BP Exploration (Alaska) Inc.*, No. 09-6181 (Alaska Super. Ct. 3/31/09).

Both complaints involve oil discharges discovered on March 2, 2006. The federal complaint alleges numerous violations of the Clean Water Act, including discharges to wetlands, and failure to take adequate spill prevention, control and countermeasure (SPCC) actions as required by law. The federal complaint also alleges violations of the Federal Pipeline Safety Act for the company's failure to abide by Department of Transportation mandates for inspecting and cleaning lines after the spills were discovered.

The state complaint alleges that, because of long-term "aggressive cost cutting," BP failed to perform the type of regular maintenance that would have protected the pipelines from corrosion. Both



complaints seek substantial penalties, and the state seeks royalties and taxes that were lost between 2006 and 2008 as a result of oil-field shutdowns and repairs that slowed production.

#### **[5] Water: Homebuilders Sue EPA/Corps over Navigable Water Designation in Arizona**

Several homebuilder associations have sued EPA and the U.S. Army Corps of Engineers (Corps) over the designation of stretches of Arizona's Santa Cruz River as traditional navigable waters under the Clean Water Act. *NAHB v. EPA, No. 09-00548 (D.D.C. filed 3/23/09)*. Plaintiffs claim that the river is not navigable and that the agencies made an erroneous determination in excess of their authority. They allege that the determination was "unsupported by any legitimate evidence demonstrating that the Santa Cruz River is currently, or ever was, navigable in fact in its ordinary condition." According to the complaint, the river is "a discontinuous stream, normally flowing only in response to significant precipitation and discharges or sewage effluent," and that the agencies ignored the Arizona Navigable Stream Adjudication Commission's declaration that the river has never been considered navigable.

#### **[6] Water: Independence, Missouri, Agrees to Sanitary Sewer Upgrades**

The city of Independence, Missouri, has entered a proposed consent decree, in which it agrees to make major improvements to its sanitary sewer system at an estimated cost of more than \$35 million and to eliminate unauthorized overflows of untreated sewage into the Missouri River each year. *U.S. v. City of Independence, No. N/A (W.D. Mo. lodged 4/1/09)*. Under the terms of the consent decree, the city will pay a civil penalty of \$255,000 and will spend an additional \$450,000 in supple-

mental environmental projects. The city will also be required to perform a comprehensive assessment of its sanitary sewer system, upgrade pump stations and improve the sewer collection system and wastewater treatment plant.

In a complaint filed concurrently with the consent decree, the federal government alleged that the city had numerous illegal discharges of untreated wastewater containing raw sewage from its sanitary sewer system. The city's sanitary sewer system transports the city's sewage to a wastewater treatment plant that serves approximately 55,000 residential and 3,500 commercial customers. The consent decree is subject to a 30-day comment period and court approval.

#### **[7] Envtl. Crime: Spanish Shipping Company Agrees to Criminal Fine for Ocean Dumping**

A Spanish shipping company has reportedly pleaded guilty in federal court to dumping oil-contaminated bilge water on the high seas and has agreed to pay a \$1 million criminal fine. *U.S. v. Consultores de Navegacion S.A., No. 08-10274 (D. Mass 4/7/09)*. The company, which operated the chemical tanker M/T Nautilus, pleaded guilty to six charges, including conspiracy, falsification of records, false statements, obstruction, and two violations of the Act to Prevent Pollution from Ships. The company will, in addition to paying the fine, serve three years of probation and implement an environmental compliance plan to prevent future violations.

The charges stem from the company's alleged improper handling of oil waste on the ship from at least June 2007 until March 2008, when U.S. Coast Guard inspectors boarded the tanker and began examining records. They found that the crew, under the direction of senior staff, used a 5-foot metal pipe



to bypass a pollution-control device and shunt oily water straight to the sea. During the time in question, the 27,000-ton ship called on ports in Boston; New Orleans; St. Croix; Houston; Freeport, Texas; and Port Reading, New Jersey. *See Law 360*, April 8, 2009.

## Legislation, Regulations and Guidance

### [8] Air: EPA Proposes to Expand List of VOCs Under Aerosol Coatings Regulation

EPA released a [proposal](#) March 30, 2009, to add 128 compounds to a list of volatile organic compounds (VOCs) that the agency will examine for their impact on ground-level ozone formation. 74 *Fed. Reg.* 14,941 (4/2/09).

According to the agency, “this proposed action amends Table 2A of the aerosol coatings reactivity rule by adding compounds and associated reactivity factors based on petitions we received; and by clarifying which volatile organic compounds are to be quantified in compliance determinations. Additionally, we are proposing certain changes related to the notice required for a company to certify that it will assume the responsibility for compliance with record keeping and reporting requirements for a regulated entity, and taking comment on whether to change who is liable following such certification. Finally, this action proposes minor revisions and corrections to the aerosol coatings reactivity rule.” EPA will use the information provided on the 128 compounds by coatings manufacturers, distributors and importers to determine if they comply with aerosol coatings emissions limits.

Among compounds proposed to be added to the list are ethanol, benzene, propane, vinyl chloride,

and styrene. The existing rule requires coatings manufacturers to use less-reactive VOCs in aerosol paints. The emissions limits are expressed in terms of ozone generated from the VOC ingredients per unit of coating material rather than in terms of the amount of volatility of organic compounds per unit of produce. The proposal would make changes to the emissions standards rule to further clarify the definition of VOCs and detail recordkeeping obligations. EPA will accept comments on the proposal until May 18, 2009.

### [9] Air: EPA Proposes New Emissions Limits for Ships in U.S. Waters

The United States and Canada have submitted a [proposal](#) to the International Maritime Organization (IMO) that would designate an area around the nations’ coastlines where stringent international emission controls would apply to ocean-going ships.

The two nations have proposed the designation of an Emission Control Area (ECA) within which the emission of nitrogen oxides, sulfur oxides and particulate matter from ocean-going ships could be controlled, even though most such ships are flagged outside either country.

Under the program, if approved by the IMO, large ships, such as oil tankers and cargo ships that operate in ECAs, would face stricter emission standards designed to reduce the threat they pose to human health and the environment. According to EPA, the standards would cut sulfur in fuel by 98 percent, particulate matter emissions by 85 percent and nitrogen oxide emissions by 80 percent from current global requirements. To achieve these reductions, ships would be required to use fuel with



no more than 1,000 parts per million sulfur beginning in 2015, and new ships would need advanced emission-control technologies beginning in 2016. The proposal was submitted to IMO on March 27, 2009.

### **[10] Water: EPA Delays Amendments to SPCC Regulations**

EPA has **delayed** the effective date of a final rule that would have eased requirements for businesses to develop plans for preventing spills of petroleum and other types of oil. 74 *Fed. Reg.* 14,736 (4/1/09). The Spill Prevention, Control, and Countermeasure (SPCC) regulations were set to take effect April 4, 2009, but will now become effective January 14, 2010. EPA is also requesting public comment on whether a further delay may be warranted.

The SPCC regulations at 40 C.F.R., Part 112 require owners and operators of facilities that use, store, transfer, or consume oil or oil-based products to develop and implement professionally certified spill-prevention plans to avoid discharges of oil to U.S. waters. The amendments, which were published December 5, 2008, exempted from the SPCC rule hot-mix asphalt, pesticide application equipment and related mix containers, and heating oil containers at single-family residences.

### **[11] EU/Green Procurement: EU Directive Requires Public Bodies to Consider Environmental Criteria When Purchasing Vehicles**

European Union (EU) transport ministers formally adopted a **directive** on “green procurement” March 30, 2009, that will require public bodies throughout EU member states to factor environmental criteria into bus, truck and other vehicle purchases. Under the new legislation, public author-

ities will be obliged to consider the lifetime energy and environmental impacts of vehicles as part of the procurement process. Factors that must be considered include fuel efficiency and emissions of carbon dioxide and other pollutants. Member states must implement the directive within 18 months.

## **Scientific/Technical Items**

### **[12] Chemical Exposure: Study Claims Traffic Fumes Affect Birth Weight**

A recent study by researchers at the University of Medicine and Dentistry of New Jersey claims that exposure to traffic pollution may affect fetal development. D.Q. Rich, *et al.*, “Ambient Air Pollutant Concentrations During Pregnancy and the Risk of Fetal Growth Restriction,” *J. Epidemiology and Community Health*, April 18, 2009. The study evaluated 336,000 infants born in New Jersey between 1999 and 2003. The researchers looked at the demographic and health information of selected New Jersey women, as well as where they lived when their children were born. They then used daily air pollution readings from U.S. EPA monitors around the state to determine the mother’s exposure to air pollution during each of the three trimesters of pregnancy. According to the study, the higher a mother’s exposure level in early and late pregnancy, the more likely that fetal growth was restricted.



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